NO.

IN THE

Supreme Court of the United States

A.GALLO & CO., INC., et al.,

Petitioners,

v.

COMMISSIONER OF ENVIRONMENTAL PROTECTION, et al.

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDING

A. Gallo and Company; Allan S. Goodman, Inc.; Dichello Distributors, Inc.; Dwan and Company, Inc.; F and F Distributors, Inc.; Franklin Distributors, Inc.; G and G Distributors, Inc.; Hartford Distributors, Inc.; Levine Distributing Company, Inc.; Northeast Beverage Corporation of Connecticut; Pepsi Cola Newburgh Bottling Company, Inc.; and Star Distributors, Inc. were the original plaintiffs in the trial court. Adirondack Beverages Corporation; Bottling Group, LLC; Coca-Cola Bottling Company of Northern New England, Inc.; Coca-Cola Enterprises, Inc.; Polar Beverages; and Windham Pepsi-Cola Bottling Company, Inc. intervened as plaintiffs in the trial court. All of the original plaintiffs and intervening plaintiffs were appellees in the Connecticut Supreme Court. New England Legal Foundation joined as an amicus in support of the appellees on that appeal. All of the appellees join as petitioners to this Court with the exception of Adirondack Beverages Corporation; Coca-Cola Bottling Company of Northern New England, Inc.; Coca-Cola Enterprises, Inc.; and Polar Beverages.

Gina McCarthy, former Commissioner of the Connecticut Department of Environmental Protection; Jodi M. Rell, former Governor of Connecticut; and Richard Blumenthal, former Attorney General of Connecticut were the defendants in the trial court. The defendants were the appellants to the Connecticut Supreme Court.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Bottling Group, LLC is a wholly-owned subsidiary of PepsiCo, Inc., a publicly traded company having no shareholders owning 10% or more of its stock.

None of the remaining corporate-petitioners are owned by a parent or publicly held company owning 10% or more of the corporation's stock.

Petitioner Hartford Distributors, Inc. is now the successor in interest by merger to petitioner Franklin Distributors, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

A. Gallo and Company, Inc., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Connecticut Supreme Court.

OPINIONS BELOW

Petitioners initiated this suit in the Connecticut Superior Court seeking declaratory relief and a temporary injunction. The court denied the application for the temporary injunction in an unpublished opinion. No. CV094043592S, 2009 WL 153228 (Conn. Super. Ct., May 5, 2009). (Appendix C at 69a.) Petitioners moved for summary judgment on liability, the respondents cross-moved, and the court granted petitioners' motion, entering judgment on liability in favor of petitioners. 52 A.3d 56 (Conn. Super. Ct. 2010). (Appendix B at 37a.) Thereafter, the court entered damages awards as to each of the petitioners. No. CV094043592S, 2011 WL 590900 (Conn. Super. Ct., Jan. 26, 2011). The court also denied the intervening plaintiffs their attorneys' fees. No. CV094043592S, 2011 WL 3891517 (Conn. Super. Ct., Aug. 4, 2011). Respondents appealed to the Connecticut Appellate Court. The appeal was transferred the Connecticut Supreme Court, which reversed the trial court's decision and entered judgment in favor of respondents. 73 A.3d 693 (Conn. 2013). (Appendix A at 1a.)

JURISDICTION

The Connecticut Supreme Court entered its judgment on August 20, 2013, reversing the judgment of the trial court. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject of the same offense 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.

The Fourteenth Amendment to the United States Constitution provides:

> 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.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are:

(1) Act of Jan. 15, 2009, Conn. Pub. Act No. 09-1, § 15 (codified as amended at Conn. Gen. Stat. § 22a-245a) (Appendix D at 87a);

(2) Act of Nov. 25, 2008, Spec. Sess., Conn. Pub. Act No. 08-1, § 11 (codified as amended at Conn. Gen. Stat. § 22a-245a) (repealed 2009) (Appendix E at 91a); and,

(3) Connecticut "Bottle Bill," Conn. Gen. Stat. §§ 22a-243 - 245 (Rev. to 2007) (pre-2008 amendment) (Appendix F at 96a).

STATEMENT OF THE CASE

For nearly 30 years, Connecticut beverage distributors had established property rights in so-called "unclaimed refund values" accumulated on sales of beverage containers in conjunction with the Connecticut "Bottle Bill," Conn. Gen. Stat. §§ 22a-243–245 (Rev. to 2007) (pre-2008 amendment). (App.51a.) The Connecticut Supreme Court construed the "Bottle Bill," Act of Nov. 25, 2008, Spec. Sess., Conn. Pub. Act No. 08-1, § 15 (codified at

Conn. Gen. Stat. § 22a-245a), to divest the distributors of these property rights. (App.36a.) Ignoring history and settled practices, the court held that because the amendment did not *affirmatively and expressly vest* property rights in "unclaimed refund values" in the distributors, the distributors could claim no property rights in the "unclaimed refund values" they had accumulated after the 2008 amendment. (App.1a-36a.) In so holding, the Connecticut Supreme Court allowed the State, under Act of Jan. 15, 2009, Conn. Pub. Act No. 09-1, § 15 (codified as amended at Conn. Gen. Stat. § 22a-245a), to retroactively take distributors' "unclaimed refund values" held as vested revenues for the period of December 1, 2008 through March 31, 2009. (App.36a.)

A. The Connecticut "Bottle Bill."

1. The "Bottle Bill," 1980 through 2008.

Enacted on January 1, 1980, the "Bottle Bill" established a system to incentivize beverage container recycling, to reduce litter and solid waste levels in Connecticut, by creating specific obligations and incentives among the State's beverage distributors, including the petitioners, as well as beverage retailers and consumers. The "Bottle Bill" provided consumers an incentive to bring empty containers to retailers by requiring retailers to pay a five-cent "refund value" for each empty container tendered by a consumer, provided the retailer sold the same kind, size, and brand of container tendered. Conn. Gen. Stat. § 22a-245(a)-(b). Because retailers freely adopted a practice of itemizing a five cent "deposit" charge per container at the point of sale,

consumers colloquially referred to the container return process as returning a "deposit."

The Bottle Bill also incentivized retailers to tender to distributors the containers they had collected from consumers by requiring distributors to pay retailers for each container tendered (1) a five-cent "refund value" and (2) a "handling fee" of one-and-a-half cents per beer container and two cents per soft drink container, provided the container was the same kind, size, and brand sold by the distributor. *Id.* § 22a-245(c), (d). After paying these "refund values" and handling fees, the distributors possessed the recyclable beverage containers and could dispose of them as they saw fit. (App.6a.)

The "Bottle Bill" did not require distributors to upcharge retailers a five-cent (or any other) "deposit" or "refund" fee on the recyclable beverage containers they sold. (App.9a.) Like the retailers, some distributors itemized a separate "deposit" charge for each container at the point of sale to retailers, while others did not. (App.9a.) Regardless of whether distributors itemized a portion of the price for their products as a "deposit" or "refund value", they counted all sums paid by the retailer as general revenues for accounting purposes. (App.9a.)

In short, the "Bottle Bill" did not mandate the collection of "deposits" on beverage containers that could later be "claimed" upon the return of those containers. Instead, it simply provided that beverage distributors had to pay a "refund value" (plus a handling fee) when presented with an empty container of the type they sold, regardless of when

the container was sold, by whom it was sold, or to whom it was sold. (App.4a.)

As the "Bottle Bill" made no exceptions for payment of "refund values" when distributors collected more "empties" than the beverage containers they sold, *see generally* Conn. Gen. Stat. § 22a-245 (Rev. to 2007) (pre-2008 amendment), distributors had to absorb any such "excess" payments. Conversely, when distributors generated "excess" revenues as the number of beverage containers sold exceeded the number of empties returned, those revenues remained the "property of the distributors in the same way as any income over and above operating expenses would be the property of the distributors." (App.51a.) Prior to the 2008 amendment, therefore, so-called "unclaimed refund values" were not a separate and distinct source of income to the petitioners. (App.49a.)

2. The 2008 "Bottle Bill" Amendment (The 2008 Act).

In late 2008, Connecticut faced a significant budget deficit. (App.2a.) Against this backdrop, the legislature amended the "Bottle Bill" by Act of Nov. 25, 2008, Spec. Sess., Conn. Pub. Act No. 08-1, § 11 (codified as amended at Conn. Gen. Stat. § 22a-245a) (repealed 2009). One of the purposes of the 2008 Act was to provide the State and its Department of Environmental Protection ("DEP") with information related to container return rates, and the difference between refund values "deposited" and paid. (App.7a.)

Consistent with that purpose, the 2008 Act required beverage distributors to open special interest-bearing accounts in the name of the distributor at a Connecticut financial institution, and to deposit an amount equal to the refund values for each container they sold, beginning on December 1, 2008. Act of Nov. 25, 2008 § 11(a). All interest, dividends, and returns earned on the special account were required to be paid back into the account, and the accounts were required to be kept separate from other funds. *Id.* Further, the 2008 Act required that all refund values for a returned container be paid out of a distributor's special account. *Id.* § 11(b). Again, since the Bottle Bill at no time required the distributors to itemize and up charge retailers a refund value, the 2008 Act merely required the distributors to segregate a specific amount of their own money into their special accounts.

The 2008 Act also required distributors to provide a quarterly report on, among other things, the beginning quarterly balance; lists of deposits credited, including "refund values" received by the distributor; lists of withdrawals; and the closing quarterly balance. *Id.* § 11(c). The 2008 Act was effective from passage, *id.* § 11, and the petitioner-distributors began funding their accounts as required on December 1, 2008 (App.8a.) The 2008 Act did not dictate a specific revenue source from which the accounts had to be funded. Act of Nov. 25, 2008 § 11. Rather, it dictated only the amount to be funded: beverage containers sold times refund value (five cents). *Id.*

3. The 2009 "Bottle Bill" Amendment (The 2009 Act).

With the State's budget crisis worsening, on January 15, 2009, the Connecticut legislature passed a new set of amendments to the "Bottle Bill." Act of Jan. 15, 2009, Conn. Pub. Act No. 09-1, § 15 (codified as amended at Conn. Gen. Stat. § 22a-245a). Section 15(d) of the 2009 Act mandated that distributors pay the entire outstanding balance in their special accounts quarterly to the Commissioner of Environmental Protection. *Id.* § 15(d). The 2009 Act was expressly effective on April 1, 2009, but stated that it was "applicable to periods commencing on or after December 1, 2008." *Id.* § 15. It, thus, required the distributors to retroactively pay to the State the sums they had deposited in their accounts under the 2008 Act.

B. The Superior Court Opinion Denying the Temporary Injunction.

From the outset, "[t]he [petitioners]. . .[sought] a temporary injunction prohibiting the defendants. . .from enforcing portions of [the 2009 Act] which require[d] the [petitioners] to pay revenue generated from beverage container [refund values] in violation of the [Fifth] and [Fourteenth] Amendments of the United States Constitution. . . ." (App.69a-70a.) As the court recognized, petitioners "assert[ed] a vested property interest" in the outstanding balances in their special accounts for the period of December 1, 2008 through March 31, 2009. (App.78a.) Petitioners contended that requiring payment of those amounts constituted "an unconstitutional taking of [their] property in

violation of the [Fifth] and [Fourteenth] Amendments of the United States Constitution." (App.78a.) The court did not decide the constitutional issue, finding instead that the petitioners had an adequate remedy at law. It denied the injunction on that basis. (App.85a-86a.)

C. The Superior Court Opinion Granting Petitioners Summary Judgment.

The petitioners sought declaratory relief and damages from the Connecticut Superior Court. (App.37a-38a.) Through a motion for summary judgment based on a set of stipulated facts, "[t]he [petitioners] claim[ed] that certain provisions of [the 2009 Act] effected a retroactive taking of their property in violation of the [F]ifth and [F]ourteenth Amendments to the United States [C]onstitution." (App.37a-38a.)

In its decision granting the petitioners' motion for summary judgment, cited by Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 262 (1st ed. 2012), the court acknowledged the presumption of constitutionality of the challenged amendment. (App.47a-48a.) It began its takings analysis with the issue of whether the unclaimed refund values were the property of the petitioners. (App.48a.) The court held, as follows:

> In essence, the distributors' obligation to pay refund values on the return container is an expense of doing business, which was paid from the income they received from the sale of filled beverages to the retailers. Therefore, this court concludes that under

> the original Bottle Bill, the unclaimed [refund values] were the property of the distributors. (App.49a.)

The court further observed, "[t]he defendants here cannot, and do not, seriously contest that prior to the 2008 Act, the unclaimed [refund values] were the property of the [petitioners]." (App.51a.)

"Having concluded that the unclaimed [refund values] were the [petitioners'] property before the adoption of the 2008 Act, the court determined[d] what effect the 2008 Act had on the [petitioners'] property interest in the unclaimed [refund values]."(App.52a.) The court concluded that "the 2008 Act mandated that the distributors place money that they owned into restricted special accounts for an undetermined, but temporary, period of time." (App.56a.) This Act, neither "lessen[ed] the [petitioners'] property rights as to the balances in the accounts for the period in question, nor create[d] rights in the state." (App.56a.) The court held that "the 2008 Act did not affect the [petitioner'] property interest in, and to, the balances in the special accounts for the period in question." (App.57a.)

Next, the court addressed whether the 2009 Act, providing that it became effective April 1, 2009, was also retroactively applicable to the period from December 1, 2008 through March 31, 2009. (App.57a.) "The crux of the controversy, therefore, [was] whether the state [was] entitled to the funds that accrued in the account prior to the 2009 Act's effective date." (App.58a.) On this issue, the court held, "by stating the 2009 Act was applicable to periods commencing on or after December 1, 2008,

the legislature expressed its intent that the payover provisions be applied retroactively from the effective date." (App.61a.) Thereafter, the court recognized, "[t]his retroactive application, however, must be constitutionally valid." (App.62a.)

The court held that the retroactive taking was unconstitutional. (App.65a.)

> By making the 2009 Act retroactive to December 1, 2008,. . .the legislature directed that the distributors relinquish rights to the money that had accrued prior to April 1, 2009, to the state. The retroactive portion of the 2009 Act upset the [petitioners'] settled expectations in an obvious way: it took their property. This taking without compensation violated the [petitioners'] rights under the United States and Connecticut constitutions. (App.65a.)

The court then entered summary judgment on liability in favor of the petitioners. (App.67a-68a.)

D. The Connecticut Supreme Court Opinion Reversing the Trial Court.

Following an entry of judgment in the trial court that included an award of money damages in excess of $5 million, the respondents appealed to the Connecticut Appellate Court, "contend[ing] that the trial court improperly determined that the retroactive provision of the 2009 act resulted in an unconstitutional taking of the [petitioners'] property." (App.11a-12a.) That appeal was transferred to the Connecticut Supreme Court under Connecticut General Statutes section 51-199(b) and

Connecticut Practice Book section 65-4 insofar as the Superior Court had declared invalid a state statute. (App.12a.)

The court began by setting forth its presumption of constitutionality for validly enacted statutes: "The court will indulge in every presumption in favor of the statute's constitutionality. Therefore, when a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (App.13a.) Significantly, the court did not limit application of this presumption to the question of whether a statute effected an unconstitutional taking. (App.13a-14a.) Rather, the court said that "we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (App.13a-14a.) The court then identified the Fifth Amendment principle at play: "[p]rivate property shall not be taken for public use, without just compensation." (App.14a.)

Next, the court set forth the competing claims of the petitioners and respondents on the issue of whether petitioners had a vested property interest in the unclaimed refund values. (App.14a-16a.) The court sided with respondents, holding that petitioners had no property interest in the unclaimed refund values for the period of December 1, 2008 through March 31, 2009. (App.16a.) In reaching that holding, the court went on to articulate entirely new rules of state law related to the determination of whether petitioners "possess[ed] a constitutionally protected interest in the disputed property." (App.16a.)

In analyzing whether petitioners had a protected property interest, the court recognized that neither the Bottle Bill in its original form, nor the 2008 amendments expressly granted the petitioners a property interest in the "unclaimed refund values." (App.18a.) Rather than determining whether the 2008 Act divested the petitioners of a preexisting property interest in "unclaimed refund values," the court sought to determine whether the 2008 Act implicitly and affirmatively vested a property interest in the unclaimed refund values in the petitioners. (App.18a.) The court, thus, analyzed whether petitioners had a property right in the refund values, "regardless of the status of the refund values before passage of the [2008] act." (App.19a.)

The court suggested that because the 2008 Act had no "provision pertaining to the disposition of the unclaimed [refund values] at the end of a reporting period" the petitioners had no present interest in those refund values. (App.22a.) The court then held "insofar as the statutory scheme may be deemed ambiguous because of its silence on the question of ownership, there is no implied support in the legislative history of the 2008 and 2009 acts for the plaintiffs' claim that they had a vested property interest in the unclaimed [refund values]." (App.22a.)

In response to petitioners' argument "that it is uncontested that they had a vested property interest in the unclaimed [refund values] before passage of the 2008 act and that the act did nothing to divest them of that revenue," the court held:

> [t]he issue. . .is whether the state's collection of the unclaimed [refund values]

> accruing during the four month period prior to the effective date of the 2009 act resulted in an unconstitutional taking of the [petitioners'] property, which does not require consideration of whether the unclaimed [refund values] were the [petitioners'] property prior to passage of the 2008 act. . . .(App.27a.)

Equivocating, the court held that even if the petitioners had preexisting property rights "they clearly had no such interest following [the 2008 act's] passage for the reasons previously described." (App.27a.) Nowhere, though, did the court find that 2008 Act affirmatively divested the petitioners of a preexisting property right; it found only that the 2008 Act did not vest the petitioners with a property right.

Next, the court rejected petitioners' assertion that this case was analogous to *Massachusetts Wholesalers of Malt Beverages, Inc. v. Attorney General*, 567 N.E.2d 183 (Mass. 1991). (App.30a.) The court found that the regulatory scheme in Connecticut was different from that in *Massachusetts Wholesalers*. (App.30a.) In so holding, the court concluded that the Connecticut regulatory scheme "require[d] that distributors. . .charge and collect a deposit on each beverage container sold," (App.31a) despite its previous and contrary recognition that, as the parties stipulated, "[t]he bottle bill [did] not require the [petitioners] to charge retailers a five cent refund value at the time of sale," (App 9a).

The court turned its attention to those cases cited by petitioners where "federal courts have applied a takings analysis to situations in which legislatures have confiscated money in specifically targeted private accounts." (App.31a-32a.) It distinguished them by stating that "[t]he property interest at stake. . .was the interest earned on the funds in the accounts, where ownership of funds was undisputed and there was no permissible regulatory purpose or cost imposed on the government." (App.32a.)

Further, in a "property interest" analysis the court had never previously performed, the court looked for "incidents of ownership" such as, "(1) the right to use the property; (2) the right to earn income from the property and contract over its terms with other individuals; and (3) the right to dispose of, or transfer, ownership rights permanently to another party." (App.33a.) Although the court recognized that the 2008 Act did not address disposition of the unclaimed refund values, it "conclude[d] that the [petitioners] had no property interest in the unclaimed [refund values] because their right to use and control the [unclaimed refund values] was severely limited following passage of the 2008 act." (App.34a.)

Finally, the court decided "that, because [petitioners] failed to prove that they had a clear entitlement to the unclaimed [refund values] attributable to the period from December 1, 2008, to April 1, 2009, the trial court improperly determined that the 2009 act resulted in an unconstitutional taking." (App.34a-35a.) The court thus held that the

retroactive taking of the "unclaimed refund values" from petitioners' bank accounts was not unconstitutional because the petitioners had no property right to those funds in the first place. (App.36a.)

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY BECAUSE THE CONNECTICUT SUPREME COURT'S OPINION EFFECTED A JUDICIAL TAKING, AND BECAUSE THERE IS A SPLIT AMONG THE LOWER COURTS OVER WHETHER A JUDICIAL DECISION CAN BE A TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The Connecticut Supreme Court's opinion erased a constitutional protection against uncompensated taking afforded to owners of private property by simply and erroneously declaring that petitioners' established property rights did not exist. Since this Court's opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010) (plurality opinion), the Circuit Courts and state courts of last resort have split over whether a judicial taking accomplished by fundamentally redefining "property interests" under state law is now a part of the Court's takings jurisprudence. This case provides an opportunity for the Court to clarify the issue of judicial takings. The Connecticut Supreme Court's opinion, while purportedly resting on state law principles of property law, eliminated established property rights by *ipse dixit* to avoid the otherwise unconstitutional

taking of petitioners' property. *See Stop the Beach*, 130 S. Ct. at 2602 (plurality opinion) (quotation and citation omitted).

A. The Connecticut Supreme Court's opinion was a judicial taking because it eliminated beverage distributors' established property rights in so-called unclaimed refund values and allowed the State to retroactively take the distributors' privately held funds.

The Fifth Amendment, made applicable to states through the Fourteenth Amendment, *Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897), protects against the taking of private property for public use without just compensation. U.S. CONST. AMEND. V. "The Takings Clause. . .is not addressed to the action of a specific branch or branches." *Stop the Beach*, 130 S. Ct. at 2601 (plurality opinion of Scalia, J.). A state may not, therefore, "do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.* (citation omitted). "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property. . . ." *Id.* at 2602 (emphasis in original); *see Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998) ("as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

The starting point for a Fifth Amendment takings claim then is whether there is a constitutionally protected interest in property. *See*,

e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984). While a taking is certainly a constitutional question, "the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips*, 524 U.S. at 164 (internal quotation and citation omitted). In the context of a judicial taking, "[w]hat counts is not whether there is a precedent for the allegedly confiscatory decision, but whether the right allegedly taken was established." *Stop the Beach*, 130 S. Ct. at 2610 (Scalia, J., plurality opinion). A party claiming a "judicial taking" must show that before the court's decision they had rights to the property taken. *See id.* at 2611.

In *Stop the Beach* this Court had to determine whether the Florida Supreme Court's decision in that case eliminated established littoral property rights. 130 S. Ct. at 2610. There, this Court observed "[t]here is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." *Id.* at 2611. The Court then addressed the background principles of state property law, and found the state court's decision to be consistent with those principles. *Id.* at 2612. As the Court noted, "[t]he Takings Clause only protects property rights as they are established under state law." *Id.* at 2612. It follows, that if the property rights existed before the Florida Supreme Court's decision, they would have been protected from uncompensated taking. *See id.* at 2612. "[W]hether the source of a property right is the common law or a

statute makes no difference, so long as the property owner continues to have what he previously had." *Id.* at 2613 n.12.

1. Distributors had a property right to unclaimed refund values under the pre-2008 Connecticut "Bottle Bill."

"Money is certainly property. . . ." *Pirie v. Chicago Tile & Trust Co.*, 182 U.S. 438, 443 (1901). The "Bottle Bill" expressly defines refund values by unit of currency, five cents. Conn. Gen. Stat. § 22a-244(a). It follows that refund values, whether "claimed" or "unclaimed", were property. The distributors' general funds were no less their property than the funds of any regulated business which is liable under statute to make payments under certain conditions.

The pre-2008 "Bottle Bill" mandated distributors to pay a five-cent refund value and an additional handling fee for empty beverage containers tendered to them by a retailer. That was the full extent of the distributor's obligations with respect to refund values under the "Bottle Bill." *See generally* Conn. Gen. Stat. §§ 22a-243–245 (providing no obligation to distributors other than to pay refund values). The "Bottle Bill" did not mandate that distributors charge any specific price on their products or segregate a specific amount or percentage of price related to cover possible "refund value" payments. *Id.* Distributors *could* absorb excess costs associated with their "Bottle Bill" obligations or recoup costs by charging more for the costs of compliance. (*See* App.5a-9a.) Nothing in the "Bottle Bill" prohibited or mandated either approach, or even provided

guidance. *See generally* Conn. Gen. Stat. §§ 22a-243–245. As the Connecticut Superior Correct recognized, "the distributors' obligation to pay refund values on the return container [was] an expense of doing business, which was paid from the income they received from the sale of filled beverages to the retailers." (App.49a.)

Since any and all money received by distributors on their sales, whether itemized or not, was the distributors' property, under the "existing rules or understanding[s] that stem[med] from [the pre-2008 'Bottle Bill']," any so-called "unclaimed refund values" were the distributors' property. As noted by the trial court, "[t]he [respondents] here cannot, and do not, seriously contest that prior to the 2008 Act, the unclaimed [refund values] were the property of the [petitioners]." (App.51a.) Indeed, the first and only challenge to this well-settled proposition emerged in the Connecticut Supreme Court's opinion.

2. The 2008 Act did not divest distributors of their property right to unclaimed refund values.

Connecticut property interests have long been held to be stable. "Interpreting a statute to impair an existing interest or to change radically existing law is appropriate only if the language of the legislature plainly and unambiguously reflects such intent." *Lynn v. Haybuster Mfg., Inc.*, 627 A.2d 1288, 1292 (Conn. 1993). Here, the "Bottle Bill" was amended, effective December 1, 2008. Act of Nov. 25, 2008, § 11. The 2008 Act did not expressly address ownership or disposition of unclaimed refund values. *See generally id.*; (App. 34a). Accordingly, the act did

not alter the distributors' existing interest in the portion of their revenue that could be "claimed" as a refund value by a retailer. Rather, the amendment set up a system for accounting and reporting where distributors had to open private bank accounts in their own names and deposit an amount equal to the refund value for every beverage sold. Act of Nov 25, 2008, § 11(a). The distributors then paid refund values from this account, deposited interest and dividends to this account, and reported on these activities to the State. *See generally id.* § 11. These amendments to the "Bottle Bill" did not require that the distributors charge any specific amount on their products for later payment of refund values. *Id.* Moreover, the 2008 Act left both the principal and interest in the account in the possession of the distributors. *Id.*

Because the 2008 Act made no provision for the ultimate disposition of funds in these accounts, it did not expressly alter the established property rights of the distributors to the funds identified as so-called unclaimed refund values. The 2008 Act did not require the petitioners to deposit any specifically identifiable revenues in their special accounts. Instead, deposits into the special accounts were simply made based on a formula: number of beverages sold times five cent refund value. The distributors were not holding separate "refund values" in trust for retailers. Any payment of refund values came from the distributors' general funds. Nothing in the 2008 Act altered distributors' settled expectations and understandings with respect to their established rights in so-called unclaimed refund values. Indeed, the Connecticut Supreme Court

deemed the 2008 Act "ambiguous because of its silence on the question of ownership." Under existing Connecticut property law, as established by *Lynn*, the 2008 Act could not have altered the distributors' well-established property interests.

3. The court's opinion effected a judicial taking because it eliminated distributors' property rights by disregarding existing state law principles and allowing the State to retroactively take petitioners' property.

When the Connecticut Supreme Court held that the petitioners had no property rights to the so-called unclaimed refund values in their special accounts, *i.e.*, the difference between the money the distributors deposited in the account and the money they paid out as refund values, it blessed the State's retroactive taking of those privately held funds under Act of Jan. 15, 2009, § 15. This decision therefore effected a *per se* taking of the petitioners' property in violation of the Fifth and Fourteenth Amendments. The court reached its conclusion by disregarding long standing principles of state law and ignoring the parties' stipulations of fact, thus, allowing the court to sidestep both the *per se* takings issues presented by the 2009 Act.

To reach its unconstitutional conclusion, the Connecticut Supreme Court began by improperly applying its presumption of constitutionality to the predicate issue of whether a property right existed. (App.13a.) ("The court will indulge in every presumption in favor of the statute's constitutionality.") (quotation and citation omitted).

The overly broad application of this presumption to the threshold issue of whether the petitioners had a property right was improper and erroneous, and paved the way for the judicial taking that followed.

The question of whether a property right existed was not a constitutional question; it was a question of state law. *See Phillips*, 524 U.S. at 164. Burdening the petitioners with what was effectively a presumption against property rights was improper. *Lynn* established that Connecticut property interests were entitled to the opposite presumption. *Lynn*, 627 A.2d at 1292. The retroactive reclassification of established principles of property rights directly contravenes the protections which the Takings Clause is meant to afford. *See Phillips*, 524 U.S. at 167 (1998) ("a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law").

By not discussing the pre-2008 "Bottle Bill," the court, by *ipse dixit,* effectively declared that any established rights no longer existed after the 2008 Act. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Rather than premising its analysis on the uncontested proposition that beverage distributors had long-standing established rights in "unclaimed refund values" and determining how, if at all, the 2008 Act modified those established rights, the court required petitioners to show that the 2008 Act affirmatively vested them with property rights in the unclaimed refund values. That the Connecticut Supreme Court applied this approach is evidenced by the fact that it did not determine who actually owned

the funds in the special accounts for the relevant period before the effective date of the 2008 Act.

The court also falsely characterized the requirements of the Bottle Bill. Specifically, the court's declaration that "[t]he scheme requires that distributors. . .charge and collect a deposit on each beverage container sold" is wholly unsupported by the statutory scheme and is contrary to the *joint stipulations* of the parties. (App.31a.) Accordingly, the court's attempt to characterize the funds in the special accounts as some type of property held in trust for a redeeming retailer represents a complete departure from established state law. Significantly, after petitioners initiated this lawsuit in the State court, the legislature later amended the Bottle Bill in 2010 to specifically provide that the funds held in the special accounts were held in trust for the state. Act of May 10, 2010, Conn. Pub. Act No. 10-25, § 2 (codified as amended at Conn. Gen. Stat. § 22a-245a).

Further, the transfer of distributors' funds into special accounts did not alter the status of the beneficial owner of the funds before transfer. States may, and often do, require individuals to hold funds in specific accounts, controlled by others, for permissible regulatory purposes. *See*, *e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (IOLTA accounts); *Phillips*, 524 U.S. at 156 (same); *Webb's Fabulous Pharmacies*, 449 U.S. at 155 (Interpleader funds). This is because the transfer of principal is not a *per se* confiscation of property. *See Brown*, 538 U.S. at 234. The pre-transfer owner is no less the owner after the transfer. *Cf. Webb's Fabulous Pharmacies*, 449 U.S. at 160 ("The

principal sum deposited in the registry of the court plainly was private property. . . .").

The Connecticut Supreme Court, however, stated that because the 2008 Act did not expressly provide for the ultimate disposition of the so-called unclaimed refund values accumulated in the accounts for the period December 1, 2008, to April 1, 2009, the distributors did not have a vested interest in those sums. (App.22a.) (citing *Bryant v. Hackett*, 171 A. 664, 667 (Conn. 1934) (property interest is vested interest if it functions as present interest)). This conclusion disturbed long-established Connecticut property law. For example, in Connecticut, "contingent remainders" granted by will are "presently existing property interests." *Gaynor v. Payne*, 804 A.2d 170, 176 (Conn. 2002) ("although that condition may never be fulfilled, that possibility does not alter the nature of the contingent remainder as an enforceable, presently existing property interest").

The court's conclusion that the distributors "possessed none of the normal incidents of ownership" also upended existing law. The petitioners retained exclusive control over the funds in the account and were permitted to use those funds to pay the operating expense of refund values payable upon the return of empty containers. Indeed, the 2008 Act specifically contemplated that the funds in the account might be fully depleted in the payment of these operating expenses.

Moreover, in addition to retaining the benefits of the revenue deposited in the special accounts, the petitioners also retained the burdens associated with

that revenue. Specifically, the petitioners were responsible for the payment of taxes on the revenue deposited in the special accounts pursuant to the 2008 Act, as well as interest accruing on those revenues. Under any test of commercial or property law, the ownership of the funds deposited pursuant to the 2008 Act remained the petitioners' property.

The court's ignoring of petitioners' clear evidence of a property interest, in favor of what it deemed a lack of "normal incidents of ownership," was completely contrary to settled principles of Connecticut property law. In Connecticut, "[a] 'property interest'. . .extends well beyond actual ownership of real estate, chattels, or money." *Millard v. Connecticut Personnel Appeal Bd.*, 368 A.2d 121, 124 (Conn. 1976). The court, ignoring this principle, pointed to the lack of an express disposition of the funds in the accounts as suggesting that the petitioners' possessed "none of the normal incidents of ownership." (App. 34a).

Connecticut law, however, has long recognized property rights where the property in question is not alienable. For example, "[a] right of action, including one for personal injuries, is a vested property interest, before as well as after judgment." *Massa v. Nastri*, 3 A.2d 839, 840 (Conn. 1939) (holding that a statute derogating a right of action was non-retroactive). Further, tort claims based on personal injuries are not alienable in Connecticut. *See Gurski v. Rosenblum and Filan, LLC*, 885 A.2d 163, 168 (Conn. 2005). The court's determination that the distributors' lack of present control over the funds evinced a lack of ownership was contrary to these

settled principles. *See*, *e.g.*, *Gaynor*, 804 A.2d at 176 (holding that a contingent remainder, which imparts no rights to control or possess property, "are not expectancies but, instead, are presently existing property interests").

Moreover, the fact that the 2008 Act did not make ultimate disposition of the excess funds does not suggest that the distributors did not hold a vested interest in those funds. *Cf. Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164 (holding that "recharacterizing the principal as 'public money' because it is held temporarily by the court" is a taking). Rather, it begs the question: Who owned the funds in the account before the Legislature retroactively recharacterized them as public money in 2009? The distributors had 30 years of settled practice establishing their rights, and nothing in the 2008 Act served to divest the distributors of those rights, expressly or otherwise.

The Court should grant the petition and reverse the judgment of the Connecticut Supreme Court, as it effected an unconstitutional taking of the petitioners' established property rights in violation of the Fifth and Fourteenth Amendments.

B. The Circuit Courts and state courts of last resort are split on the issue of whether judicial action may be a taking in violation of the Fifth and Fourteenth Amendments.

While the Connecticut Supreme Court's opinion meets the judicial taking standard declared by the plurality of this Court in *Stop the Beach*, there is still a divergence of opinion in the lower courts over

whether a judicial action may be an unconstitutional taking. This case provides an opportunity for the Court to resolve the existing split.

In *Stop the Beach*, a plurality of this Court announced that judicial action could violate the Takings Clause if it served to eliminate an established property right: "If a legislature *or a court* declares what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach*, 130 S. Ct. at 2602 (plurality opinion of Scalia, J., joined by the Chief Justice, and Thomas, and Alito, JJ.) (emphasis in original). Justices Breyer and Ginsburg concurred in part and in the judgment, concluding that no judicial taking occurred, but passed on the question of whether judicial action could violate the Takings Clause. *Id.* at 2619 (Breyer and Ginsburg, JJ., concurring in part and in the judgment). Justice Kennedy and Sotomayor concurred in part and in the judgment as well, but argued against using the Takings Clause, as opposed to the Due Process Clauses, to invalidate judicial action affecting property. *Id.* at 2613-18 (Kennedy and Sotomayor, JJ., concurring in part and in the judgment). *Stop the Beach*, thus, did not firmly establish through a majority of this Court that judicial actions may violate the Takings Clause.

At least three Circuit Courts, however, have found that judicial actions may violate the Takings Clause. In *Smith v. United States*, the Federal Circuit concluded that a "judicial takings" claim existed even before *Stop the Beach* for purposes of

determining the period of limitations under the Tucker Act. 709 F.3d 1114, 1116-17 (Fed. Cir. 2013), *cert. denied*, No. 13-5260, 2013 WL 3489701 (Oct. 7, 2013). The Federal Circuit said, "[t]he Court in *Stop the Beach* did not create this law, but applied it." *Id.* at 1117. In *Vandevere v. Lloyd*, the Ninth Circuit, citing *Stop the Beach*, said that "any branch of state government could. . .effect a taking." 644 F.3d 957, 963 n.4 (9th Cir. 2011). Further, the Ninth Circuit stated, "[w]e also note that a federal court remains free to conclude that a state supreme court's purported definition of a property right really amounts to a subterfuge for removing a pre-existing, state-recognized property right." *Id.* Finally, the Third Circuit seemed to implicitly accept that a judicial action may be a taking in *In re Lazy Days' RV Center, Inc.*, 724 F.3d 418, 425 (3d Cir. 2013). There, one of the parties argued that a bankruptcy court order was a taking. *Id.* The Third Circuit, rather than categorically holding that judicial action could not be a taking, concluded that the particular judicial action at issue was not a taking. *Id.* Further, the Texas Supreme Court, relying on *Stop the Beach*, implicitly recognized judicial takings when it stated that "merely pronouncing. . .a limitation on property rights, whether by judicial decree or executive fiat, would raise serious, constitutional concerns." *Severance v. Patterson*, 370 S.W.3d 705, 710 n.5 (Tex. 2012).

In contrast, the Supreme Court of Kansas rejected the notion of a judicial taking, stating that *Stop the Beach* has no precedential value as to that issue. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 P.3d 1106, 1127 (Kan. 2013), *cert.*

denied, No. 12-1436, 2013 WL 2903456 (Oct. 7, 2013). The Court of Appeals of Maryland, with no explanation as to whether it was rejecting the theory of judicial takings or the merits of the claim, rejected a judicial takings claim premised on *Stop the Beach*, "[w]e are unpersuaded by Appellees' thin argument on this score. . . ." *Exxon Mobil Corp. v. Albright*, 71 A.3d 150, 151 n.1 (Md. 2013).

Indeed, the lower federal courts are unsure of what to make of the plurality's opinion in *Stop the Beach*. *See*, *e.g.*, *Weigel v. Maryland*, Civ. No. WDQ-12-2723, 2013 WL 3157517, *8 (D. Md., June 19, 2013) ("There is some—contested—authority that a federal district court may declare unconstitutional a state court decision that effects a Fifth Amendment takings.") (citing *Stop the Beach*, 130 S. Ct. at 2601); *Shinnecock Indian Nations v. United States*, 112 Fed. Cl. 369, 385 (2013) ("[T]he portion of the Supreme Court's decision in *Stop the Beach* that discussed the standard for finding that a judicial taking had occurred and stated that a judicial taking was a valid cause of action was signed by only four justices and therefore did not create binding precedent.") (citations omitted); *see also Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 435 n.5 (7th Cir. 2011) (Hamilton, J., concurring in part and dissenting in part) (recognizing that *Stop the Beach* did not produce a majority opinion on whether a court decision can effect a compensable taking of property); Josh Patashnik, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255, 260-64 (2012) (discussing what, if any, controlling law came out of *Stop the Beach*).

The Court should grant the petition as this case presents an occasion to resolve this split and to provide guidance on an important issue: the fundamental protection against uncompensated takings of private property enshrined in the Fifth and Fourteenth Amendments.

II. REVIEW IS NECESSARY BECAUSE THE CONNECTICUT SUPREME COURT'S ARBITRARY OPINION WAS A VIOLATION OF DISTRIBUTORS' DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT, AND BECAUSE THERE IS A SPLIT AMONG THE LOWER COURTS OVER WHETHER A DEPRIVATION OF PROPERTY CAN BE ADJUDICATED AS A DUE PROCESS VIOLATION.

The Connecticut Supreme Court's decision eliminating distributors' established property rights to so-called "unclaimed refund values", and allowing the State to retroactively take distributors' unclaimed refund values held as vested revenues, was arbitrary and a violation of the distributors' substantive due process rights secured by the Fourteenth Amendment. The court's decision allowed the State to retroactively take the distributors' property and, thus, effectively deprived distributors of their property without due process of law.

A. The Connecticut Supreme Court's opinion arbitrarily eliminating beverage distributors' established property rights in so-called unclaimed refund values, despite 30 years of settled expectations and practices to the contrary, deprived distributors of their property without due process of law under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment protects individuals from state actions that would deprive an individual of life, liberty, or property without due process of law. U.S. CONST. AMEND. IV. The Due Process Clause has been found to "offer protection against legislation that is unfairly retroactive" because "a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (citation omitted). "[D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Id.* at 549 (Kennedy, J. concurring in the judgment and dissenting in part).

With these retroactivity concerns in mind, "[i]t is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights." *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy and Sotomayor, JJ., concurring in part and in the judgment). The Due Process Clause would, therefore, "prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.* at 2615. In this context,

the Due Process Clause protects against the fundamental unfairness of allocating public burdens through arbitrary retroactive means. *See Eastern Enterprises*, 524 U.S. at 558 (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting). "If a judicial decision. . .eliminates an established property right, the judgment [should] be set aside as a deprivation of property without due process." *Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, and Sotomayor, JJ., concurring in part and in the judgment).

Established property rights are those to which the owner has a legitimate expectation. *Id.* at 2615 (citations omitted). For due process purposes, property interests are "secured by existing rules or understandings." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (internal quotation and citation omitted). Here, as discussed concerning the judicial takings issues above, the petitioners had a settled expectation of established property rights to the so-called unclaimed refund values for nearly 30 years. *Supra*, Part I(A). Further, the Connecticut Supreme Court's opinion can only be described as arbitrary or irrational as it eliminated petitioner-distributors' interests in those unclaimed refund values by ignoring "existing rules and understandings." It thereby implicated the due process concern of fundamental fairness. *Id.*

It was fundamentally unfair for the court to eliminate the distributors' property rights in the so-called unclaimed refund values because it retroactively allocated the entire burden of the regulatory scheme upon the distributors. If the State had sought only to prospectively alter the

distributors' obligations, the burdens of the regulatory scheme could have been spread across both consumers and distributors, who each create the necessity for and benefit from the bottle return scheme. *Cf. Eastern Enterprises*, 524 U.S. at 559 (noting that Congress might have assessed all those who now use coal, or the taxpayer, to pay for retired coal miners' benefits, and asking why instead the burden was placed on the individual). Rather, the Connecticut Supreme Court allowed the State to retroactively place that entire burden solely on distributors by eliminating distributors' property rights in so-called unclaimed refund values. Unlike the State, the distributors could not retroactively adjust their cost structures to account for the revenues taken by the State as result of the court's elimination of their property interest. The court's decision, therefore, interfered with distributors' "distinct investment-backed expectations," and amounted to a direct taking of distributors' property. *Contra Eastern Enterprises*, 538 U.S. at 567-68 (finding no substantive due process violation where government action (1) did not interfere with "distinct investment-backed expectations"; (2) did not involve a direct taking; and (3) preserved indemnification to help spread the risk of liability, thereby diminishing the economic impact).

This Court should therefore grant the petition to reverse the Connecticut Supreme Court's arbitrary decision eliminating the petitioner-distributors' property rights in so-called unclaimed refund values. That decision violates the petitioners' substantive due process rights under the Fourteenth Amendment.

B. The Circuit Courts and state courts of last resort are split over whether a judicial decision that results in a deprivation of property can be adjudicated as a substantive due process claim.

The Connecticut Supreme Court's opinion eliminating the petitioner-distributors' property rights in unclaimed refund values, despite a legitimate expectation to those funds established through 30 years of settled practice, was arbitrary under the Due Process Clause of the Fourteenth Amendment. In *Stop the Beach*, however, the plurality expressed that a claim premised on a judicial decision eliminating a property right should not proceed under the Due Process Clause but rather under the Takings Clause. 130 S. Ct. at 2606 (plurality opinion of Scalia, J.) ("The first problem with using Substantive Due Process to do the work of the Takings Clause is that we have held it cannot be done."). The plurality thus held "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion)). The plurality believed that using a due process approach where economic liberties were at play would "propel[] us back to what is referred to. . .as the *Lochner* era." *Id.* (internal quotation and citation omitted).

At least four members of this Court, however, have suggested that due process continues to be a

viable means to challenging a retroactive deprivation of property. In *Eastern Enterprises*, Justices Breyer, Stevens, Souter, and Ginsburg dissented from the plurality's takings analysis, asserting that due process was the appropriate framework for analyzing whether a retroactive deprivation of property ran afoul of constitutional protections. *See generally Eastern Enterprises*, 524 U.S. at 554-58 (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting). The dissenters rejected, as misplaced, fears that using due process analysis would resurrect *Lochner*. *Id.* at 557. Instead, they said that due process protects against retroactivity "in light of a basic purpose: the *fair application of law*. . . .It is not to resurrect long-discredited substantive notions of 'freedom of contract.'" *Id.* at 558 (citation omitted) (emphasis in original).

In *Stop the Beach*, Justice Kennedy joined by Justice Sotomayor, asserted that due process was the appropriate framework for deciding whether a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause." 130 S. Ct. at 2615 (Kennedy and Sotomayor, JJ., concurring in part and in the judgment) (citations omitted). Justice Kennedy's approach in *Stop the Beach*, with a focus on whether a legitimate expectation of a property owner has been unsettled, flows from the same retroactivity concerns identified by the four dissenters in *Eastern Enterprises*. Further, in *Stop the Beach*, Justices Breyer and Ginsburg neither expressly rejected the takings approach of the plurality, nor rejected the due process approach of

Justices Kennedy and Sotomayor. 130 S. Ct. at 2618-19 (Breyer and Ginsburg, JJ., concurring in part and in the judgment). Substantive due process, therefore, remains as a viable theory for judicial decisions effecting a retroactive elimination of established property rights.

Because of the split among the lower courts over whether judicial takings are viable, *see supra*, Part I(B), it naturally follows that lower courts are also split over whether due process challenges to judicial action eliminating property rights are viable. The Second Circuit, relying on *Stop the Beach*, has indicated that whenever an individual claims a deprivation of property, the Takings Clause is the appropriate textual source of protection, not due process. *See Harmon v. Markus*, 412 Fed. Appx. 420, 423 (2d Cir. 2011) (citation omitted), *cert. denied*, 132 S. Ct. 1991 (2012). The Kansas Supreme Court categorically rejected a due process claim that Medicaid reimbursement rates were improperly calculated because, relying on *Stop the Beach*, it concluded that the claim was for a violation of an economic liberty. *Villa v. Kansas Health Policy Authority*, 291 P.3d 1056, 1070 (Kan. 2013). The Eleventh Circuit has also, at least, implied that substantive due process claims related to economic interests are categorically barred. *See Helm v. Liem*, 523 Fed. Appx. 643, 645-46 (11th Cir. 2013).

In contrast, the Fifth Circuit has explicitly found that a substantive due process claim is not automatically subsumed into a takings analysis for a deprivation of property. *Steward v. City of New Orleans*, No. 11-30947, 2013 WL 3964005, at *4 (5th

Cir., Aug. 2, 2013) (citing *John Corp. v. City of Houston*, 214 F.3d 573, 281-83 (5th Cir. 2000) (finding that a blanket rule that Takings Clause subsumes substantive due process claims relating to deprivations of property was inconsistent with majority of other circuits)). Further, the Seventh Circuit rejected on the merits a substantive due process claim related to a municipal zoning body's decision to revoke a commercial designation, rather than holding the claim was categorically barred as a claim for an economic liberty or subsumed into takings analysis. *Bettendorf*, 631 F.3d at 426-27.

This case provides the Court with an opportunity to clarify its prior opinions and resolve the existing split amongst the lower courts with respect to whether substantive due process claims remain viable for deprivations of established property rights. Resolution of this issue is of great importance because it bears on the constitutional protections of private property enshrined in the Takings Clause of the Fifth and Fourteenth Amendments and the Due Process Clause of the Fourteenth Amendment. This Court should, therefore, grant the petition to provide clarity on these important issues.

CONCLUSION

For all these reasons, this Court should grant the petition for writ of certiorari on the questions presented.

Respectfully Submitted,

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