No. A16-0874

State of Minnesota

In Supreme Court

Timothy Hall, Jr. et al.,

Petitioners,

vs.

State of Minnesota et al.,

Respondents.

BRIEF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Takings Clause prevent a state from seizing an individual's monetary assets and laying claim to interest accruing on that account where it has been deemed "abandoned" by a statutory enactment purporting to cut-off or abrogate common law property rights?
2. Does the Due Process Clause require that states must provide actual notice to owners before seizing their assets and or laying claim to accruing interest, where a state can—with minimal effort—identify and provide written notice to the owner's home address?

INTEREST OF AMICUS CURIAE[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit 501(c)(3) public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts on issues of public interest affecting small businesses. Accordingly, NFIB Legal Center submits this *amicus curiae* brief because the case presents a matter of great public importance that may affect the rights of all small business owners in Minnesota. The NFIB Legal Center is uniquely

1. NFIB Legal Center certifies that this motion was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity contributed monetarily toward its preparation or submission.

situated to brief the Court on the manner in which the state's conduct in this controversy affects small business owners.

NFIB Legal Center is the nation's leading small business association, representing members in Washington, D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB Legal Center's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB Legal Center represents businesses nationwide, including in Minnesota, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB Legal Center member employs ten people and reports gross sales of about $500,000 a year. NFIB Legal Center membership reflects American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that affect small businesses.

STATEMENT OF CASE

Amicus NFIB Legal Center adopts Petitioners' statement of facts and procedural history in this case.

STATEMENT OF ARGUMENT

The Minnesota Uniform Disposition of Unclaimed Property Act, Minn. Stat. §§ 345.31–.60 (2017) ("MUPA" or the "Act"), authorizes the state to assert

control and to assume possession of financial assets if the owner does not take affirmative steps to preserve her property rights.[2] *Hall v. State*, 890 N.W.2d 728, 733 (2017). The state defends this regime on the view that it is magnanimously holding so called "abandoned" property for the benefit of the owner. But that is misleading.

If the state was truly acting as a trustee to safeguard the owner's full interests, there would be no grounds for complaint. But the state is not acting as a fiduciary. Although recognizing that the owner maintains a right to the return of assets seized under MUPA—the statute abrogates important common law rights at the time the state assumes control. Specifically, MUPA takes away the common law right to earn interest on certain accounts.[3] Indeed, while the state is willing to return property to its rightful owner (if claimed

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2. MUPA deems property presumptively "abandoned" after a defined dormancy period. But this abrogates the owner's common law right to maintain exclusive control over his or her property with only periodic oversight. The common law holds that there is no abandonment, and that the owner retain all rights, unless and until there is a manifest sign of intent to relinquish his or her rights. *See State v. McCoy*, 38 N.W.2d 386, 388 (Minn. 1949); *see also White v. City of Elk River*, 840 N.W.2d 43, 51 (Minn. 2013) (affirming that the burden "rests with the party asserting waiver" to prove the owner's intent to waive constitutionally protected property rights and that "waiver is generally a question of fact that 'is rarely to be inferred as a matter of law.' ") (quoting *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009)).

3. NFIB Legal Center is concerned that small business owners—especially elderly proprietors—may unwittingly, fall subject to the MUPA regime when holding assets in interest bearing savings accounts or when holding other long-term investments.

within MUPA's prescribed period), the state will not surrender interest that the owner would otherwise be entitled to collect had the state not seized the funds. Rather, the state takes interest collected on assets held under MUPA for itself—without any semblance of compensation.

Accordingly, MUPA effects an unconstitutional taking in violation of the Fifth Amendment. Well-settled precedent establishes that the Takings Clause protects all forms of property—including monetary assets. Takings jurisprudence requires both a return of seized monetary assets and payment of interest for the time withheld from the owner. And a statute purporting to limit an owner's rights is immaterial to the takings analysis. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). This is because the Takings Clause requires courts to ask whether positive legislative enactments abrogate preexisting common law rights.

The confiscatory nature of this regime underscores Petitioners' due process concerns. Significantly, the state compels transfer of assets under MUPA directly into the general fund. Minn. Stat. § 345.48, subd. 1. Given that the state seeks to retain all interest generated on assets held under MUPA, the government's pecuniary interest stands at odds with the interests of those (often elderly, or perhaps disadvantaged) individuals affected by this regime. Thus, while the state ostensibly claims benevolence to the affected owners, it is improper to deferentially approve the passive method through which the

state has chosen to provide notice. Indeed, the state could easily send actual notice to most affected owners—while still covering its costs in the process. As such, the state's choice to provide only constructive notice belies the predatory nature of the MUPA regime.

ARGUMENT

I. THE STATE EFFECTS A *PER SE* TAKINGS WHEN ASSERTING PHYSICAL CONTROL AND DOMINION OVER REAL OR PERSONAL PROPERTY

The Takings Clause of the Fifth Amendment provides that government shall not take private property, even for a public use, without payment of just compensation. The Takings Clause "imposes a condition on the exercise" of police power. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 314 (1987). Thus, for example, in *Horne v. U.S. Department of Agriculture*, 135 S. Ct. 2419, 2428 (2015), the U.S. Supreme Court held that the federal government could not enforce a regime requiring raisin growers to surrender a portion of their crop as a condition of participating in the raisin market without paying just compensation.

The rule that any permanent physical invasion or occupation of private property must be deemed a *per se* taking is unflagging.[4] *See Hendler*, 952 F.2d

4. The fact that the state may eventually return property held under MUPA does not immunize it from takings liability. *See United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945) (holding the government effected a taking in appropriating an unexpired term of a warehouse lease, and concluding that the

at 1376 (cataloguing physical takings cases and explaining that an occupation must be considered "permanent" if the government assumes control without indicating "a timetable for withdraw"). This is true regardless of how burdensome or inconsequential a physical occupation may seem. For example, in *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419 (1982), an ordinance requiring installation of a small cable box amounted to a taking.

Time and again, the U.S. Supreme Court has affirmed that government assumes a categorical obligation to pay just compensation when taking actual physical possession or control of private property.[5] And that rule applies just the same with personal property (including monetary assets). *Horne*, 135 S.

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finite nature of the invasion went to the question of compensation owed); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (same); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949) (same); *see also Ark. Game and Fish Commission*, 133 S. Ct. 511 (2012) (holding that even a "temporary" occupation may amount to a taking). In any scenario, the government "could subsequently decide to return [appropriated] property to its owner, or otherwise release its interest in the property." *Hendler*, 952 F.2d 1364, 1376 (Fed. Cir. 1991). "Yet no one would argue that that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner." *Id.* In any event, even setting aside the question of whether the state incurs takings liability when assuming control of a bank account (it does), the primary concern here is that the state has taken for itself interest accruing on accounts appropriated into the General Fund under MUPA. Plainly this constitutes a permanent taking, as the State refuses to return collected interest.

5. *See Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (flooding of private property constituted a taking); *United States v. Cress*, 243 U.S. 316 (1917) (compensation owed even for intermittent flooding); *United States v. Causby*, 328 U.S. 256 (1946) (low-altitude flights effected a taking in interfering with the owner's quiet use and enjoyment of the land).

Ct. at 2426. For example, in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), the Court held that—because it would be unconstitutional for government to directly appropriate monetary assets—it is unconstitutional for a permitting authority to force a landowner to pay extortionate "fees" as a condition of a permit approval.[6]

Here the state suggests that MUPA cannot amount to a taking because ownership does not ***technically*** transfer under the Act. The implication is that so long as the state disavows ownership, it can assert physical dominion over private property while avoiding a takings problem; however, this flatly contravenes canonical takings doctrine.[7] *United States v. Clarke*, 445 U.S. 253, 257 (1980) (state assumes a "self-executing" duty to pay just compensation); *see also Gen. Motors Corp.*, 323 U.S. at 378–79 (government must pay for any interest taken from owner, even when taking less than full title). To be sure, public entities often invade private property without expressly invoking the power of eminent domain or formally seeking to compel transfer of title. In those circumstances the owner is entitled to seek just compensation through

6. More precisely, *Koontz* clarified that a condition requiring payment of a fee is enforceable only if the authority can demonstrate that the exaction is necessary and roughly proportional to mitigate anticipated public impacts. 133 S. Ct. at 2595.

7. *Horne*, 135 S. Ct. at 2429 ("The fact that the [owner] retain[s] a[n] [] interest . . . does not mean there has been no physical taking.").

an inverse condemnation claim. *See Jacobs v. United States*, 290 U.S. 13, 15 (1933).

II. OWNERS ARE ENTITLED TO COMPENSATION FOR THE "FULL AND PERFECT EQUIVALENT" OF WHAT HAS BEEN TAKEN—INCLUDING THE RIGHT TO COLLECT INTEREST ON MONEY WHERE THAT RIGHT IS RECOGNIZED UNDER BACKGROUND COMMON LAW PRINCIPLES

a. The Just Compensation Clause Requires an Award that Both Provides Fair Market Value and Assures Payment of Interest from the Time of the Taking

In 1893, the U.S. Supreme Court emphatically repudiated the notion that a legislative body could minimize its constitutional obligation by defining "just compensation" owed for a taking. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Rather, it is the exclusive province of the courts to determine whether "just compensation" was paid. *Id*. And the government must pay the owner for the "full and perfect equivalent" of what was taken. *Id*. at 326.

This not only requires payment for the fair market value, but also the payment of interest where "disbursement of the award is delayed." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). This is because the owner must be "placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Id*. The Takings Clause requires that "interest must be added to the damages award in order to

compensate for the time value of money and the potential opportunity the owner has lost to earn income on its damages award as a result of the taking." *Otay Mesa Prop., L.P. v. United States*, 779 F.3d 1315, 1328 (Fed. Cir. 2015).

The state does not satisfy its constitutional obligation by merely (eventually) returning private property to its rightful owner. "It is now axiomatic that 'the Fifth Amendment's reference to just compensation entitles the property owner to receive interest from the date of the taking of payment as part of his just compensation.' " *Id*. (quoting *United States v. Thayer-W. Point Hotel Co.*, 329 U.S. 585, 588 (1947). Indeed, the state has a categorical duty to pay just compensation upon assuming control of private property (real or personal), which includes not only the return of the principal taken from a bank account (or the corpus of another such asset) but also interest accrued from the time it assumes physical control.

b. MUPA Effects an Unconstitutional Taking to the Extent It Extinguishes the Common Law Right to Earn Interest

The state argues property held under the MUPA regime is maintained exclusively for the benefit of the owner. But even if this Court were to infer that the state may ***exercise control*** over private property without incurring an obligation to pay just compensation when acting as a fiduciary—in *parens patriae*—that would not resolve the independent question of whether the Takings Clause precludes the state from ***claiming interest*** on property so

held. *See Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003). There are two reciprocal reasons why the state is forbidden from appropriating interest earned on property held "in trust." First, the state necessarily violates the fiduciary relationship where it takes for itself a share of property that it claims to hold for the benefit of a citizen. Second, in asserting ownership of accrued interest for itself, the state necessarily takes that property for a public use without just compensation.[8] *See Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) ("The classic taking [is one] in which the government directly appropriates private property for its own use.").

The state maintains that nothing is taken from the principal owner when denied the right to collect interest. As embraced by the court of appeals, the theory holds that no one can claim a taking for interest withheld under MUPA because the Act defines the scope of protected rights for properties deemed "abandoned." *See Hall*, 890 N.W.2d at 735. But this argument is circular. If courts were to define the scope of protected property rights with reference to the very statute alleged to effect a taking, then there could never be a regulatory taking.

8. *Amicus* does not dispute that the state could impose reasonable fees to defray the actual costs of administering a program to safeguard assets deemed "abandoned." But, the authority would bear the burden of justifying the amount so charged. *See Koontz*, 133 S. Ct. at 2595.

For this reason, courts "evaluate [] takings claim[s] with reference to those rights enuring in the title to the subject [property]." *See* Luke A. Wake, *The Enduring (Muted) Legacy of Lucas v. South Carolina Coastal Council: A Quarter Century Retrospective*.[9] The inquiry necessarily focuses on what common law rights the owner held prior to enforcement of the contested regime. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) (emphasizing that those rights preexisting the assailed regime are transferred with conveyance of title from one owner to the next—including the fundamental right to prosecute a takings claim).[10] A statute purporting to abrogate common-law rights thus cannot be given effect—at least not where it would result in the state directly assuming for itself (or transferring to another party) the right to collect such interest for public use. *See Brown*, 538 U.S. at 235.

9. *Available* online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960341 (last visited May 16, 2017) (forthcoming in Geo. Mason Civil Rights L. J., Volume 28, Issue 1).

10. Through the 1990s, a growing body of courts embraced the so called "notice rule," which held that an owner acquiring title after enactment of a restriction could have no takings claim because they were "on notice" of the restriction at the time of acquisition. But *Palazzolo* repudiated the notice rule—emphasizing that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." 533 U.S. at 627.

III. THE STATE CANNOT ABROGATE A TAKINGS CLAIM OR THE DUTY TO PAY JUST COMPENSATION BY REDEFINING PRIVATE PROPERTY RIGHTS THROUGH LEGISLATION

No one questions the power of the legislature to enact law imposing restrictions or conditions on the use of private property. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). In just the same manner as the City of Minneapolis may restrict permissible uses for real property under its conferred police powers, the state may invoke its police powers to regulate use of other forms of property. For example, the state can impose reasonable restrictions on the sale of chattels. Likewise, the state can legitimately enforce restrictions, or impose positive legal requirements, governing the use and maintenance of financial accounts.

Such economic regulation is ubiquitous and is generally upheld when challenged under the Due Process Clause. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 (1938) (applying a rational basis standard of review). Likewise, lawfully imposed restrictions or conditions governing the use of private property will generally survive a challenge under the Takings Clause. This is because in most regulatory takings cases courts apply the multi-factor balancing test set forth in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), which requires consideration of (1) the economic impact of the restriction; (2) the owner's investment-backed expectations, and (3) the

character of the government's conduct. While a property owner might conceivably prevail in challenging an especially burdensome restriction or condition, the reality is that takings claims almost invariably fail under *Penn Central* because courts tend to apply the factors deferentially in favor of government defendants. *See* Adam R. Pomeroy, *Penn Central after 35 Years: A Three-Part Balancing Test or a One-Strike Rule?*, 22 Fed. Circuit B.J. 677 (2013). And while this Court has held that the Minnesota Constitution requires a more exacting standard of review when an owner alleges a regulatory taking, *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980), there is no question that ordinary commercial restrictions on the sale of products (or governing the use or maintenance of financial accounts), will survive a takings challenge, even under Minnesota's more protective standard.

But the MUPA regime is different. It does not simply regulate or impose a condition on the use of private property—but instead appropriates, for the state itself, an affirmative interest in properties deemed statutorily "abandoned." This is problematic under the Minnesota Constitution because this Court made clear in *McShane* that public authorities effect a taking when enforcing a regulatory regime to advance their own pecuniary interests over

the rights of an individual owner.[11] 292 N.W.2d at 258–59; *see also DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299 (Minn. 2011).

Even setting aside the Minnesota Constitution, a statute purporting to transfer an interest in private property to public use amounts to a *per se* taking under the Fifth Amendment. The "State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). But that is effectively what the state urges here by arguing that property owners have no right to earn interest on property deemed statutorily "abandoned."

Importantly, MUPA imposes a condition on the owner's common law right to continue collecting interest on his or her financial assets. And while the requirement to intermittently interact with one's bank (or with another such institution) can hardly be viewed as an onerous demand, this is nonetheless a legal imposition abrogating the owner's common law rights to retain uncontested control over his or her assets indefinitely. *See McCoy*, 38 N.W.2d at 138. The question is whether the legislature can—through

11. "Because the restrictions were adopted specifically to benefit a government enterprise, rather than to mediate among competing private uses of land, the court applied a more stringent standard of liability . . . ." R.S. Radford, Luke A. Wake, Deciphering and Extrapolating: Searching for Sense in Penn Central, 38 Ecology L.Q. 731, 746–47 (2011); *see also* Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

proscriptive legislation—impose conditions compelling transfer of a recognized common law private property interest to the state?

But as set forth in Section I, *supra*, the U.S. Supreme Court has already answered this question—unequivocally rejecting the state's fundamental argument. *Loretto*, 458 U.S. at 434. If the state could impose such conditions on the continued ownership of private property, the legislature might just as well enact legislation dictating that the fee simple title to one's home reverts to the state if the owner "abandons" the property by leaving it vacant for some statutorily defined period—therein abrogating (*i.e.*, taking for itself) the owner's common law rights to continue ownership indefinitely. Likewise, under the state's theory, Minneapolis might just as well enact an ordinance dictating that automobiles must be moved at least once a week (even where parked on private property), ostensibly in the interest of maintaining community aesthetics or in furtherance of some other "rational" policy objective—therein deeming unmoved vehicles subject to escheat.

For that matter, the rational basis test is such a low bar that the legislature might very well impose significantly more complex or burdensome requirements on the right to continue owning private property without running afoul of the Due Process Clause. While plausibly justified on legitimate public policy grounds, the state might advance its own pecuniary interest in collecting revenue for the general fund by further accelerating the

statutory timeline for "abandonment" under MUPA. The state might also require owners to comply with more precise (*i.e.*, more burdensome) procedures to avoid "abandonment" or to recover assets that the state has taken under its control. The legislature could just as well enact a statute purporting to extinguish any and all rights of ownership at the time of "abandonment"—with such property therein escheating to the state without any opportunity for recovery.

Although such legislation may survive a substantive due process challenge, it would necessarily violate the Takings Clause. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 545–48 (2005) (clarifying that while the Due Process Clause concerns the propriety of government conduct, the Takings Clause looks to the burden imposed on the owner's property rights). The U.S. Supreme Court's decision in *Lucas* illustrates this point. In that case, David Lucas was denied the right to make any sort of improvement to his two beachfront lots because the South Carolina Coastal Management Act prohibited, without exception, all development seaward of an administratively drawn demarcation line. *Lucas*, 505 U.S. at 1007–08. The act was unquestionably justified as a valid exercise of South Carolina's police powers. *Id*. at 1022, n.10 (setting forth South Carolina's legislative findings). Nonetheless the Court held that, as applied to Mr. Lucas' property, the act

effected a taking because it wholly abrogated his common law right use his property for an economically beneficial purpose. *Id*. at 1027.

In defending its regime, South Carolina argued that Mr. Lucas could have no expectation to use his property in contravention of the Act, which represented the legislature's judgement that the prohibited uses were noxious. *Cf. Lucas*, 505 U.S. at 1039 (Blackmun J., dissenting) (arguing that the Takings Clause should not be understood as interfering with the power of the state "to prevent any use of property it finds to be harmful to its citizens"). But the fact that the act denied development rights could not be dispositive for the question of whether Mr. Lucas held a protected right to build on the land because that would allow legislative bodies—which respond to political pressures indifferent to individual rights—to operate beyond the constraints of the Takings Clause.[12] To be sure, "Such an approach would defeat essentially any takings claim." *The Enduring (Muted) Legacy of Lucas*, *supra* at 12.

If the legislature could, for example, simply dictate what rights an owner holds in his or her property, the state might seek to limit compensation owed for an exercise of eminent domain by proclaiming that landowners have no right to severance damages in eminent domain proceedings. *Cf. Cnty. of Anoka*

12. *See Lucas*, 505 U.S. at 1018 (noting the "heightened risk that private property [may be] pressed into some form of public service under the guise of mitigating serious public harm" in certain cases).

v. Blaine Bldg. Corp., 566 N.W.2d 331, 334 (Minn. 1997) (recognizing owners maintain a constitutional right to severance damages). Then again, if the legislature could evade the strictures of the Takings Clause simply in enacting laws abrogating common law property rights, it might just as well take real property in future public works projects—without paying any compensation—by including provisions (a) requiring that owners must dedicate property for the footprint of planned projects as a condition of obtaining any development permit, (b) prohibiting owners from passing along full title; or (c) imposing an expiration date on "fee simple" titles.[13] *See Palazzolo*, 533 U.S. at 627 (stressing that a legislature may not "put an ***expiration date*** on the Takings Clause") (emphasis added).

Accordingly, it can be no answer that through enactment of MUPA the legislature has chosen to "enact [a] statute[] resulting in the lapse or divestment" of the owner's common law property rights. *See* Pet'rs' Opening

13. Unfortunately, these examples are not farfetched given the political motives driving law makers. For example, lawmakers in Pasco County, Florida have enacted an insidious law prohibiting the issuance of building permits for properties within the footprint of a planned highway, except on the condition that the owner dedicate the land within that highway corridor. *See Hillcrest Prop. LLP v. Pasco Cnty.*, 939 F. Supp. 2d 1240, 1242 (M.D. Fla. 2013) (chiding a County attorney for "proudly declar[ing], 'the [regime] . . . saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages"); *see also Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 852 (2016) (holding unconstitutional a state law that prohibited development of properties within planned future highway corridors).

Br., No. A16-0874, at 11. *Lucas* makes clear that the takings analysis looks to the background principles of state property law, as objectively defined at common law. *See Lucas*, 505 U.S. at 1027-31 (emphasizing that owners' expectations are formed by the common law standard); *see also Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding that an enactment extinguishing the owner's right to exclude the public amounted to a taking). The legislature cannot take an end run around the Takings Clause by legislating private property rights out of existence. *Cf. Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). As this Court recently affirmed in *City of Elk River*, the only way to terminate constitutionally protected property rights is by "exercise of [the State's] eminent domain power or by written agreement with the [] owner." 840 N.W.2d at 51 (rejecting the notion that prospective legislation may "terminate" constitutionally protected property rights).

Some courts have said that positive enactments may become so much a part of the legal landscape as to become ensconced, with sufficient time, into the "background principles" of state property law.[14] *See generally* R.S. Radford

14. In any event, even those courts embracing this view "suggest that an enactment must be of a certain vintage before it may be viewed as a background principle." *The Enduring (Muted) Legacy of Lucas*, *supra* at 29-30. For example, while *Palazzolo* left unanswered the question of when—if ever—

and J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L.J. 449 (2001). But the *Lucas* majority was clear in holding that background principles must find their roots in the common law.[15] 505 U.S. at 1031 (emphasizing in its discussion of background principles that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land"). Thus, statutory standards can only be viewed as incorporated into the background principles of state property law in so far as

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a legislative enactment may be incorporated into a state's background principles, "Chief Justice Rehnquist suggested that enacted restrictions in colonial Boston and or New York City's first comprehensive zoning ordinance from 1916 would be sufficiently aged to fit within *Lucas'* background principles framework." *Id*. (citing *Tahoe–Sierra Pres. Council*, 535 U.S. at 352) (Rehnquist, C.J., dissenting)). Thus, while it may be conceivable that a legislative enactment could change background principles with the passage of time, it would be wholly improper to say that an enactment from the past several decades is sufficiently ossified to be incorporated into the state's background principles. For that matter, a legislative enactment should not even be entertained as potentially altering established background principles unless it may be said to predate the living memory of any person who might be affected, as that approach would at least roughly comport with the notion that background principles stand as an essentially static historical baseline against which modern regulatory changes are assessed.

15. Those jurisdictions that liberally construe the background principles doctrine as incorporating positive enactments "have chosen to view *Lucas* through the lens of Kennedy's concurrence." *See The Enduring (Muted) Legacy of Lucas*, *supra* at 13, 29–31. But, this is improper given that *Lucas* was not a plurality decision. *Id*. at 13 (emphasizing that Kennedy's concurrence was "immaterial to the ultimate result").

they comport to historic common law principles.[16] *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) (emphasizing that the State may not change historical common law rights *ipse dixit*, and that statutory restrictions on property rights must mirror "traditional property interests long recognized under state law").

IV. CONSTRUCTIVE NOTICE IS NOT ENOUGH

It would be laudable if the state were truly seeking to safeguard the rights of owners who may have lost track of their assets, especially since elderly individuals and disadvantaged persons are presumably more likely to have trouble keeping-up with their financial affairs. But the confiscatory nature of the MUPA regime is plainly demonstrated by the simple fact that the state opted against providing actual notice to affected owners. Instead, it created a website (inaccessible for those without internet—including even some small business owners), which theoretically provides ***constructive***

16. This only makes sense given that statutorily imposed restrictions may be lifted at any point in time, which would necessarily restore the *status quo ante* to the default common law standards governing ownership and use of private property from time immemorial. *See Hage v. United States*, 35 Fed. Cl. 147, 151 (1996) (observing that common law property rights have been defined by a millennium of Anglo-American cases); *see also* Alexander Hamilton, 1 Records of the Federal Convention of 1787, at 302 (Max Ferrand ed., 1911) (endorsing the Lockean view that property rights antecede the Constitution and that the one "great ob[ject] of Gov[ernment] is [the] personal protection and security of Property").

notice. But this is pure legal fiction. *See Mullane v. Cent. Hannover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In reality, affected individuals will likely only search the state's abandoned property database if they realize that their assets have been transferred from their proper account—and only then if they are savvy and computer literate enough to find and navigate the state's website. One can imagine that a small business owner, perhaps a farmer or a mechanic, who spent his life working with his hands is unlikely to stumble upon this online resource without help from someone else. Yet even that assumes he should think to check the status of his savings account. And if he should suffer a stroke or some other condition that impedes his life functions, one can imagine that he will be all the less likely to find information on his "abandoned" property through the state's website.

The state feigns confidence in the relative efficacy of its constructive notice regime—pointing out that the plaintiffs eventually learned that their property was being held in the general fund.[17] But the key word is "eventually." Even if ***all*** affected owners ***eventually*** discover that they have lost control of their assets, or that their agents, family or heirs may—at some point—learn that their property has been transferred to the state's control, and even if they

17. Yet it is telling that, for three of the four plaintiffs, the owners learned (only by chance) that the state held their property ***through a third party***.

all do so within the time to file a claim for the return of the property in question, it is essential to keep in mind that the state is benefiting financially in holding these assets because—all the while—it is collecting interest.

Indeed, it would be improper to overlook the state's profit motive. *Cf. Jones v. Flowers*, 547 U.S. 220, 239 (2006). Where a public authority stands to advance its own institutional interests (especially those of a pecuniary nature) at the expense of an individual, there is heightened risk that the authorities may have improper motives. In turn, it is only proper to scrutinize related government conduct more carefully to be sure that the state has avoided any inference of malfeasance or willful neglect of constitutional duties owed to affected citizens.

In this case, the MUPA regime is constitutionally infirm precisely because the state has not taken easy and simple steps to provide effective notice to property owners. *Cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The state could search the Driver and Vehicle Services'— database—or other publicly available databases or tax records—to find current contact information for individuals who have lost control of their assets under MUPA. Then the state could mail a notice. Or, even more simply, the state could send a letter to the last known address on file with the bank before the account was seized.

While this approach would require resources, the state could offset those expenses by charging fees approximating the costs associated with reuniting the owner with his or her "abandoned" property. *See Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997) (affirming that where imposed for the purpose of offsetting costs a charge may be upheld as a fee—so long as the "true motivation [is not] to raise revenue"). The only potential down-side to proactively sending out notice by mail (from the perspective of a revenue hungry public entity) is that it would all too effectively accomplish its supposed objective. After all, the best policy for generating public revenue would be to indefinitely delay or to tacitly obstruct the process of reuniting owners with their "abandoned" property.

The constitutionally required policy, by contrast, is that which most efficiently and effectively accomplishes the goal of reuniting owners with their property by providing reasonable notice. Unfortunately, when acting to maximize institutional profit-interests over the rights of individuals, the state is acting effectively in predatory manner. *See Taylor v. Yee*, 136 S. Ct. 929, 930 (Alito, J.) (expressing concern that "[a]s advances in technology make it easier . . . to identify and locate property owners, many States appear to be doing less and less to meet their constitutional obligation to provide adequate notice before escheating private property"). The first principles of good government require more. John Locke, Second Treatise on Civil Government, Ch. IX §124

(1690) ("The great and chief end . . . of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property.");[18] *see also* Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 Queen's L.J. 259, 260–61 (2005) (arguing that the sovereign owes fiduciary-like duties to its citizens).

V. CONCLUSION

For the foregoing reasons, NFIB Legal Center, as *amicus curiae*, urges this Court to reverse the decision of the court of appeals and hold that (1) the Takings Clause requires return of property held under MUPA, along with any accruing interest; and (2) the state should take minimal steps to provide actual notice to individuals affected by the MUPA regime, including—ARG at the least—using readily available resources to find current contact information for affected parties to provide actual notice.

Respectfully submitted,

Dated this 25th Day of May, 2017 By: */s/ Aaron R. Gott*

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18. *Available* online at http://www.constitution.org/jl/2ndtr09.htm (last visited May 19, 2017).

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