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IN THE SUPREME COURT OF PENNSYLVANIA

No.: 216 MM 2017

SANDS BETHWORKS GAMING, LLC

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD

Respondents.

REPLY BRIEF OF PETITIONER SANDS BETHWORKS GAMING, LLC IN SUPPORT OF ITS PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

INTRODUCTION 1
ARGUMENT 2
I. The Amended Act's Provisions on the Supplemental Assessment and CMCD Account Distributions Violate the Uniformity Clause. 2
II. The Supplemental Assessment and the CMCD Account Serve No Public Purpose. 8
III. The Supplemental Assessment and the CMCD Account Violate Pennsylvania's Special Law Prohibition. 13
IV. The Challenged Provisions Violate the Equal Protection and Due Process Guarantees of the Constitution of the United States. 16
V. The Supplemental Assessment and CMCD Account Provisions Should Be Severed from the Amended Act. 18
VI. The Parties Have Agreed that, if Sands Prevails, the Funds Will Be Returned. 18
CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Allegheny Cty. v. Monzo,
500 A.2d 1096 (Pa. 1985) 4, 14, 15, 16

Clifton v. Allegheny Cty.,
969 A.2d 1197 (Pa. 2009) 4

Commonwealth v. E. Motor Exp., Inc.,
157 A.2d 79 (Pa. 1959) 5

Ehrlich v. City of Racine,
26 Wis. 2d 352 (1965) 3

In re Cope's Estate,
43 A.79 (Pa. 1899) 7

Kelley v. Kalodner,
181 A. 598 (Pa. 1935) 7

Kelo v. City of New London,
545 U.S. 469 (2005) 11, 12

Lawrence v. State Tax Comm'n of Mississippi,
286 U.S. 276 (1932) 4

Mathews v. Eldridge,
424 U.S. 319 (1976) 20

Mount Airy #1 LLC v. Pennsylvania Dep't of Revenue,
154 A.3d 268 (Pa. 2016) 3, 6, 9

Nextel Comm. of the Mid-Atlantic, Inc. v. Commonwealth,
171 A.3d 682 (Pa. 2017) 3

Nodlinger v. Hahn,
505 U.S. 1 (1992) 16

R. v. Com., Dep't of Public Welfare,
636 A.2d 142 (Pa. 1994) 20

Robinson Township v. Commonwealth,
147 A.3d 536 (Pa. 2016) 13

Sablosky v. Messner,
92 A.2d 411 (Pa. 1952) 7

Saulsbury v. Bethlehem Steel Co.,
196 A.2d 664 (Pa. 1964) 7

Shelly Funeral Home v. Warrington Twp.,
57 A.3d 1136 (Pa. 2012) 4

West Mifflin Area Sch. Dist. v. Zahorchak,
4 A.3d 1042 (Pa. 2010) 13

STATUTES

4 Pa. C.S. § 1101 et seq. 1

4 Pa. C.S. § 1102(3) 9

4 Pa. C.S. § 1102(6) 11

4 Pa. C.S. § 1102(12.1) 11

4 Pa. C.S. § 1403 10

4 Pa. C.S. § 1407(B) 10

4 Pa. C.S. § 1407.1(C) 7

4 Pa. C.S. § 1407.1(E) 7

4 Pa. C.S § 1904(a) 19

OTHER AUTHORITIES

Pa. Const. Art. III, § 32 13

Pa. R. App. P. 1532(a) 19

INTRODUCTION

Petitioner Sands Bethworks Gaming, LLC ("Petitioner" or "Sands") respectfully replies in support of its challenge to the tax scheme imposed by the provisions of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 *et seq.*, *as amended* (2017) (the "Amended Act"). None of the Respondents' arguments withstands scrutiny.

The tax scheme establishes a variable tax that violates the Uniformity Clause. All casinos pay the Supplemental Assessment into the CMCD Account. Certain casinos then have the same money that they paid into the CMCD Account returned to them from the Account in amounts that vary depending on their slot revenues. The Respondents offer little response other than to claim that the payouts from the CMCD Account are not a tax credit or refund. But the Respondents do not negate the straightforward operation and effect of the CMCD Account distributions, which directly offset the tax liability of the casinos that receive them. The inexorable result is a variable tax rate for casinos paying the Supplemental Assessment. This scheme plainly violates the Uniformity Clause.

The Respondents acknowledge that the Supplemental Assessment and CMCD Account may only be used to funnel money back to private casinos. Given the restricted private distribution scheme, it is unsurprising that the Respondents fail to muster a credible claim that the scheme serves a public purpose. For similar

reasons, the Supplemental Assessment is irrefutably a special tax that could survive under the Special Law Clause only if the burdens imposed on the taxpayer are not palpably disproportionate to the benefits of the tax. It is not plausible that Sands benefits from paying taxes that directly fund its rivals' marketing and capital development. Such a narrow private-interest scheme also serves no rational basis that can justify its discrimination among taxpayers, in violation of federal due process and equal protection.

The Supplemental Assessment and CMCD Account provisions therefore must be severed from the Amended Act. The parties, moreover, have agreed that funds paid into the CMCD Account will be returned. This Court should further declare unconstitutional and enjoin any further collection of the Supplemental Assessment and any other distributions from the CMCD Account.

ARGUMENT

I. The Amended Act's Provisions on the Supplemental Assessment and CMCD Account Distributions Violate the Uniformity Clause.

As demonstrated in Sands' opening brief, the Amended Act's tax scheme creates a variable tax rate. The Supplemental Assessment serves only to fund distributions from the CMCD Account that are based on casinos' Gross Terminal Revenue ("GTR"). The net result is a direct reduction in the recipients' tax

liability that varies based on revenue. (Br. at 11-12, 16-17, 20-26.)[1] The Uniformity Clause does not permit graduated or variable tax rates based on revenue or income. *Mount Airy #1 LLC v. Pennsylvania Dep't of Revenue*, 154 A.3d 268, 275-78 (Pa. 2016). The scheme's variable tax rate violates the Uniformity Clause. *Id.*

The Respondents are incorrect that only the Supplemental Assessment paid into the CMCD Account is relevant to the uniformity analysis. They further err by claiming that the distributions out of the CMCD Account should not impact the analysis because the mandatory distributions supposedly do not function as "credits." (Resp. at 26.) The distributions are fundamental to the uniformity analysis. The CMCD Account distributions have the inescapable and direct effect of reducing the net Supplemental Assessment tax liability for the casinos that receive them. As this Court made clear in *Nextel Comm. of the Mid-Atlantic, Inc. v. Commonwealth*, a tax scheme violates the Uniformity Clause whether its disparate treatment occurs in the initial payment of the tax or in a scheme that creates exemptions or payouts. 171 A.3d 682, 696-99 (Pa. 2017); *see also Ehrlich v. City of Racine*, 26 Wis. 2d 352, 356 (1965) (accounting for rebates in a uniformity analysis and holding "[w]e are unable to give judicial absolution to a

[1] "Resp." refers to the Respondents' brief, while "Br." refers to the Petitioner's opening brief.

two-stage tax differential which would be a constitutional transgression if done in one stage”).

The Uniformity Clause thus requires review of the full tax scheme, including consideration of its overall operation and practical effect. Substance always prevails over form, as Sands has already demonstrated. (*See* Br. at 27.) Both this Court and the Supreme Court of the United States have long established that the constitutionality of a tax law is determined by its practical operation and effect. *See, e.g.*, *Lawrence v. State Tax Comm’n of Mississippi*, 286 U.S. 276, 280 (1932) (“[I]n passing on [a taxing scheme’s] constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it”); *Shelly Funeral Home v. Warrington Twp.*, 57 A.3d 1136, 1141 (Pa. 2012) (explaining that, “irrespective of how taxes are described, reviewing courts assess their validity based on how they operate in practice”); *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1211 (Pa. 2009) (“when a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated”); *Allegheny Cty. v. Monzo*, 500 A.2d 1096, 1103 (Pa. 1985) (“The imposition of taxes which are to a substantial degree unequal in their operation or effect upon similar kinds of business or property, or upon persons in the same classification is prohibited” (internal quotations and citations omitted));

Commonwealth v. E. Motor Exp., Inc., 157 A.2d 79, 89 (Pa. 1959) ("the nature of the tax depends not upon its label, but upon its incidence, *i.e.*, its practical operation and effect").

In this situation, the practical operation of the scheme is straightforward and demonstrates its variable net effect. First, the parties agree that the initial Supplemental Assessment is a tax. (*Compare* Br. at 27-28 *with* Resp. at 23.) The tax is paid by participants of a specific industry based on their revenues and is paid into the CMCD Account, a restricted and single purpose fund. The rub is that certain statutorily-selected casinos that pay the tax into the restricted fund will also receive mandatory payouts right back from the fund. In fact, the very purpose of the restricted fund is to serve as a vehicle for collecting the tax receipts paid into it and then paying them right back to a specific subset of the taxpayers. It is undeniable that those taxpayers that receive a distribution thus have a lower net tax liability. The casinos that do not receive a distribution effectively pay a higher Supplemental Assessment rate than the distribution recipients, which makes the scheme unconstitutionally varied.

The Respondents cannot escape the plain practical operation and effect of the scheme by labeling the payout a "distribution" or "grant" rather than a "credit" or "refund." (*See* Resp. at 26-27.) The Respondents focus too narrowly on nomenclature. Whatever label is assigned to the scheme—credit, rebate,

distribution, payout, reimbursement, or anything else—the payout from the restricted account is unquestionably a net reduction in tax rate that depends on the taxpayers' revenues. The Respondents plainly would not question that the mandatory distributions amounted to a rebate or credit if the Amended Act actually used those more traditional terms—*i.e.*, if it called the payouts "refunds" or "rebates" or "credits." The only difference would be the use of more accurate terminology to explain what these provisions actually do. The operation and effect would remain the same, which confirms that this is an improper, non-uniform tax scheme.

The Respondents' argument that the disparate impact is potentially "minimal" is equally unavailing. (Resp. at 31-33.) The potential impact here is far from minimal. The Respondents contend that the impact is insignificant by arguing that "no competitor of Sands will ever receive more than $4,000,000 in grant money during the course of a single year" and that this would be at most "two percent" of Sands' GTR. (Resp. at 32.) That is a substantial sum, especially considering it reflects money going directly to competitors for their marketing and capital investment—and it will continue year after year. This is not a one-time payment and rebate. The Uniformity Clause is not rendered inapplicable by subjective contentions that a particular impact is "minimal" or relatively small. *Mount Airy*, 154 A.3d at 275.

At any rate, this Court has struck down far more modest variations under the uniformity principle. For example, the Court invalidated an ordinance that imposed an occupational tax on all taxpayers except those earning under $600. *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664 (Pa. 1964). The Court similarly held that an income tax scheme with graduated rates violated the Uniformity Clause even when the variation between the minimum and maximum rates was a mere one percent. *Kelley v. Kalodner*, 181 A. 598 (Pa. 1935). More than a century ago, the Court struck down a $5,000 exclusion from estate taxes in *In re Cope's Estate*, 43 A. 79 (Pa. 1899).[2] A reduction in tax liability of up to $4 million and 2% of revenues dwarfs the variations found invalid in those cases.[3]

The Respondents are likewise incorrect that potential eligibility for discretionary grants saves the scheme. (Resp. at 28-29.) The statute does not mandate that the discretionary grants be used to decrease the variability in the payout scheme. The only limit is that no single casino can receive more than $4 million in distributions or grants per year. 4 Pa. C.S. § 1407.1(C). Simple mathematics further demonstrates that uniformity is impossible under the current

[2] The Court's decision in *Sablosky v. Messner*, 92 A.2d 411 (Pa. 1952), is not to the contrary. It stands for the simple proposition that the General Assembly may rationally and legitimately exempt intra-familial transactions from taxation.

[3] Recipients at the $4 million distribution level stand to reduce their effective tax rate by *at least* 2.6% (since to qualify, they must have revenues of $150 million or less). *See* 4 Pa. C.S. § 1407.1(E); *see also* Br. at 12 (table of effective tax rate reductions).

statutory scheme. Using this past fiscal year as an example, after the four eligible casinos receive their mandatory distributions (totaling approximately $11 million), only $2.7 million will be available to distribute amongst the remaining casinos. (*See* Br. at 12-13 & n. 11.) Given that there will not be enough funds left in the CMCD Account for even one casino to match the top-level recipients' refund, there is no way that the remaining CMCD Account funds could be paid out in a manner that would result in uniform net impacts. Plus the scheme is annual, meaning that this kind of post-hoc analysis would need to be done every year to ensure uniformity. This lawsuit does not aim for "absolute" uniformity, but to ensure very basic uniformity as is constitutionally required. That uniformity principle is plainly violated here.

II. The Supplemental Assessment and the CMCD Account Serve No Public Purpose.

The Supplemental Assessment and CMCD Account scheme does not serve any public purpose. The Supplemental Assessment is paid into the restricted CMCD Account. The Respondents acknowledge that the CMCD Account may be used for only one purpose—to funnel the Supplemental Assessment proceeds back to certain private casinos in the form of mandatory distributions and discretionary grants. (*See* Resp. at 21-22.) The general public cannot enjoy any benefit from this closed and restricted private scheme.

The Respondents attempt to deflect scrutiny from the clear private objective of this scheme by citing the general purposes of the Amended Act. They observe that the Amended Act, as a whole, is meant to provide increased tax revenue, permit tax reductions, and promote tourism and economic development. (*See* Resp. at 30-31; *see also* 4 Pa. C.S. § 1102(3).) But the Supplemental Assessment and CMCD Account bear no rational relationship to those generalized goals. *See Mount Airy*, 154 A.3d at 278.

For one, any link to the Amended Act's purported public purposes is tenuous given that the CMCD Account distributions are paid out to private casinos regardless of whether the recipients make any *incremental* investments in marketing and capital development. Because money is fungible, the individual recipients of the mandatory distributions can simply replace their existing marketing or capital expenditure budget with the Supplemental Assessment distributions and pocket an equal amount as private profits. The Amended Act does nothing to ensure that any public goals will be met once the money is placed into purely private hands.

The restricted, private purpose of the Supplemental Assessment and the CMCD Account scheme is unlike other provisions of the Amended Act that specifically direct slot machine tax revenue to counties and local governments and to enumerated public purposes such as local police, parks, heritage sites, child

advocacy centers, domestic violence services, and property tax relief. *See, e.g.*, 4 Pa. C.S. § 1403; *see also id.* § 1407(B) (directing a Daily Assessment of 5.5% of GTR to the Pennsylvania Gaming Economic Development and Tourism Fund to pay for local public works and to pay off the debt for certain public projects according to an enacted economic development budget).

By contrast, the CMCD Account distributions bear little-to-no logical connection to the public benefits that the Respondents propose. For example, the Respondents assert that the distributions will provide a "safety net" for "struggling" casinos and thereby "encourage[]" the casinos to "continue their operations and retain their employees." (Resp. at 31, 33.) As an initial matter, the Respondents offer no rationale for how CMCD Account distributions will increase employment or encourage employee retention when the distributions must be spent on marketing and capital development. The Respondents also fail to explain how diverting tax dollars to failing casinos would constitute a public purpose.[4] Similarly, the Respondents do not explain how cash payouts to casinos will increase tourism or promote economic development beyond the advancement of the narrow economic interests of the individual recipients. It is particularly hard to

[4] For that matter, the Respondents have not demonstrated that lower *revenues* means that a casino is not *profitable*. They offer no evidence, for example, suggesting that the four projected recipients of the mandatory distribution this year—Mount Airy Casino and Resort, SugarHouse Casino PA, Presque Isle Downs, or Lady Luck Casino Nemacolin—are "struggling" compared with Sands or other licensed casinos that receive no state-sponsored CMCD Account distributions.

conceive how the grant payouts have any rational connection to the promotion of "technological advances" or the development of "innovative gaming products." (*Id*. at 31 (quoting 4 Pa. C. S. § 1102(6), (12.1)).) These bare assertions have no merit.

The Respondents also fail to offer a coherent explanation for how the CMCD Account distributions will promote economic development. They point to no economic development plan. They do not explain how the millions of dollars in CMCD Account payouts will generate increased future tax revenues. They likewise offer no support for their claim that the payouts will "ensure that the benefits of legalized gaming would be shared among the various communities throughout Pennsylvania." (*See* Resp. at 37; *see also id.* at 30.) The unsubstantiated assertion that the CMCD Account distributions could result in increased tax revenues or tangentially benefit the surrounding community does not transform purely private payouts into a public benefit. That trickle-down argument has no limiting principle and would authorize taxation to fund virtually any private payout scheme. It is precisely the type of argument that runs afoul of the public purpose requirement.

The Respondents' unsupported and post-hoc "economic development" rationale is wholly distinguishable from the pursuit of a comprehensive economic development plan endorsed by *Kelo v. City of New London*, 545 U.S. 469 (2005).

(*See* Resp. at 31 (citing *Kelo* for the proposition that economic development qualifies as a public purpose for purposes of the Takings Clause of the Fifth Amendment).) Although *Kelo* recognized that transfers to private parties to promote economic development may serve a public purpose, the Court repeatedly emphasized that the private transfers challenged in that case were permissible only because they were a component of a "carefully formulated" and "integrated" "economic development plan."[5] *Id.* at 483-84. Conversely, the Supreme Court in *Kelo* observed that a "one-to-one" transfer of property "for the sole reason that [the recipient] will put the property to a more productive use and thus pay more taxes" "would certainly raise a suspicion that a private purpose was afoot."[6] 545 U.S. at 486-87. That is precisely what the Respondents propose here. *Kelo* therefore underscores the lack of public purpose advanced by the Supplemental Assessment and CMCD Account distribution scheme.

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[5] *Kelo* involved a due process challenge to a city's condemnation of private property to support the city of New London's economic development plan. Due process requires a taking to serve a public purpose. It is forbidden to take property simply to "confer[] a private benefit on a particular private party." 545 U.S. at 477.

[6] The Court in *Kelo* further noted that it was particularly difficult to assign an improper motive to the government in that case because the identities of the private beneficiaries of the city's economic development plan were unknown when the plan was adopted. *See* 545 U.S. at 478 n.6. Here, by contrast, the recipients of the CMCD Account distributions for 2018, could be readily projected by the General Assembly by the time the Act was passed on October 30, 2017, since the eligibility for the distributions is determined by the prior year's gross terminal revenues.

III. The Supplemental Assessment and the CMCD Account Violate Pennsylvania's Special Law Prohibition.

The Supplemental Assessment and CMCD Account scheme blatantly violate the Pennsylvania Constitution's Special Law Clause, Pa. Const. Art. III, § 32. The Special Law Clause was enacted to "restrict legislative favoritism of particular industries or persons" and to "restrain state legislatures from granting special privileges or treatment to select industries, groups, or individuals which did not serve to promote the general welfare of the public." *Robinson Township v. Commonwealth*, 147 A.3d 536, 572 (Pa. 2016) (internal citation omitted). The violation of the Special Law Clause could not be more apparent: only a handful of private casinos are eligible for millions of dollars of refunded Supplemental Assessment money to fund their commercial operations. The scheme is precisely the type of favoritism that the Special Law Clause was designed to prohibit.

The Respondents incorrectly assert that the Special Law Clause does not apply to the challenged scheme. (Resp. at 33-38.) The Respondents narrowly read the Special Law Clause to include only legislation that applies to a "class of one member" or a class that "is closed or substantially closed to future membership." (Resp. at 35 (quoting *West Mifflin Area Sch. Dist. v. Zahorchak*, 4 A.3d 1042, 1048 (Pa. 2010)).) But legislation that applies to only a substantially closed membership

is already *per se* unconstitutional.[7] The Special Law Clause applies broadly to ensure fair and equal application of the law. The Special Law Clause also has particular application to special taxes where only a "portion of the public is specially benefited." *Monzo*, 500 A.2d at 1105. Special taxes fail under the Special Law Clause if the "benefit received and the burden imposed [are] palpably disproportionate." *Id.* at 1102.

The Supplemental Assessment is undeniably a special tax. The Supplemental Assessment is siphoned directly into the pockets of a small clique of individual casinos for their commercial marketing and capital development. The Supplemental Assessment cannot conceivably be described as "a general tax for the purpose of raising revenues for public use." *Monzo*, 500 A.2d at 1102. The Respondents concede as much, and acknowledge that "the money deposited into the CMCD Account can only be spent on the … distributions and grants that are challenged by Sands in this case." (Resp. at 21-22.)

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[7] The Respondents raise the issue of whether the tax scheme *per se* violates the Special Law Clause. (Resp. at 35.) The Supplemental Assessment and CMCD Account also fail under the *per se* test because the class of recipients for each fiscal year is closed: only Category 1 and 2 casinos with revenue less than $200 million, and Category 3 casinos with revenue less than $50 million during the last fiscal year may receive a mandatory distribution. The closed class is created each year once revenue figures are calculated, and, at that point, only certain casinos qualify for distributions while the remaining casinos are barred from the class. The Respondents are incorrect that this restrictive scheme is saved by the remote prospect that any casino could qualify for a mandatory distribution in future years, when the taxes and benefits are already fixed. (*Id.*) At the point each distribution is made, the class is closed and thus the scheme is *per se* unconstitutional.

The Respondents do not seriously question that the Supplemental Assessment is a special tax. They instead attempt to distinguish *Monzo* by asserting that the hotel tax in that case was a special law only because it funded a single convention center in Allegheny County. (*See* Resp. at 36.) But the fact that the CMCD Account funnels money to a few private casinos instead of to one municipal convention center is not a meaningful distinction. In fact, the Court in *Monzo* found that the hotel tax had widespread impact because the Pittsburgh convention center would "benefit immeasurably" the "City of Pittsburgh hotels and businesses located near the convention center." 500 A.2d at 1104. The Court nonetheless treated the hotel tax as a special tax because it was levied for a "special local purpose" that benefitted only nearby businesses. *Id.* at 1105-06. The narrow and private purpose of the Supplemental Assessment is far more restricted than the hotel tax in *Monzo*. The Supplemental Assessment must therefore be scrutinized as a special tax under *Monzo*'s proportionality test.

The Respondents do not even argue that the Supplemental Assessment can satisfy the *Monzo* proportionality test. Nor could they, as no credible argument can be made that the benefits received by Sands are proportionate to the burden imposed by the Supplemental Assessment. *Monzo*, 500 A.2d at 1105. At most, the Respondents assert that "all slot machine licensees gain from the creation and maintenance of a vibrant casino industry throughout the Commonwealth." (Resp.

at 29.) The Respondents do not explain, however, how Sands would plausibly benefit by making payments to its competitors in various locations throughout the Commonwealth. Sands could not benefit, as its standing in the marketplace will unquestionably be harmed by state subsidy of rival enterprises. The Supplemental Assessment is therefore a special tax that runs afoul of the Special Law Clause.

IV. The Challenged Provisions Violate the Equal Protection and Due Process Guarantees of the Constitution of the United States.

Due process forbids taxation that lacks any rational link to any legitimate governmental purpose. Due process also forbids special taxes that disproportionately benefit a select private group. *See Monzo*, 500 A.2d at 1102-03. The tax scheme violates those requirements.

Insofar as equal protection is concerned, the Respondents note that the federal constitution's Equal Protection Clause is more permissive than the Uniformity Clause of the Pennsylvania Constitution. (Resp. at 44.) The level of scrutiny is immaterial, however, because the scheme does not satisfy even the more permissive rational basis test. Rational basis requires a classification "to rationally further a legitimate state interest." *Nodlinger v. Hahn*, 505 U.S. 1, 10 (1992). As discussed above, the tax scheme imposes differential burdens on licensed casinos for reasons entirely unconnected with any proper government purpose.

The Respondents note the unremarkable principle that, unlike the Pennsylvania Uniformity Clause, federal equal protection permits graduated tax rates based on revenues or profits. (*See* Resp. at 44-46.) But graduated taxes are permitted under federal law because they serve a legitimate purpose, for example, to raise money for the general government coffers. Equal protection does not permit arbitrary favoritism for private parties absent a reasonable link to a proper government purpose or proportional benefits to the burdened party. As detailed in Section II above, any link between this scheme and a legitimate public purpose is utterly lacking.

Contrary to the Respondents' claim, the scheme does not share in the otherwise legitimate interests that motivated the Commonwealth to license slot machines in the first place. (Resp. at 42.) The Supplemental Assessment and CMCD Account operate as a discreet and restricted scheme that has no economic or logical connection to other provisions of the Amended Act that, by contrast, direct gaming tax proceeds to the public treasury, municipal and local governments, and to other proper public purposes. The public benefits afforded by other, unrelated tax provisions in the Amended Act therefore do not cleanse the Supplemental Assessment and CMCD Account scheme of its discriminatory and irrational operation.

There is simply no rational basis for the tax scheme or any discernible state interest furthered by it. It does not withstand federal equal protection or due process scrutiny.

V. The Supplemental Assessment and CMCD Account Provisions Should Be Severed from the Amended Act.

The parties agree that a severance is appropriate if the Court rules for the Petitioner on the unconstitutionality of the challenged provisions.

VI. The Parties Have Agreed that, if Sands Prevails, the Funds Will Be Returned.

The question whether this Court can order the relief that Sands seeks is largely mooted by the parties' stipulated agreement that the Respondents will secure a refund of the money paid into the CMCD Account. To their credit, the Respondents reiterate that they will honor that commitment and they correctly acknowledge that the unusually limited and specific nature of the CMCD Account distinguishes this situation from a more typical request for retroactive refund from the general treasury. (Resp. at 22.) The parties' agreement therefore resolves the question of whether this Court has authority to order a refund of the Supplemental Assessment proceeds from the CMCD Account.

The Respondents nonetheless argue that this Court's jurisdiction and authority is limited to declaratory relief. They contend that the Court could not otherwise order a return of the money that Sands has paid to date into the CMCD

Account (presumably in the absence of an agreement). To the extent there is any need to reply on these issues notwithstanding the parties' agreement, the Respondents are incorrect.

Section 1904(a) of the Amended Act does not limit this Court's original jurisdiction to only requests for declaratory relief. Section 1904(a) extends by its terms to "any challenge." The Court's authority to issue special relief, moreover, is explicit. Pennsylvania Rule of Appellate Procedure 1532(a) states that the Court may "issue a preliminary or special injunction" and may "grant other interim or special relief required in the interest of justice and consistent with the usages and principles of law." Those provisions remove any question that the Court may order injunctive relief and other remedies in this type of action.

Assuming (as Sands respectfully submits is the case) that the Court has power beyond issuing just a declaratory judgment, the Respondents' brief is clear that there is no dispute that the Court can enjoin further collection of the Supplemental Assessment and can enjoin any payments out of the CMCD Account. (*See* Resp. at 19-22.) In that case, the only further source of disagreement between the parties on the scope of the Court's authority is whether the Court could mandate the return of Supplemental Assessment payments that are now sitting in the CMCD Account.

As to this final issue, Sands agrees that a significant question is raised whether this Court has authority to order the Respondents, as state officials, to take money out of the CMCD Account and pay it back to Sands in the absence of their agreement. Such relief could be considered the type of affirmative injunction that would trigger sovereign immunity. That raises a possible conflict between due process, which clearly mandates that states provide a remedy where a tax has been unconstitutionally collected, and sovereign immunity, which prevents the Court from issuing a mandatory injunction requiring state officials to take affirmative action. The Court does not need to resolve this conflict, given that the Respondents have agreed to take the necessary steps to return the money.

Were the Court to reach the issue, however, the resolution of any tension between the constitutional need for a remedy and the scope of sovereign immunity must be resolved in favor of affording a remedy in this case. Not only do the authorities set forth in Sands' opening brief compel this conclusion (Br. at 44), but it is a bedrock due process principle that states must supply remedies where property rights are impacted. *See e.g.*, *R. v. Com., Dep't of Public Welfare*, 636 A.2d 142, 146 (Pa. 1994) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).[8] Were it otherwise, then the outcome of a successful challenge by Sands in this case

[8] There is no merit to the Respondents' argument that a remedy is only required where there is a derogation of a federal right, as the *Mathews* test applies to liberty and property interests created under state law as well as federal law. *R. v. Com., Dep't of Public Welfare*, 636 A.2d at 146. In any event, there are also federal rights at stake here.

could be a fund sitting with unconstitutionally collected monies that could not be touched by anyone or used in any way—under circumstances where the parties to this dispute agree that they should be returned. Due process and common sense, therefore, necessitate return of the unconstitutionally collected tax money to Sands.

CONCLUSION

The petition for review should be granted in full.

Respectfully submitted,

Dated: April 10, 2018 By: */s/ Ilana Eisenstein*

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CERTIFICATION OF WORD COUNT

I hereby certify that pursuant to Pennsylvania Rules of Appellate Procedure 2135(a)(1) and 2135(d), that the word count for the foregoing Brief, including footnotes, and headings but not including the cover, tables, signature block, or proof of service, is less than 7,000 words. Accordingly, this Brief complies with the aforesaid Rules.

Dated: April 10, 2018 By: */s/ Ilana Eisenstein*

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: April 10, 2018 By: */s/ Ilana Eisenstein*

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