

State of Minnesota  
**In Supreme Court**

Timothy Hall, Jr., et al.,

*Plaintiffs-Appellants,*

vs.

State of Minnesota, et al.,

*Defendants-Respondents.*

---

**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF  
CONSUMER ADVOCATES IN SUPPORT OF APPELLANTS**

---

GUSTAFSON GLUEK PLLC  
Daniel E. Gustafson (#202241)  
Daniel C. Hedlund (#258337)  
Joseph C. Bourne (#0389922)  
Canadian Pacific Plaza  
120 South Sixth Street, Suite 2600  
Minneapolis, MN 55402  
(612) 333-8844

TESKE, MICKO, KATZ, KITZER  
& ROCHEL, PLLP  
Vildan A. Teske (#241404)  
Phillip M. Kitzer (#390441)  
Brian T. Rochel (#391497)  
222 South Ninth Street, Suite 4050  
Minneapolis, MN 55402  
(612) 746-1558

*Counsel for Plaintiffs-Appellants  
Timothy Hall, Jr., et al.*

OFFICE OF THE ATTORNEY GENERAL  
STATE OF MINNESOTA  
Sarah L. Krans (#338989)  
445 Minnesota Street, Suite 1800  
St. Paul, MN 55101-2128  
(651) 757-1060

*Counsel for Defendants-Respondents  
State of Minnesota, et al.*

FRIEDMAN IVERSON  
Todd Murray (#347462)  
509 First Avenue N.E., Suite 2  
Minneapolis, MN 55413  
Tel: (612) 564-4025  
Fax: (612) 392-7979

CHRISTENSEN LAW OFFICE PLLC  
Daniel M. Eaton (#389452)  
800 Washington Avenue North, Suite 704  
Minneapolis, MN 55401  
Tel: (612) 823-0188  
Fax: (612) 823-4447

*Counsel for Amicus Curiae National  
Association of Consumer Advocates*

*(Additional Counsel for Appellants and Amici listed on the Next Page)*

ZIMMERMAN REED, PLLP  
J. Gordon Rudd, Jr. (#222082)  
David Cialkowski (#306526)  
1100 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
Tel: (612) 341-0400  
Fax: (612) 341-0844

THRONSET MICHENFELDER, LLC  
Patrick W. Michenfelder (#24207X)  
Cornerstone Building  
One Central Avenue West, Suite 203  
St. Michael, MN 55376  
(763) 515-6110

REINHARDT, WENDORF &  
BLANCHFIELD  
Garrett D. Blanchfield (#209855)  
Brant D. Penney (#316878)  
E 1250 First National Bank Building  
332 Minnesota Street  
St. Paul, MN 55101  
(651) 287-2100

*Counsel for Plaintiffs-Appellants  
Timothy Hall, Jr., et al.*

AARP FOUNDATION LITIGATION  
Julie Nepveu (DC #458305)  
*\*Pro Hac Vice*  
601 E Street, N.W.  
Washington, D.C. 20049  
(202) 434-2060

GRAY, PLANT, MOOTY, MOOTY  
& BENNETT, P.A.  
Janet C. Evans (#0182734)  
Neil S. Goldsmith (#0391906)  
500 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 632-3000

SUBBARAMAN PLLC  
Mahesha P. Subbaraman (#392486)  
222 South Ninth Street, Suite 1600  
Minneapolis, MN 55402  
(612) 315-9210

*Counsel for Amici Curiae  
AARP and AARP Foundation*

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b>	iii
<b>ARGUMENT</b>	1
<b>1. MUPA is unconstitutional because it violates its citizens procedural due process rights by depriving them of their protected property without adequate notice.</b>	1
A. The appellants have been deprived of property interests that are entitled to due process protections.	1
1) <i>The appellants have established property interests under state law and federal constitutional law.</i>	1
2) <i>The state has deprived the appellants of their protected property interests.</i>	5
B. The state fails to provide adequate notice before depriving appellants of their protected property, even though it could readily do so.	5
1) <i>The right to one's money is a protected property interest.</i>	7
2) <i>There is a substantial risk that the state will seize property that has not actually been abandoned.</i>	7
3) <i>Because MUPA has evolved into a significant revenue generator for the state, it has an interest in not providing meaningful notice to the property's rightful owner.</i>	8
<b>2. MUPA is unconstitutional because it violates its citizens procedural due process rights by depriving them of their protected property without adequate notice</b>	10
A. Earned interest on a bank account is a private property interest.	10

B. The state’s use of the property in the general fund alone is a taking, as is the state’s retention of interest earned while in the state’s possession.	11
C. The appellants are entitled to just compensation in the form of constructive interest.	12
<b>CONCLUSION</b>	12

## TABLE OF AUTHORITIES

### Cases

<i>Bd. of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972)	1
<i>College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.</i> , 527 U.S. 666 (1999)	2
<i>Drye v. United States</i> , 528 U.S. 49 (1999)	3
<i>Halla v. Norwest Bank Minnesota, N.A.</i> , 601 N.W.2d 449 (Minn. Ct. App. 1999)	4
<i>Jones v. Flowers</i> , 547 U.S. 220 (2006)	6, 9
<i>Lacey v. Duluth, Missabe &amp; Iron Range Ry. Co.</i> , 51 N.W.2d 831 (Minn. 1952)	4
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	2
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	7
<i>Memphis Light, Gas &amp; Water Div. v. Craft</i> , 436 U.S. 1 (1978)	2
<i>Mullane v. Cent. Hannover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950)	5
<i>Phillips v. Wash. Legal Found.</i> , 524 U.S. 156 (1998)	4, 10
<i>Sawh v. City of Lino Lakes</i> , 823 N.W.2d 627 (Minn. 2012)	1, 5
<i>Spaeth v. Plymouth</i> , 344 N.W.2d 815 (Minn. 1984)	11
<i>United States v. \$277,000 U.S. Currency</i> , 69 F.3d 1491 (9th Cir. 1995)	12
<i>Walker v. City of Hutchinson</i> , 352 U.S. 112 (1956)	5
<i>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980)	10, 11

## **Statutes**

MINN. STAT. § 61A.12 (2016)	4
MINN. STAT. § 336.3-413 (2016)	4

## **Other Authorities**

T. Conrad Bower, <i>Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework</i> , 74:3 OHIO STATE L.J. 515 (2013)	8
Thomas W. Merrill, <i>The Landscape of Constitutional Property</i> , 86 VA. L. REV. 885 (2000)	3

## **ARGUMENT<sup>1</sup>**

### **1. MUPA is unconstitutional because it violates its citizens procedural due process rights by depriving them of their protected property without adequate notice.**

This Court conducts a two-step analysis to determine whether the government has violated an individual's procedural due process rights. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). First, this Court asks whether the government has deprived an individual of a protected life, liberty, or property interest. *Id.* Next, this Court reviews whether the procedures followed by the government were constitutionally sufficient. *Id.*

#### **A. The appellants have been deprived of property interests that are entitled to due process protections.**

##### ***1) The appellants have established property interests under state law and federal constitutional law.***

Property interests for the purpose of procedural due process may take “many forms,” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972), and the purpose of property is to protect that which “people rely in their daily lives.” *Id.* at 577.

---

<sup>1</sup> This brief is filed by Amicus Curiae National Association of Consumer Advocates. NACA is a national non-profit association of consumer law attorneys and has a public interest in this case. This brief was not authored, in whole or in part, by any attorney for the appellants or the respondent. Neither the appellants or the respondent made any monetary contribution to the preparation or submission of this brief.

In *Roth*, one of the Supreme Court's first forays into defining property for the purpose of due process, the Court held that property interests are not created by the Constitution, but instead stem "from an independent source such as state law." *Id.*

A subsequent Supreme Court decision, however, cautions that the reliance on state law as a source of property rights is not absolute. Federal constitutional law determines whether the property interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). The Court seemingly reaffirmed this observation in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where it noted that property "is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

Seventeen years later, the Court further clarified the definition of constitutional property in *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999). In that case, the Court wrote that "[t]he hallmark of a protected property interest is the right to exclude others." *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673 (1999). This right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*

That same term, in *Drye v. United States*, 528 U.S. 49 (1999), the Supreme Court held that property, at least for the purpose of a federal tax lien statute, means “the power to channel” a valued asset. *Drye v. United States*, 528 U.S. 49, 61 (1999). In so holding, the Court noted that “the important consideration is the breadth of control the [owner] could exercise over the property.” *Id.*

The Supreme Court’s definitions of property in *College Savings Bank* and *Drye* are analytically similar. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 915 (2000). The “power to channel” test emphasizes the positive side of control over an asset—the power to determine who gets the beneficial use. Conversely, the “right to exclude” test emphasizes the negative side—who does *not* get the beneficial use. *Id.*

To summarize, the Supreme Court has held that one initially looks to state law to determine whether there is a property interest, and then to federal constitutional law to determine whether the interest is an entitlement protected by the Due Process Clause. If one has the “right to exclude” others from the property or the “power to channel” the property, then it is subject to due process protections.

Applying this analytical framework to this case, the appellants have established property rights that require due process. First, Minnesota law

creates property interests in bank accounts,<sup>2</sup> accrued interest,<sup>3</sup> checks,<sup>4</sup> and life insurance proceeds.<sup>5</sup> And each of these state property interests rises to the level of constitutional property because the owner has both the right to exclude and the right to channel the property.

Bank account holders have the right to exclude other individuals from the funds in their bank account and have the power to channel the funds as they choose—they can spend the funds, pay the funds to another, donate the funds to charity, invest the funds, and so forth. This right to exclude and power to channel similarly applies to accrued interest, checks, and life insurance proceeds. Therefore, the appellants have established property rights that are entitled to due process protections.

---

<sup>2</sup> See *Halla v. Norwest Bank Minnesota, N.A.*, 601 N.W.2d 449, 453 (Minn. Ct. App. 1999) (explaining that the relationship between a bank and a person who deposits money is that of debtor and creditor and that when a person makes a deposit, the person is entitled to the amount deposited upon demand).

<sup>3</sup> See *Lacey v. Duluth, Missabe & Iron Range Ry. Co.*, 51 N.W.2d 831, 834 (Minn. 1952) (determining that interest should be awarded as compensation for the use of another's money); see also *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 165 (1998) (discussing the common law concept that the owner of the principal is the owner of the interest).

<sup>4</sup> See MINN. STAT. § 336.3-413 (2016) (providing that acceptor of a draft is obliged to pay the draft to the person entitled to enforce the draft).

<sup>5</sup> See MINN. STAT. § 61A.12 (2016) (life insurance policy beneficiary entitled to proceeds of policy).

**2) *The state has deprived the appellants of their protected property interests.***

Under Minnesota law, a person may make out a due process violation when he alleges that the government's action "adversely affect[s] his possession or ownership of [the property] in any way." *Sawh v. City of Lino Lakes* at 632. When government has the authority to "impose restrictions" on the person's ownership of property, this interference with the property interest is sufficient to create a right to due process. *Id.* at 633.

Here, for example, Mary Wingfield not only lost the power to channel the funds in her savings account, but she lost the interest she was accruing. This lost of accrued interest was a significant deprivation given that the principal was over \$100,000. Similarly, the other named appellants were deprived of easy access to their money when the state took possession of it without notice. Accordingly, the appellants have established that they have been deprived of protected property interests.

**B. *The state failed to provide adequate notice before depriving appellants of their protected property, even though it could have readily done so.***

Procedural due process requires notice and a meaningful opportunity to be heard. *Sawh* at 632. The right to a hearing is meaningless without notice. *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956). Notice must be more than "a mere gesture." *Mullane v. Cent. Hannover Bank & Trust Co.*, 339

U.S. 306, 315 (1950). The method of providing notice must be designed to actually notify the other party. *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (“The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”).

In this case, the state chooses not to provide direct notice to property owners at any time, even though it could easily do so. The process of sending a postcard would be simple and inexpensive because, in most cases, the state knows the citizen’s address or could easily locate it.<sup>6</sup> Rather than take this practical step to actually alert its citizens to the location of their property, the state relies on a virtually unknown website that a citizen must first locate and then search to learn that the state now has her property. This is particularly problematic because nearly one million Minnesotans do not have ready internet access.<sup>7</sup> This lack of convenient internet access is even more prevalent among Minnesota’s racial minorities.<sup>8</sup>

---

<sup>6</sup> See Appellants’ Brief, p. 20, n. 5 for widely available resources to locate changed addresses.

<sup>7</sup> 2013 U.S. Census Bureau’s American Community Survey, Minnesota findings summarized at <https://mn.gov/admin/demography/news/annual-statewide-summary/2013-acs-release.jsp> (last visited May 23, 2017). According to the survey, 17% of Minnesotans do not have internet access in their home. Given the state’s population of approximately 5.5 million people, about 935,000 Minnesotans do not have easy internet access.

<sup>8</sup> According the ACS survey, only 61% of American Indians in Minnesota have internet access at home; only 72% of African Americans; and only 77% of Hispanics.

The complete inadequacy of the state's notice is even more apparent under the three-factor balancing test enunciated by the Supreme Court in *Mathews v. Eldridge*. In *Mathews*, the Supreme Court explained the three factors used to determine whether procedures are constitutionally sufficient: (1) the private interest that is affected; (2) the risk of erroneous deprivation of the interest; and (3) the state's interest, including the burdens that additional procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

***1) The right to one's money is a protected property interest.***

As discussed above, the right to one's hard-earned money is a constitutionally-protected property interest. Minnesotans expect that their money will be easily accessible to them when they need it. Therefore, the first *Mathews* factor favors the appellants' position.

***2) There is a substantial risk that the state will seize property that has not actually been abandoned.***

The risk of erroneous deprivation, of course, is a fact-intensive inquiry. But the amended complaint alleges that Minnesotans have been erroneously deprived of their property they had no intention of abandoning. For example, the amended complaint alleges that families are sometimes unaware of the assets of deceased love ones; life insurance benefits fail to locate beneficiaries,

and bank accounts and safe-deposit boxes are left untouched.<sup>9</sup> These allegations demonstrate a substantial risk that the state will seize funds that have not actually been abandoned. Accordingly, the second *Mathews* factor weighs against the state position.

**3) *Because MUPA has evolved into a significant revenue generator for the government, the state has an interest in not providing meaningful notice to the property's rightful owner.***

MUPA has strayed from a consumer protection statute designed to reunite citizens with their property. Instead, it has become primarily a revenue-generating statute for the state. This has occurred deliberately through legislative reduction of dormancy periods, elimination of direct notice to property owners, and increased enforcement efforts to collect property from holders.

These changes are not unique to Minnesota. Throughout the country, states have recognized that unclaimed property statutes can significantly boost state revenues without having to undertake spending cuts or tax increases that are likely to be unpopular with voters. *See* T. Conrad Bower, *Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework*, 74:3 OHIO STATE L.J. 515, 516-17 (2013).

---

<sup>9</sup> App. Add. p. 25, ¶ 4.

Because the state relies on the revenue generated by MUPA, it has an interest in *not* providing adequate notice to the property's rightful owner. See *Jones v. Flowers* at 239 ("There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them."). This conflict of interest weighs heavily against the state's position in the *Mathews* balancing test.

In sum, Minnesotans have the right to unfettered access to their hard-earned money and the record indicates a likelihood that the state erroneously seizes funds that are not actually abandoned. Further, given the state's financial interest in keeping as much of its citizens' money as possible, the indirect notice the state provides is not designed to actually reunite citizens with their property. Rather, it appears to be designed to achieve the opposite result—to keep the money in the state's coffers and away from its rightful owners. This lack of meaningful notice of the deprivation of the appellants' protected property is unconstitutional under the due process clause.

**2. MUPA is also unconstitutional because it is an impermissible taking of private property for public use without just compensation.**

The Fifth Amendment, applicable to states through the Fourteenth Amendment, provides that private property shall not be take for public use without just compensation. *Phillips v. Washington Legal Found.* at 163-164. Thus, there are three elements to a takings claim: (1) a private property interest; (2) a taking; and (3) that just compensation is due. All three elements are present here.

**A. Earned interest on a bank account is a private property interest.**

The rule that “interest follows principal” has existed for centuries at common law. *Phillips* at 165. This rule simply means that interest earned from principal is a property right just as much as the principal itself. In *Phillips*, the Supreme Court applied this common law doctrine to a takings analysis and held that the “interest income generated by funds held in IOLTA accounts is the ‘private property’ of the owner of the principal.” *Id.* at 172.

The Court made a similar holding in the factually-complex case of *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In *Webb’s*, the Court held that the state’s retention of interest earned on a court interpleader fund was a taking in violation of the Fifth and Fourteenth

Amendments. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980). In reaching this holding, the Court observed that the “earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.” *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). *Id.*

Here, when the state seizes funds from its citizens' bank accounts and other financial assets and places them in the general fund for state use, it refuses to pay the interest earned while the funds are in the state's possession. This earned interest is protected property under the “interest follows principal” rule in *Phillips* and *Webb's*. Therefore, the appellants have satisfied the first element of a takings claim.

**B. The state's use of the property in the general fund alone is a taking, as is the state's retention of interest earned while in the state's possession.**

The mere use of property by the government is a taking that requires just compensation. *Spaeth v. Plymouth*, 344 N.W.2d 815, 821 (Minn. 1984) (obligation to make just compensation arises when private property is put to use by public authorities).

Here, MUPA requires the state to use the funds by placing them in the general fund. Under *Spaeth*, this use alone constitutes a taking. Further, as note above, the state retains the interest earned on the appellants' property

while in the general fund, which is a further taking under *Phillips* and *Webb*'s. Accordingly, the appellants have satisfied the seconded element of a takings claim.

**C. The appellants are entitled to just compensation in the form of constructive interest.**

As argued in the appellants' brief, the state owes its citizens constructive interest accrued during the time the state holds their property. When money is deposited in the government's general fund, those funds are "considered as constructively earning interest at the government's alternative borrowing rate." *United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1496 (9th Cir. 1995). This is because even if the money is not segregated into a conventional interest-bearing account, "all financial assets in the hands of the government are a means by which the government does not have to borrow equivalent funds." *Id.* at 1495. Therefore, the appellants are entitled to just compensation and have established the final element of a takings claim.

**CONCLUSION**

This Court should reverse the court of appeals' ruling and hold that MUPA does not satisfy procedural due process and that it results an unconstitutional taking.

(signature follows)

**ATTORNEYS FOR AMICUS  
CURIAE NATIONAL  
ASSOCIATION OF CONSUMER  
ADVOCATES**

Date: May 25, 2017

*/s/ Todd Murray*

---

Todd Murray (#347462)  
FRIEDMAN IVERSON, PLLC  
509 First Ave NE, Suite 2  
Minneapolis, MN 55413  
todd@friedmaniverson.com  
(612) 564-4025 (phone)  
(612) 392-7979 (fax)

Daniel M. Eaton (#389452)  
CHRISTENSEN LAW OFFICE PLLC  
800 Washington Ave N, Suite 704  
Minneapolis, MN 55401  
dan@clawoffice.com  
(612) 823-0188 (phone)  
(612) 823-4447 (fax)