No. _____

In The
Supreme Court of the United States

PAMINDER S. PARMAR, Individually and as Executor of the Estate of Surinder K. Parmar,

Petitioner,

v.

LISA MADIGAN, as Attorney General of the State of Illinois and MICHAEL FRERICHS, as Treasurer of the State of Illinois,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Reich v. Collins*, 513 U.S. 106, 108 (1994) that "due process requires a 'clear and certain' remedy for taxes collected in violation of federal law." The plain language of section 15(a) of the Illinois Estate Tax Act expressly provided jurisdiction and a basis for a taxpayer's post-deprivation remedy consistent with *Reich*, but the Supreme Court of Illinois found that Petitioner's constitutional and tax refund claims filed under this statutory provision were subject to state sovereign immunity. It determined that the Petitioner's exclusive post-deprivation remedy was only available under a generic statutory provision requiring that payments be made under protest and that a complaint be filed and an injunction be secured within 30 days from the date of payment enjoining the transfer of the payment to the State Treasurer. In the event that an injunction is denied or is not otherwise obtained within 30 days from the date of payment, this statutory "protest fund" provision authorizes the immediate transfer to the state treasury of all monies paid under protest, even if the taxpayer should subsequently prevail on the merits of the suit, and thus does not necessarily remove the bar to recovery of state sovereign immunity.

The question presented by this Petition is whether the State of Illinois failed to provide the Petitioner taxpayer with a clear and certain post-deprivation procedure consistent with the Due Process Clause of the

QUESTION PRESENTED – Continued

Fourteenth Amendment when it refused to give effect to the plain and unambiguous language of section 15(a) of the Estate Tax Act conferring jurisdiction upon Illinois' trial courts to "hear and determine all disputes in relation to a tax arising under the Act," including claims about the alleged unconstitutionality of the State's retroactive application of the Estate Tax Act.

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OPINIONS AND ORDERS ENTERED IN THE CASE

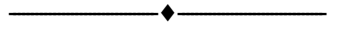
The opinion and judgment of the Supreme Court of Illinois filed May 24, 2018 (App. 1-25) is reported at 2018 IL 122265.

The opinion and judgment of the Appellate Court of Illinois, Second District, filed April 13, 2017 (App. 26-45) is reported at 2017 IL App. (2d) 160286.

The order and judgment of the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois, filed January 28, 2016 (App. 46-47) is unreported.

STATEMENT OF THE BASIS FOR JURISDICTION

The Supreme Court of Illinois on May 24, 2018 entered an opinion and judgment reversing the judgment of the Appellate Court of Illinois, Second District, and affirming the judgment of the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois, which dismissed Petitioner's complaint for lack of jurisdiction. Jurisdiction is conferred on this Court under 28 U.S.C. § 1257(a) to review by writ of certiorari the judgment of the Supreme Court of Illinois.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Fourteenth Amendment to the U.S. Constitution, the jurisdiction and venue provisions of the Illinois Estate and Generation-Skipping Transfer Tax Act (35 ILCS 405/15) and the protest fund provisions of the Illinois State Officers and Employees Money Disposition Act (30 ILCS 230/2a) are involved in this case and are reproduced in the Appendix (App. 48-51).

STATEMENT OF THE CASE

Petitioner, Paminder S. Parmar ("Parmar") filed a complaint on November 1, 2015 in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois (the "Circuit Court") against Lisa Madigan ("Madigan"), the Attorney General of the State of Illinois, and Michael Frerichs ("Frerichs"), the Treasurer of the State of Illinois, seeking a declaration that the retroactive application by the State of Illinois of the Illinois Estate and Generation Skipping Transfer Tax Act (35 ILCS 405/1 et seq.) (the "Act" or the "Estate Tax Act") unconstitutionally violated his rights to due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States and relevant provisions of the Illinois Constitution of 1970. App. 3-4. It also averred that the retroactive application of the Act violated the Takings Clause of the Fifth Amendment. App. 3. The complaint alleged that Madigan

was responsible for administering and enforcing the Act and that Frerichs was responsible for receiving and refunding monies collected pursuant to the Act. App. 28. Parmar filed his complaint individually and as the duly authorized executor of the estate of his mother, Dr. Surinder K. Parmar, who died in DuPage County, Illinois, on January 9, 2011. App. 1-2.

Dr. Parmar left an estate valued at more than $5 million but the estate was not subject to taxation under the Estate Tax Act because the Act expired before the date of Dr. Parmar's death. Two days after Dr. Parmar's death, however, the Illinois General Assembly adopted a bill that created a new estate tax regime covering persons who, like Dr. Parmar, died after December 31, 2010. App. 2. On January 13, 2011, the bill was signed by Governor Bruce Rauner and became Pub. Act 96-1496; it amended 35 ILCS 405/2(b) (West 2014) by reestablishing the Illinois estate tax which had earlier expired January 1, 2010. App. 2, 27-28. By its terms the amended section 2(b) applied retroactively to the estates of persons dying after December 31, 2010, including the estate of Dr. Surinder K. Parmar. *Id*.

In September 2012, Petitioner paid $400,000 to the Illinois Treasurer toward the estate's tax liability. App. 2. The following month, Parmar filed the estate's Illinois estate tax return and paid an additional sum of almost $160,000 to the Treasurer for late filing and late payment penalties, as well as interest. *Id*. In April 2013, Parmar requested a waiver of penalties, which the Illinois Attorney General granted in

September 2013. In July 2015, after a downward adjustment in the estate's federal tax liability, Parmar filed an amended Illinois estate tax return and thereafter received a "Certificate of Discharge and Determination of Tax" from the Attorney General on July 24, 2015, stating that the estate's tax liability, including interest and penalties, had been paid. App. 3. Shortly thereafter, Parmar filed another amended return, based on a newly formed belief that the amendment to the Estate Tax Act did not apply to his mother's estate, and thereafter promptly commenced this case. *Id*.

The Circuit Court on January 28, 2016 granted a motion to dismiss Parmar's complaint for lack of subject matter jurisdiction, agreeing with Madigan and Frerichs that the lawsuit was barred by the doctrine of sovereign immunity. App. 5, 31, 46. Parmar appealed and the Appellate Court of Illinois reversed, finding that the doctrine sovereign immunity was not an impediment to suit because the "officer-suit" exception to the doctrine applied. App. 6, 38. The Supreme Court of Illinois thereafter granted a petition for leave to appeal by Madigan and Frerichs, and on May 24, 2018 reversed the Appellate Court and reinstated the Circuit Court's dismissal for lack of subject matter jurisdiction. App. 6, 25.

According to the Supreme Court, the statutory provision at issue granting the Circuit Court "[j]urisdiction to hear and determine all disputes in relation to a tax arising under this Act" did not include a sufficient waiver of sovereign immunity to permit Parmar

to maintain his suit. App. 15. It also held that the "officer-suit" exception to the doctrine was inapplicable to Parmar's claims. App. 12. And most importantly for this Petition, the Supreme Court found that, in the absence of an effective waiver of sovereign immunity, taxpayers are required to follow the protest fund provision of the Illinois State Officers and Employees Money Disposition Act, 30 ILCS 230/2a (the "Protest Fund Provision"), in order to obtain a refund of taxes erroneously paid.[1] App. 21-22.

The Protest Fund Provision essentially provides that monies claimed in error by the State of Illinois must be paid under protest to a State officer in order to be refundable by the State Treasurer. App. 49. To avoid transfer to the State of the monies paid in protest, the Protest Fund Provision mandates that a complaint be filed and an injunction be secured within 30 days from the date of payment enjoining the transfer of the disputed payment out of the "protest fund." *Id*. In the event that an injunction is denied or is not otherwise obtained within 30 days from the date of payment, the Protest Fund Provision requires the immediate transfer to the State of all monies paid under protest, regardless of whether the taxpayer subsequently prevails on the merits of the suit. *Id*.

The Supreme Court held that the procedure available under the Protest Fund Provision satisfied the

[1] The Supreme Court in its May 24, 2018 opinion confusingly referred to the protest fund provision of the Illinois State Officers and Employees Money Disposition Act as the "Protest Moneys Act," but the provision isn't a stand-alone statute.

requirements of due process and accordingly rejected Parmar's argument that due process requires that his complaint be permitted to proceed in the circuit court. App. 20-21.

REASONS FOR ALLOWANCE OF THE WRIT

The Supreme Court of Illinois decided an important question of federal law in a way that conflicts with this Court's decision in *Reich v. Collins*, *supra*. *Reich* informs that "due process requires a 'clear and certain' remedy for taxes collected in violation of federal law," but the statutory scheme endorsed and relied upon by the Supreme Court in its May 24, 2018 opinion provides neither a clear nor certain remedy to recover taxes incorrectly collected in derogation of federal law. *Reich*, 513 U.S. at 108.

This Court has repeatedly stated that, "despite its immunity from suit in federal court, a State which holds out what plainly appears to be 'a clear and certain' postdeprivation remedy for taxes collected in violation of federal law may not declare, after disputed taxes have been paid in reliance on this remedy, that the remedy does not in fact exist." *Alden v. Maine*, 527 U.S. 706, 740 (1999), quoting *Reich*, 513 U.S. at 108; *accord Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442, 445 (1998). The Supreme Court of Illinois ran afoul of this prohibition when it found that the plain language of section 15(a) of the Illinois Estate Tax Act did not confer jurisdiction upon Illinois' trial courts to

hear a taxpayer's claim about the alleged unconstitutionality of the State's retroactive application of the Estate Tax Act.

Seldom is statutory language more clear than the creation of jurisdiction set forth in section 15(a) of the Estate Tax Act: "Jurisdiction to hear and determine *all* disputes in relation to a tax arising under this Act shall be in the circuit court for the county having venue . . . " (italics added). Contained in the same Act under which the taxes in question were levied, this language provided a "clear and certain" remedy for Illinois' collection of the taxes in violation of federal law. The Supreme Court nonetheless interpreted the word "all" in section 15(a) to mean "very few," and its tortured construction of this plainly written statutory provision more resembles linguistic acrobatics than cogent legal analysis. App. 13-16.

According to the Supreme Court, "the General Assembly only intended in section 15(a) of the Estate Tax Act to fix jurisdiction and venue for all disputes that do *not* implicate sovereign immunity." App. 15 (emphasis in original text). It based its interpretation upon the lack of an express reference in the statutory provision to sovereign immunity, the absence of which the Court found was incompatible with an effective waiver of the doctrine. But the lack of any express reference to sovereign immunity in the statute also undermined the Supreme Court's interpretation of it because the unambiguous statutory provision isn't at all susceptible to the meaning ascribed to it by the State of Illinois and its highest court. And that is where

the due process violation comes into play because the result is the same "bait-and-switch" this Court disapproved of in *Reich*. 513 U.S. at 111.

The Supreme Court's statutory interpretation rendered section 15(a) impermissibly superfluous. While the Court disavowed any need to "identify all of the causes of action" that would necessarily require the limited grant of jurisdiction it divined from the statutory provision, the Court did indicate in its opinion that mandamus actions and garden variety enforcement actions by the State's Attorney General might fall within its ambit. App. 15. But since the circuit courts in Illinois are courts of general jurisdiction, no special grant of jurisdiction for mandamus actions or an Attorney General's enforcement action has historically been necessary. "Our constitution provides that circuit courts have 'original jurisdiction of all justiciable matters,' with certain stated exceptions" not material here. *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 587 (Ill. App. Ct. 1999), citing Ill. Const. 1970, art. VI, § 9. *See Bishop v. Burgard*, 198 Ill. 2d 495, 505 (Ill. 2002) (citing *Health Cost* with approval).

None of the authorities relied upon by the Supreme Court in its May 24, 2018 opinion addressed the necessity of a special grant of jurisdiction "to hear and determine all disputes in relation to a tax arising under [the Estate Tax] Act," and the State's jurisprudence doesn't show that any special grant has been necessary

for an Attorney General's enforcement action[2] or a taxpayer's mandamus suit against a public official to compel the performance of some purely ministerial, non-discretionary act.[3] Simply put, section 15(a) of the Estate Tax Act contained a clear and certain post-deprivation remedy to recover taxes collected in violation of federal law, and the State of Illinois impermissibly took it away from Parmar after he paid taxes in reliance on this remedy. The Supreme Court of Illinois misapprehended the purpose of section 15(a) of the Estate Tax Act, which was to waive State sovereign immunity as it pertained to "disputes in relation to a

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[2] Statutory authorization for the Attorney General to prosecute enforcement actions on behalf of the State is set forth in section 16 of the Estate Tax Act. Under section 16(a) of the Estate Tax Act, "[i]t is the duty of the Attorney General to exercise general supervision over the assessment and collection of the tax provided in this Act, and in the discharge of that duty, the Attorney General may prescribe rules and regulations as are deemed necessary and may institute and prosecute suits and proceedings as may be necessary and proper, appearing therein for that purpose. . . . The Attorney General shall determine and assess the tax as provided for in this Act." 35 ILCS 405/16(a).

[3] Neither of the cases cited in the Supreme Court's opinion support its construction of section 15(a) of the Estate Tax Act. The Supreme Court in *People ex rel. Berlin v. Bakalis*, 2018 IL 122435 considered a petition for mandamus to direct a state trial court judge to vacate a one-year term of mandatory supervised release under the State's penal code; it stated: "This court has discretionary original jurisdiction to consider requests for mandamus relief under the Illinois Constitution." *Id.*, ¶ 16. Nor does *People ex rel. Madigan v. Kole*, 2012 IL App (2d) 110245 reflect that the Attorney General's enforcement action discussed therein required a special grant of jurisdiction or even whether it was brought under section 15(a) of the Illinois Estate Tax Act.

tax arising under this Act," and that error has constitutional ramifications.

Even if it could be shown that the Supreme Court's construction of section 15(a) of the Estate Tax Act caused no deprivation of due process, Petitioner still would not have a clear and certain post-deprivation remedy. The Protest Fund Provision provides insufficient procedural safeguards to afford even a modicum of due process protection to taxpayers seeking to recover taxes collected in violation of federal law. When construed together, Illinois' "bait and switch" construction of section 15(a) of the Estate Tax Act and the lack of due process protection afforded by the Protest Fund Provision are the double whammy that cause the federal constitutional violation. This Court's "precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 22 (1990).

It is doubtful that the Protest Fund Provision's attenuated 30 day period of time within which to file suit and obtain injunctive relief comports with standards of due process, but its other procedures most assuredly do not pass constitutional muster. To receive due process under the statutory scheme of the Protest Fund Provision, the taxpayer must win at every turn

because he will otherwise lose the opportunity for a remedy when the taxes collected in violation of federal law are transferred to the State from the protest fund. For example, any failure to obtain injunctive relief within 30 days from the date of payment will result in the immediate transfer to the State of all monies paid under protest. Such a transfer will preclude any meaningful opportunity for recovery, regardless of whether the taxpayer subsequently prevails on the merits of the suit, as a consequence of State sovereign immunity. And it is unlikely that a taxpayer could prevail on the merits of a suit following transfer to the State of all monies paid under protest – Parmar's unsuccessful claim shows that.[4] Once the monies paid under protest are transferred to the State, the taxpayer is left without a remedy and the circuit court will lose jurisdiction to adjudicate the merits of the dispute. Such a result is not substantively different than what impermissibly occurred to Parmar in this case, and cannot satisfy the requirements of due process.

The Protest Fund Provision is similarly deficient with respect to the issue of appellate review of a judgment erroneously entered against the taxpayer. It makes no allowance for a stay of enforcement to accommodate an appeal by a taxpayer, and instead

[4] The Supreme Court recognized this fact in its May 24, 2018 opinion when it acknowledged that the statutory remedy prescribed by the Protest Fund Provision "would not constitute a claim against the State and would operate outside of the bar of sovereign immunity" because monies paid under protest aren't considered general revenues or part of the State treasury. App. 21-22.

unambiguously provides that "payments . . . are to be held in the protest fund until the final order or judgment of the court." App. 50. But by the time a taxpayer successfully prevails on an appeal, the monies paid under protest will no longer be in the protest fund and available for recovery. Such a result is anything but "a 'clear and certain' remedy for taxes collected in violation of federal law" as required by *Reich*.

The case authority relied upon by the Supreme Court in its May 24, 2018 opinion doesn't suggest a cure for the constitutional infirmities of the Protest Fund Provision. Both *McGinley v. Madigan*, 366 Ill. App. 3d 974, 979-80 (Ill. App. 2006) and *Brooker v. Madigan*, 388 Ill. App. 3d 410, 414-15 (Ill. App. 2009) involved taxpayers lucky enough to win at every turn before ultimately losing on appeal. Neither case bolsters the Supreme Court's flawed constitutional analysis.

As matters now stand, Parmar has been left without a remedy because he acted as a conscientious and law-abiding citizen and timely paid all of the taxes that the State of Illinois claimed were due in reliance upon an express post-deprivation remedy that proved to be illusory. While the State may, under the teachings of *Reich* and *Newsweek*, provide either a protest-then-pay remedy, or a pay-then-protest remedy, "a State may *not* . . . reconfigure its scheme, unfairly, in midcourse – to 'bait and switch.'" *Reich*, 513 U.S. at 110-11. Like the average Georgia taxpayer referenced in *Reich* who was presumed to have read statutory text in accordance with its plain meaning, Parmar should have been

"entitled to pursue what appeared to be a 'clear and certain' postdeprivation remedy" in section 15(a) of the Estate Tax Act. *Id*. at 113.

CONCLUSION

Petitioner is entitled to a clear and certain remedy and a forum in which to adjudicate the merits of his constitutional and tax refund claims. For the foregoing reasons, Paminder S. Parmar respectfully requests that this petition for a writ of certiorari be granted, that the judgment dismissing his complaint for lack of jurisdiction be vacated and reversed, and that this case be remanded for such further proceedings as may be consistent with the reversal.

Respectfully submitted,

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