No.

In the Supreme Court of the United States

STARS INTERACTIVE HOLDINGS (IOM) LTD., F/K/A AMAYA GROUP HOLDINGS (IOM) LTD., AND RATIONAL ENTERTAINMENT ENTERPRISES LTD., PETITIONERS,

v.

COMMONWEALTH OF KENTUCKY, EX REL. J. MICHAEL BROWN, SECRETARY OF THE GOVERNOR'S EXECUTIVE CABINET, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

SHERYL G. SNYDER
THERESA A. CANADAY
GRIFFIN TERRY SUMNER
JASON P. RENZELMANN
FROST BROWN TODD LLC
400 W. Market Street
32nd Floor
Louisville, KY 40202

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLOUD
KATHERINE MORAN MEEKS
FARRAH BARA
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

QUESTIONS PRESENTED

Kentucky's Loss Recovery Act allows any person to sue a gambling winner for treble the amount of another person's gambling losses. For the first time in its history, the Commonwealth of Kentucky filed suit under the Loss Recovery Act on its own behalf, seeking to recover the combined losses of its citizens on petitioners' online poker website over a five-year period. In a 4-3 decision, the Supreme Court of Kentucky held that Kentucky was entitled to recover the value of every losing wager by Kentucky players without accounting for any winning wagers by those same players, and without regard to the amount of profits petitioners made from those wagers. After trebling, the judgment—the largest in Kentucky history—stands at $870 million, or more than $1.3 billion including interest.

The questions presented are:

1. Whether an award of statutory damages violates due process when it exceeds by a factor of more than 30 any conceivable harm.

2. Whether the Excessive Fines Clause prohibits a State from punishing a defendant by imposing a penalty 50 times in excess of the defendant's revenue earned from the prohibited conduct.

PARTIES TO THE PROCEEDING

Petitioners Stars Interactive Holdings (IOM) Ltd. and Rational Entertainment Enterprises Ltd. were the defendants in the Franklin Circuit Court, the appellants in the Kentucky Court of Appeals, and the appellees in the Kentucky Supreme Court.

Respondent the Commonwealth of Kentucky was the plaintiff in the Franklin Circuit Court, the appellee in the Kentucky Court of Appeals, and the appellant in the Kentucky Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Petitioners Stars Interactive Holdings (IOM) Ltd. and Rational Entertainment Enterprises Ltd. are indirect subsidiaries of Flutter Entertainment PLC. No publicly traded company owns ten percent or more of petitioners' stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Commonwealth of Kentucky ex rel. John Tilley, Secretary, Justice and Public Safety Cabinet v. Stars Interactive Holdings (IOM) Ltd., f/k/a Amaya Group Holdings (IOM) Ltd., and Rational Entertainment Enterprises Ltd.*, Franklin Circuit Court, No. 10-CI-00505 (Aug. 12, 2015; Nov. 20, 2015; Dec. 23, 2015) (summary judgment granted in favor of Commonwealth on liability and damages);
- *Stars Interactive Holdings (IOM) Ltd., f/k/a Amaya Group Holdings (IOM) Ltd., and Rational Entertainment Enterprises Ltd. v. Commonwealth of Kentucky ex rel. John Tilley, Secretary, Justice and Public Safety Cabinet*, Commonwealth of Kentucky Court of Appeals, No. 2016-CA-000221-MR (Dec. 21, 2018) (opinion reversing and remanding);
- *Stars Interactive Holdings (IOM) Ltd., f/k/a Amaya Group Holdings (IOM) Ltd., and Rational Entertainment Enterprises Ltd. v. Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary of the Governor's Executive Cabinet*, Nos. 2019-SC-0058-DG and 2019-SC-0209-DG (Dec. 17, 2020) (reversing the decision of the Court of Appeals).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Constitution, Statutes, and Rules:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

STARS INTERACTIVE HOLDINGS (IOM) LTD., F/K/A AMAYA GROUP HOLDINGS (IOM) LTD., AND RATIONAL ENTERTAINMENT ENTERPRISES LTD., PETITIONERS,

v.

COMMONWEALTH OF KENTUCKY, EX REL. J. MICHAEL BROWN, SECRETARY OF THE GOVERNOR'S EXECUTIVE CABINET, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

Petitioners Stars Interactive Holdings (IOM) Ltd., f/k/a Amaya Group Holdings (IOM) Ltd., and Rational Entertainment Enterprises, Ltd. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is reported at 617 S.W.3d 792 (Ky. 2020). Pet.App.1a-40a. The opinion of the Kentucky Court of Appeals is unpublished but available at 2018 WL 6712631 (Dec. 21, 2018). Pet.App.41a-71a. The opinions of the Franklin Circuit Court are unpublished and reproduced in the appendix at Pet.App.72a-173a.

JURISDICTION

The Supreme Court of Kentucky entered judgment on December 17, 2020. Pet.App.1a. That court denied a petition for rehearing on March 25, 2021. Pet.App.175a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

This case concerns the largest civil judgment in Kentucky history—an $870 million treble damages award that, with interest, exceeds $1.3 billion. The suit arises under Kentucky's Loss Recovery Act ("LRA"), a law enacted when John Adams was president that permits a losing gambler to recover his money or property from the winner—and, if the gambler fails to sue, empowers "any other person" to sue for treble the amount lost. Until this case, this somnolent statute had not produced a reported decision in 60 years. But in 2011, the Commonwealth of Kentucky dusted it off and, for the first time in the law's history, hired private plaintiffs' lawyers to bring an action in the State's own name. Rather than sue any winning poker players, the State's lawsuit targeted petitioners, the operators of PokerStars, an online platform on which

individual poker players could play against each other. The State sought to recover, for the State's own benefit, the combined poker losses of its citizens on the PokerStars platform over a five-year period.

On its own, Kentucky's aggregation of these claims would have produced a significant damages award. But the Kentucky Supreme Court supersized the State's recovery by holding that damages should be calculated by adding the value of every losing wager by Kentucky players—without crediting a single winning wager and without regard to the actual revenue ($18 million) earned in Kentucky by petitioners. Once the losing hands were combined and the winning hands discarded, the results came to $290 million, a figure that *on its own* eclipsed any previous civil damages award in Kentucky history. But the Kentucky courts then trebled the damages to produce a judgment of historic proportions—$870 million. Completing the trifecta, the interest that has accumulated on the award, $400 million, itself towers far above any previous civil judgment Kentucky has seen.

These monstrous damages cry out for this Court's review. Even in matters of state concern, this Court applies constitutional brakes to "damages that run wild." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). In cases involving punitive damages, this Court has repeatedly admonished that awards exceeding actual harm by more than a single-digit ratio likely violate the Constitution. Here, the Kentucky Supreme Court upheld a billion-dollar judgment that is utterly disconnected from any rational measure of real-world harm. The PokerStars platform accounted for only a tiny fraction of the gaming occurring in Kentucky, much of which takes place in the State's own lottery. Yet the Kentucky Supreme Court blessed a damages award that exceeded the actual losses

of Kentucky players by a factor of 34 and petitioners' revenue by a factor of 50. This case is the poster child for a grossly excessive punishment prohibited by the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment.

While the staggering damages alone deserve this Court's attention, review is also needed because the Kentucky Supreme Court's opinion deepened an entrenched split over whether the Due Process Clause requires courts to consider the magnitude of the underlying damages when awarding punitive or multiple damages. Five federal appeals courts hold that due process generally limits punitive damages to a 1:1 ratio when the underlying damages are already substantial. But the Eleventh Circuit and multiple state courts do not consider the size of the underlying damages in their due process analysis. The split is especially intolerable because the Kentucky Supreme Court adopts a different approach from the federal circuit with jurisdiction over Kentucky—the Sixth—a result that will lead to forum shopping and inconsistent judgments for defendants located in the same State.

Left uncorrected, the decision below will invite States to pursue novel claims in state court for the combined value of injuries supposedly suffered by their citizens—and keep the proceeds to pad state budgets. When a State brings a *parens patriae* action in its own name, it can seek aggregated damages without having to clear the Rule 23 limits facing private plaintiffs that seek to certify a class. Kentucky's resort to a decrepit civil statute also allowed it to do an end-run around the procedures, protections, and liability limitations of the State's criminal laws. The low barriers to entry for these suits, combined with the potentially explosive damages, create incentives for States and the plaintiffs' bar to use litigation against deep-

pocketed corporate defendants as a revenue-raising tool. Indeed, even as the Kentucky courts intoned that the purpose of the suit was to deter online gaming, Pet.App.11a, the governor announced that Kentucky would use the proceeds to fund pension obligations for state employees—a use that has no connection whatsoever to any supposed harms from petitioners' actions. The judgment was a political expedient at the expense of a foreign corporation. Only this Court can interpose constitutional limits to prevent abuse of these actions.

Certiorari is warranted.

A. Background

At common law, the losing party to a wager or gamble had no right to recover his losses from the winner. 7 *Williston on Contracts* § 17:23 (4th ed. 2021). Like nearly half of its sister States, Kentucky has displaced that default rule with a statutory cause of action designed to return a losing gambler to the position where he started.

Kentucky's Loss Recovery Act dates to 1798. *See* Act of 1798, Vol. I, Digest Stat. Laws of Ky., Title 87 §3. The law allows a losing gambler or his creditors to bring a civil action against the "winner" to recover losses of $5 or more incurred "at one (1) time, or within twenty-four (24) hours." Ky. Rev. Stat. 372.020. If neither of those parties brings a claim within six months, then Kentucky empowers "any other person [to] sue the winner, and recover treble the value of the money or thing lost." Ky. Rev. Stat. 372.040.

Although nearly half of the States have a gambling-loss statute, Kentucky's is an outlier. Many States pro-

vide a cause of action only for the losing gambler, and create no statutory rights for third parties.[1] Even among those States that do allow third-party recovery, the majority limit the class of plaintiffs to specific individuals—such as spouses, children, heirs, or creditors—who suffer direct and foreseeable injuries from another's gambling losses.[2] Kentucky stands among the minority of States that authorize "any other person" to recover another's gambling losses for his own benefit.[3]

No matter the breadth of Kentucky's statutory language, suits by total strangers to a gambling transaction have been rare. Pet.App.61a. Historically, when the statute was invoked at all, it was used by family members to recoup a relative's ill-fated wager. *See Gumer v. Sailor*, 286 S.W.2d 515, 516 (Ky. 1956) (action by father to recover son's losses); *Tabet v. Morris*, 285 S.W.2d 143, 144 (Ky. 1955) (per curiam) (action by mother to recover son's

---

[1] Conn. Gen. Stat. § 52-554; Md. Code Ann., Crim. Law § 12-110; Mich. Comp. Laws Ann. § 600.2939; N.H. Rev. Stat. Ann. §§ 338:2, 338:3; N.Y. Gen. Oblig. Laws § 5-419; Va. Code Ann. § 11-15; W. Va. Code Ann. § 55-9-2.

[2] *See* Ala. Code § 8-1-150 (wife, children, next of kin); Ark. Code Ann. § 16-118-103 (heirs, executors, or creditors); Miss. Code Ann. § 87-1-5 (wife or children); Mo. Code § 434.040 (wife, heirs, executors, or creditors); N.M. Stat. Ann. § 44-5-3 (spouse, children, heirs, executors, creditors); Wis. Stat. Ann. § 895.056 (family and heirs); *cf.* Ind. Code Ann. § 34-16-1-2 (authorizing state's attorney to recover gambling losses for spouse and minor children); S.D. Codified Laws § 21-6-2 (same).

[3] *See* D.C. Code § 16-1702; 720 Ill. Comp. Stat. Ann. 5/28-8; Mass. Gen. Laws Ann. ch. 137, § 1; Ohio Rev. Code Ann. § 3763.04; S.C. Code § 32-1-20. *Cf.* Ga. Code Ann. § 13-8-3 (allowing suit by "any person" but requiring proceeds to be split with county educational fund); N.J. Rev. Stat. Ann. § 2A:40-6 (same but requiring split with State).

losses); *Scott v. Curd*, 101 F. Supp. 396, 397 (E.D. Ky. 1951) (action by wife to recover husband's losses). A federal court interpreting Kentucky's law concluded that the legislature had authorized suits by "any other person" simply to account for the fact that a gambler may have dependents outside his immediate family. *See Salonen v. Farley*, 82 F. Supp. 25, 27-28 (E.D. Ky. 1949). Rather than deprive an injured party of a remedy by artificially limiting the class of plaintiffs, Kentucky "gave the right to all persons" to sue for gambling losses. *Id.* at 28. But in all events the statute was "primarily intended" for "the protection of the dependents of those losing in gambling." *Id.*

B. Proceedings Below

1. This case marks the first time in the LRA's 200-year history that the State of Kentucky sued as a plaintiff to recover, for its own benefit, the combined value of losing wagers by its citizens.

In 2011, private plaintiffs' lawyers representing Kentucky brought this suit under the LRA against petitioner Rational Entertainment Enterprises Ltd. ("REEL") and the Oldford Group, the predecessor-in-interest to petitioner Stars Interactive Holdings (IOM), Ltd. ("Stars"). Stars and REEL are foreign corporations domiciled in the Isle of Man. During the period relevant to this suit, REEL operated the PokerStars online platform.[4] Within the United States today, real-money poker games on the PokerStars site are accessible only in New Jersey and Pennsylvania, two of the States that have expressly legalized online gaming. *See* N.J. Stat. Ann. § 5:12-95.17(*l*); Pa. Cons. Stat. § 13B11. But as of 2011, players in Kentucky and other States could compete in tournaments and cash

[4] Petitioner Stars is an indirect corporate parent of REEL.

games on the site.

As the host of online games, petitioners took only a cut, or "rake," from each cash-game hand played on the PokerStars platform. Pet.App.23a, 44a. During the time period relevant to this lawsuit, 2006 to 2011, petitioners' total revenue in Kentucky amounted to $18 million, and their profits would necessarily have been significantly less. The State's action under the LRA nonetheless sought to hold petitioners liable for the entire value—times three—of its citizens' lost wagers on the site over the five-year limitations period, without accounting for any gains made by those same players. For example, if a Kentucky player won $1,000 at two hands of poker but lost $250 at a third hand on the same day, the State claimed he had lost $250, even though he actually ended the day ahead by $750. Similarly, if two Kentucky players competed head-to-head, each winning and losing $250 to the other, the State counted the game as generating $500 in losses, even though it ended in a draw. After rejecting petitioners' motion to dismiss, the Franklin Circuit Court entered judgment for the State on liability.

2. Kentucky subsequently moved for summary judgment on damages. Petitioners maintained electronic records showing the amount of every wager made on the PokerStars platform by Kentucky residents. Using that data, the State submitted a damages calculation of $290 million *before* trebling, a figure representing the gross losses of Kentucky players during the relevant time period. Petitioners objected that the State's proposal grossly overstated real-world losses because it counted only lost wagers, while failing to account for the substantial winnings by Kentucky players. By the State's own calculations, if the State had added every instance where a Kentucky player ended up with a net loss at the end of a

calendar day, then damages over the five-year limitations period would have come to $68 million, less than a quarter of the State's proposed award. Pet.App.111a. And had the State subtracted *total* winnings from *total* losses over the five-year limitations period, then damages would have come to $26 million, less than a tenth of what the State was seeking. Pet.App.112a.

The Franklin Circuit Court accepted the State's $290 million damages calculation, while reserving judgment on whether those damages should be trebled. Pet.App.155a-156a. But the court's reasoning did not match the dollar figure it awarded. Observing that the LRA provides relief to gamblers who lose $5 or more "within twenty-four hours," the circuit court held that the State could recover only for a player's net losses at the end of a calendar day after winnings were deducted. Pet.App.154a-155a. "To allow for the player to recover for each hand lost without offsetting it by his winnings would be to allow the player to receive a windfall." Pet.App.154a. The court mistakenly concluded, however, that the State's damages figure complied with that rule. Pet.App.154a-155a.

Petitioners moved for reconsideration, pointing out that the $290 million damages figure reflected gross losses, without accounting for winnings, a point the State readily conceded. But rather than revise its damages ruling, the circuit court discarded its earlier reasoning. The court acknowledged that a longstanding Kentucky precedent, *Elias v. Gill*, 18 S.W. 454, 456 (Ky. 1892), limited a gambler's recovery under the LRA to his net losses once winnings were subtracted. Pet.App.121a-124a. But it held that *Elias* applied only where the gambler sued in his own name. Pet.App.126a. Because the State was suing as "any other person," it was "not required to offset the Kentucky players' losses with their winnings." Pet.App.111a.

In the same order, the circuit court trebled the damages and entered a final judgment for Kentucky of $870 million, compounded at the then-applicable statutory rate of 12% interest. Pet.App.135a-136a.[5] The court rejected petitioners' argument that the damages were unconstitutionally excessive, holding that the PokerStars site was "illegal" and that petitioners' profits had come at "the incalculable expense of the violation of Kentucky's laws." Pet.App.133a-134a. The court declined petitioners' request that it make factual findings in support of its ruling that the treble damages were proportional to the offense. Pet.App.134a. The court also denied a post-judgment motion to reduce the interest rate to 0.11%, the comparable rate on federal judgments. Pet.App.104a.

3. Kentucky's intermediate appellate court reversed as to liability and ordered the circuit court to dismiss the case. Pet.App.70a. It held that the State did not qualify as a "person" entitled to sue for treble damages under the LRA because the legislature had created a separate forfeiture action by which the State could seek profits "obtained or conferred" in violation of Kentucky's gambling laws. Pet.App.64a-65a (citing Ky. Rev. Stat. 528.100).

4. In a 4-3 opinion, the Kentucky Supreme Court reversed and reinstated the circuit court's damages award. After rejecting petitioners' state-law arguments as to liability, the supreme court quickly dispatched with petitioners' constitutional challenges to the treble damages award. In the space of one paragraph, the court held that the judgment did not violate the Excessive Fines Clause because it was "proportionate to the amount of money lost by Kentucky gamblers" on the PokerStars site.

---

[5] In 2017, Kentucky amended its statutory post-judgment interest rate from 12% to 6%.

Pet.App.29a. "In fact, it is *exactly* that amount, times three, as calculated based on PokerStars' records." Pet.App.29a. "This 'fine' is not excessive and is the very definition of mathematically proportionate." Pet.App.29a.

Again in a single paragraph, the supreme court also rejected petitioners' argument that they lacked notice under the Due Process Clause of the potential size of the judgment against them. Pet.App.29a. The court did not address petitioners' separate argument that the imposition of treble damages violated their due process rights because the underlying calculation of loss, which did not include a setoff for winnings, was "artificially inflated" and more than sufficient, standing alone, "to deter and punish." Stars Br. (Ky. Oct. 1, 2019).

5. The Kentucky Supreme Court denied rehearing on March 25, 2021. Pet.App.174a-175a. Following denial of rehearing, the State has moved aggressively to satisfy the judgment, including with a motion aimed at securing control of certain of petitioners' trademark rights.

REASONS FOR GRANTING THE PETITION

The Kentucky Supreme Court allowed the State to bring a novel claim under an antediluvian state law that resulted in a staggering judgment far out of proportion to any real-world injuries. Along the way, the Kentucky court felled every possible barrier that might have slowed the runaway damages. It allowed Kentucky to aggregate all lost wagers by Kentucky citizens into a single action. It calculated the State's damages solely by reference to losing hands without factoring in the winning hands or petitioners' revenue. On its own, that award surpassed any previous civil judgment in the State's history. But the Kentucky court then trebled the damages to create a Frankenstein's monster of an award.

This Court should intervene to overturn the judgment because it flouts basic norms of fairness and proportionality embodied in the Due Process and Excessive Fines Clauses. The $870 million damages award has no rational relationship to any actual injuries experienced by Kentucky poker players, many of whom came out *winners* on the PokerStars platform. The Kentucky Supreme Court's cursory analysis cannot be squared with the careful approach taken by federal courts of appeals, which have applied a searching due process inquiry and vacated damages as excessive even when they complied with a statutory scheme.

Certiorari is also warranted because the Kentucky Supreme Court's decision deepens a split over whether a substantial damages award constrains the size of punitive damages. Five federal appeals courts have recognized strict due process limits on punitive damages in these circumstances, whereas the Eleventh Circuit, the Kentucky Supreme Court, and multiple other States do not factor the size of the underlying damages award into their due process analysis. This Court's review is urgently needed because Kentucky diverges from the federal appeals court in the circuit where it sits, creating a risk of arbitrary results depending on the forum in which Kentucky-based defendants are sued.

The questions presented are exceedingly important. The Kentucky Supreme Court's errant opinion creates a windfall for the State at a time when public officials touted that the treble damages award could cure shortfalls in the state budget. Allowing the judgment to stand opens the door to copycat claims by other States seeking massive damages for speculative injuries by their citizens—damages that serve to fill state coffers at the expense of out-of-state corporate defendants like petitioners. And this case, which presents the questions cleanly and without

any remaining state-law issues, is an optimal vehicle in which to address them.

I. The Kentucky Supreme Court's Decision Conflicts with Decisions of This Court and Federal Courts of Appeals Interpreting the Due Process Clause

A. The Decision Below Is Irreconcilable with This Court's Precedents and Basic Due-Process Principles

1. This Court has long recognized that "the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme." *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989). A judgment that is "grossly excessive" in comparison to the underlying harm cannot stand. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). For example, in cases involving punitive damages, this Court has not tolerated liability far in excess of actual harm. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court cautioned that an award of punitive damages that exceeds compensatory damages by more than a single-digit ratio will likely violate due process. *Id.* at 425. And if the underlying compensatory damages are already "substantial," then "a punitive damages award at or near the amount of compensatory damages" may reach the constitutional limit. *Id.* at 429.

The astronomical treble damages award imposed under the LRA surpasses these established constitutional limits. The mismatch between the size of the judgment and the size of the actual losses could not be starker. Even before trebling, the $290 million damages calculation was 11 times larger than players' net losses ($26 million) and 16 times larger than petitioners' revenue ($18 million). The ratios after trebling are even more eye-popping. The

$870 million treble damages award looms 34 times larger than players' net losses and nearly 50 times larger than petitioners' revenue in Kentucky. The result is an award that is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mountain & S. R.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

Kentucky's billion-dollar award further offends basic notions of fairness because it is manifestly and completely dissociated from any real-world harm. The Kentucky Supreme Court reaffirmed in this case that *gamblers* suing under the LRA are confined to recovering their actual poker losses. Pet.App.30a. But it discarded that limit when the State brought suit as a plaintiff, holding that Kentucky could recoup the entire value of every losing wager without crediting the millions of dollars won back by its citizens. The result was a windfall to the state treasury far in excess of any harm sustained by Kentucky residents. Even worse, the state court required petitioners to pay these sums even though petitioners never pocketed the winnings in the first instance—the players did.

The constitutional problems with the supersized damages are only magnified by the usurious interest rates imposed by the Kentucky courts. Kentucky's statutory interest rate far exceeds the comparable rate on federal judgments, which is tied to historically low Treasury yields. 28 U.S.C. § 1961. And it dwarfs the return Kentucky could possibly have expected to receive from any other investment. *See* Walter Hamilton, *Madoff's Returns Aroused Doubts*, L.A. Times (Dec. 13, 2008) (describing Bernie Madoff's consistent 11% returns as "too good to be true"). To date, the interest that has accrued on the award—$400 million and counting—*itself* surpasses any previous judgment in Kentucky history. And the interest alone is a whopping 15 times larger than the

actual losses of Kentucky's players. This is the very definition of gross excessiveness.

2. The Kentucky court concluded that the damages award in this case was "proportional" because it was exactly what the legislature prescribed. Pet.App.28a-29a. But both the Seventh and Eighth Circuits have reduced damages that transgress constitutional limits, even if that requires a departure from a statutory scheme. Had this appeal been brought in either of those circuits, there is no question the judgment would not have survived.

In *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, 980 F.3d 1117 (7th Cir. 2020), *pet. for cert. filed*, No. 20-1426, the Seventh Circuit vacated a jury verdict on due process grounds even though it complied with a Wisconsin law that limited punitive damages to no more than twice the amount of compensatory damages. A jury awarded the plaintiff $140 million in compensatory damages, and the district court remitted the punitive damages to $280 million to comply with the statutory cap. Although the district court's judgment satisfied the Wisconsin statute, the Seventh Circuit deemed the award excessive and reversed. It held that, in cases where the underlying compensatory damages are already "substantial," the Due Process Clause may bar an award of punitive damages even twice that amount. *Id.* at 1143-44. And because the defendant's conduct in *Epic Systems* inflicted only economic injury, the Seventh Circuit concluded that the 2:1 ratio between punitive and compensatory damages violated due process—no matter that the damages complied with Wisconsin's statutory cap. *Id.* at 1144.

Likewise, in *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019), the Eighth Circuit vacated a verdict under the Due Process Clause even though the jury awarded the exact quantum of damages required by stat-

ute. After finding that defendants had violated the Telephone Consumer Protection Act, the jury awarded statutory damages of $500 per call, multiplied by the total number of calls made to the plaintiff class, for an aggregate award of $1.6 billion. After the district court reduced the damages to $10 per call, the plaintiffs appealed, arguing that the statute required liquidated damages of $500 per call. *Id.* at 955. Although the Eighth Circuit agreed with plaintiffs that the statute's language was mandatory, it held that the award violated due process because it punished the defendant severely for causing only transitory harms from unwanted phone calls. *Id.* at 962. "To state the obvious, $1.6 billion is a shockingly large amount." *Id.* In the Eighth Circuit's view, it made no difference that Congress had fixed the amount of damages per call, because the "absolute amount of the award, not just the amount per violation, is relevant to whether the award is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 963 (quoting *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 (8th Cir. 2012)).

There is little doubt that the result below would have been different had this case been litigated in the Seventh or Eighth Circuit rather than the Kentucky Supreme Court. Under *Epic Systems*, the Seventh Circuit would have been required to consider the substantiality of the underlying damages calculation *before* it trebled the award. And because the $290 million loss calculation already overcompensates the State for its citizens' poker losses—by failing to account for their winnings—the trebling provision would not have survived constitutional scrutiny in the Seventh Circuit.

Similarly, had this case been brought in the Eighth Circuit, the court would have considered the absolute size of the "shockingly large" damages award. As in *Golan*,

the court would have held that the billion-dollar judgment violated petitioners' due process rights because it vastly exceeded any concrete harms. Although some percentage of Kentucky players surely suffered net losses, the damages award in this case compensated the State for intermittent losses by players who ultimately emerged as winners. The Eight Circuit manifestly would not have permitted ruinous damages for nonexistent injuries. This Court should bring Kentucky into line with the federal circuits and mandate a damages analysis that is tied to real-world harms.

3. The Kentucky Supreme Court justified the $870 million award (plus interest) by reference to the state funds that would need to be expended to address the supposed "societal and fiscal harm caused by PokerStars." Pet.App.21a-23a. But there is not a shred of evidence in the record that any Kentucky citizen amassed "gambling debt" or "developed an addiction while using the PokerStars website," as the Kentucky Supreme Court surmised. Pet.App.21a-22a. Nor did the State offer proof that any Kentucky citizen committed "felonious financial crimes," such as "embezzlement" or "check kiting," to recover losses sustained on petitioners' site. Pet.App.22a. To the contrary, the circuit court specifically refused to make factual findings to support the treble damages award, *see* Pet.App.134a, leaving the Kentucky Supreme Court to grasp for publicly available reports that were not part of the record, and that discussed risks associated with forms of gambling not at issue in this case.

The publicly available studies on which the Kentucky Supreme Court relied do not even discuss online poker specifically. The court cited a 2020 report by the Kentucky Council for Problem Gambling that pegged the "social cost to Kentucky from gambling addiction" at $81 million per year. Pet.App.21a. But this figure is guesswork

at best, calculated by multiplying the estimated number of problem gamblers in the State by an "academic estimate of the social cost per addicted gambler." Ky. Council on Problem Gambling, *Out of the Shadows* 25 (2020), tinyurl.com/3x4nmx2n. More to the point, the report did not link these costs to online poker, much less to petitioners' site; it focused only on legalized forms of gambling, including wagering on horse races, casinos in neighboring States—and Kentucky's own state-run lottery. *Id.* at 21, 25.

Lacking actual evidence linking the PokerStars site to social problems, the Kentucky Supreme Court was forced to speculate that PokerStars must give rise to undesirable consequences because gambling writ large is associated with addiction and financial troubles. Pet.App.21a-23a. But it is a basic tenet of due process that a defendant cannot be held liable for injuries he had no role in causing. *Cf. Paroline v. United States*, 572 U.S. 434, 442-43 (2014) (vacating court of appeals opinion holding that defendant could "be made liable for the victim's entire losses," even those caused by others). The Kentucky Supreme Court had no basis to uphold a billion-dollar judgment absent *any* showing of a causal nexus between petitioners' online poker platform and the generalized gambling-related ills that supposedly justified the catastrophic treble damages award.

The Kentucky Supreme Court further justified the damages on the ground that online poker violates Kentucky law. Pet.App.33a. But pronouncing the conduct illegal does not mean that it qualifies for the most draconian penalty possible. Due process requires that the punishment fit the offense, *State Farm*, 538 U.S. at 426, and nothing about petitioners' conduct justifies the largest civil damages award in Kentucky history.

Petitioners did not engage in fraud, deceit, or violence, or place any person at risk of physical harm, the traditional hallmarks of reprehensible conduct that might support a significant damages award. *See State Farm*, 538 U.S. at 419; *Gore*, 517 U.S. at 576. Nor is petitioners' conduct inherently repugnant or shocking. To the contrary, some form of gambling is legal in almost every State, with three States expressly allowing online poker. Despite its posturing in this case about the evils of gaming, Kentucky—the home of the Derby—allows pari-mutuel wagering on horseracing. Ky. Rev. Stat. 230.361. The State also runs a lottery that generated $1.2 billion in ticket sales last year alone, far more than the $26 million Kentucky players lost on the PokerStars platform over a *five-year* period. *See* Ky. Lottery Ann. Rep. (2020), https://tinyurl.com/knfjhcb2.[6]

The imposition of these catastrophic damages is especially shocking in light of poker's widespread popularity. Kentucky has inflicted the harshest possible punishment on petitioners for hosting a game that millions of Americans play in their backyards and living rooms. Poker is no illicit activity: It is "America's card game, some say its national pastime." James McManus, *No More Bluffing*, N.Y. Times: Op-Ed (Aug. 24, 2012). The game's many adherents include presidents and Justices of this Court. Scott Sloan, *Putting Texas Back in Texas Hold 'Em*, 27 Sports Laws. J. 103, 109 (2020) (naming former Justices Rehnquist and Scalia as regular players). President Eisenhower famously bought his wife Mamie's engagement

[6] Because Kentucky exempts its lottery from the LRA, *see* Ky. Rev. Stat. 372.005, a private citizen could not bring an action to reclaim the value, times three, of all the worthless lottery tickets sold by the State.

ring with poker winnings. Norman Chad, *For U.S. Presidents, Poker Is a Main Event*, Wash. Post (June 16, 2019). Even if the State has the power to prohibit this everyday pastime, due process does not permit Kentucky to rain down its harshest sanction—the largest civil damages award in its history—on a longstanding, commonplace activity.

B. The Kentucky Supreme Court Deepened a Split Over Due Process Limits on Punitive or Treble Damages Awards

The astronomical judgment is all the more troubling because it inflames an existing split of authority concerning due process limits on punitive damages. In *State Farm*, this Court suggested without deciding that, in cases where the underlying damages calculation is already "substantial," the Due Process Clause may cap punitive damages at an amount "equal to" but not exceeding the underlying award. 538 U.S. at 425. Today, the Second, Sixth, Seventh, Eighth, and Tenth Circuits explicitly consider the size of the initial damages figure in assessing whether the punitive award complies with due process, often enforcing a 1:1 ratio between punitive damages and actual harm. But the Eleventh Circuit and at least four state supreme courts pay no heed to the baseline damages calculation in their due process analysis. This division of authority is especially intolerable because Kentucky stands at odds with the federal appeals court in the circuit where it sits—the Sixth.

1. Start with the Second Circuit. That court instructs that the underlying damages calculation "weighs heavily" in its analysis of whether a punitive award satisfies due process. *Thomas v. iStar Fin., Inc.*, 652 F.3d 141, 149 (2d Cir. 2011) (per curiam). Because the plaintiff's recovery in *Thomas* was "very substantial" in relation to his injury

even *before* punitive damages were imposed, due process required "a punitive damages award equal to or less than the remitted compensatory damages award." *Id.*

The Sixth Circuit follows the same approach. After *State Farm*, the court embraced "the general principle that a plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances." *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007). And it has repeatedly vacated or remitted punitive damages on the ground that the baseline award was already significant. *Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 429 (6th Cir. 2009); *Bridgeport Music, Inc. v. Justin Combs Publ'g, Inc.*, 507 F.3d 470, 488 (6th Cir. 2007).

The Seventh Circuit has likewise declared that due process requires a punitive damages ratio "closer to 1:1" where the baseline award is already "substantial." *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019), *cert. denied sub nom. Saccameno v. Ocwen Loan Servicing, LLC*, 140 S. Ct. 2674 (2020); *see also Epic Sys. Corp.*, 980 F.3d at 1143-44.

The Eighth Circuit follows suit and expressly considers whether a "punitive damages award is excessive when measured against [a] substantial compensatory damages award." *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005). The court has admonished that "caution is required" when the underlying damages are significant, and in multiple cases has remitted punitive damages down to a 1:1 ratio in order to comply with due process. *Id.*; *see also Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive damages to 1:1 ratio because a $600,000 award for harassment was "a lot of money").

In the Tenth Circuit as well, a due process challenge to a punitive damages award must "begin by examining the amount of compensatory damages." *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1068 (10th Cir. 2016). "The Supreme Court has defined different standards for punitive awards depending on whether they are combined with substantial or insubstantial compensatory damages." *Id.* at 1069. Because the general damages in *Lompe* were "substantial" in relation to "the nature of the injuries actually suffered" by the plaintiff, the Tenth Circuit held that punitive damages must be remitted to "[a] ratio of 1:1" to ensure the punishment was "reasonable and proportionate" to the harm. *Id.* at 1070, 1075.

2. The Eleventh Circuit and multiple state supreme courts take the exact opposite approach. These courts do not consider whether a large damages calculation requires a strict limit on the amount of punitive damages. Instead, these courts find that due process is satisfied so long as punitive damages do not exceed actual harm by greater than a single-digit ratio.

An outlier among the federal courts, the Eleventh Circuit has dismissed as mere "dicta" this Court's instruction that a 1:1 ratio between punitive damages and actual harm may approach the constitutional limit where the underlying award is substantial. *See Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (upholding $20.7 million punitive award). And the court has regularly "upheld ratios substantially greater than 1:1 in cases with large compensatory damages awards." *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 901 F.3d 1282, 1290 (11th Cir. 2018). So long as the punitive damages ratio falls below 10:1, the Eleventh Circuit generally finds due process satisfied. *See id.*

Similarly, the Nevada Supreme Court upheld a punitive damages award of nearly $58 million, notwithstanding that the jury returned a separate verdict of $23 million to compensate plaintiffs for their actual injuries. *Wyeth v. Rowatt*, 244 P.3d 765, 781 (Nev. 2010) (en banc). Rather than consider whether the enormous jury award should have limited the amount of punitive damages, the court held simply that "the remitted punitive damages awards here are less than three times the compensatory awards," and were thus "well within the accepted ratios." *Id.* at 785.

In the same vein, the Arkansas Supreme Court affirmed a punitive damages award of $25 million, nearly five times the size of the underlying damages. *Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 348 (Ark. 2004). The court did not pause to consider whether the substantial compensatory damages should pull the punitive award down to earth. Because "single-digit multipliers" generally "comport with due process," the court held that the $25 million punitive award raised no constitutional concerns. *Id.* (alteration and citation omitted).

And the Missouri Court of Appeals specifically rejected an argument that "a punitive damages ratio of 1:1 is the 'outermost' constitutional limit in cases where the jury has awarded 'substantial damages.'" *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 722 (Mo. Ct. App. 2020), *cert. denied*, No. 20-1223 (June 1, 2021). The court upheld staggering punitive damages awards of $900 million against one defendant and $715 million against the other—notwithstanding that the jury had already compensated plaintiffs $500 million and $125 million, respectively, for the conduct of these same defendants. *Id.* In the court's view, due process did not impose a strict 1:1 ratio on punitive damages because the defendants were

"multi-billion dollar corporations" that could be deterred only with outsize awards. *Id.* at 723.

Kentucky further entrenched the split when it refused even to consider whether the LRA's trebling provision could constitutionally be applied to petitioners given the mammoth underlying damages calculation—$290 million, itself the largest civil award in state history. Petitioners raised the argument that the $290 million *before* trebling was sufficient to deter and punish, but the court simply ignored it, holding that the treble damages were constitutional because they were "exactly" the amount prescribed by the legislature.

3. The split is especially untenable because the Kentucky Supreme Court and the Sixth Circuit stand on opposite sides of the divide. In *Bridgeport Music*, the Sixth Circuit recognized that due process constrains punitive damages in cases where the underlying award is not just substantial, but provides some compensation in excess of actual injury. 507 F.3d at 489 (addressing award that included copyright holder's actual damages plus infringer's profits). That is exactly the case here: The underlying loss calculation of $290 million vastly exceeded any conceivable real-world harm because it failed to account for millions of dollars in winnings by Kentucky players. Had this case been litigated in the Sixth Circuit, *Bridgeport Music* would have precluded application of the trebling provision. But the Kentucky Supreme Court saw due process as no barrier to an award of multiple damages. These inconsistent rulings will promote forum-shopping and produce arbitrary results against defendants located in the same State. Only this Court can bring the consistency and clarity that due process requires.

II. The Decision Below Is Inconsistent with This Court's Precedents Interpreting the Excessive Fines Clause

For many of the same reasons that the treble damages award violates due process, it also transgresses the Excessive Fines Clause. "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (cleaned up). Like the Due Process Clause, the Excessive Fines Clause enforces a principle of proportionality—a requirement that "[t]he amount of the forfeiture . . . bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). A fine violates that guarantee when it is "grossly disproportional to the gravity of a defendant's offense." *Id.*

As an initial matter, there is no dispute in this case that the judgment is a form of punishment that triggers application of the Excessive Fines Clause. The Kentucky Supreme Court has repeatedly described the LRA as a punitive statute—an extension of the State's criminal laws. Pet.App.14a; *Jacob v. Clark*, 72 S.W. 1095, 1096 (Ky. 1903) ("The action here allowed is in the nature of a penalty for a violation of the law."). And this Court has separately recognized that statutory treble damages, like those at issue here, are punitive because they reflect "an intent to punish past, and to deter future, unlawful conduct." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

The punishment meted out in this case is "grossly disproportional" to petitioners' offense—hosting an online poker platform. *See Bajakajian*, 524 U.S. at 334. Petitioners have not engaged in acts of violence, created a risk of death or physical injury, or engaged in fraud or deceit. *See* p. 19, *supra*. And there is no evidence in the record

that online poker causes harms not associated with other forms of wagering that Kentucky expressly condones (horse racing) or even sponsors (lottery tickets).

Although the conduct at issue is not particularly reprehensible, the Kentucky Supreme Court imposed the most extreme penalty possible—an amount, times three, reflecting the value of *all* losing hands and *no* winning hands by Kentucky players. The judgment far outstrips the amount Kentucky could have seized under its gambling forfeiture statute, Ky. Rev. Stat. 528.100. That law empowers the State to do precisely what it claimed to do in this case—pursue the ill-gotten gains of a gambling operation—but only after obtaining a criminal conviction. And it limits the State's recovery to money or property the defendant obtained in violation of the State's laws—in other words, petitioners' $18 million revenue. It defies logic that Kentucky should be permitted to seize 50 times that amount from petitioners under the LRA *without* having to meet its burden of sustaining a criminal conviction.

The judgment also far exceeds the penalties available for the same conduct under many other States' laws. In evaluating whether one State's punishment is excessive under the Eighth Amendment, this Court looks to the common practice among the States. *See Graham v. Florida*, 560 U.S. 48, 61 (2010). Although nearly half the States have enacted loss-recovery statutes, only six in addition to Kentucky provide for double or treble recovery under these laws. *See, e.g.*, Mich. Comp. Laws Ann. § 750.315 (treble damages); Or. Rev. Stat. Ann. § 30.740 (double damages). And, among those six, only four—the District of Columbia, Illinois, Massachusetts, and South Carolina—follow Kentucky in allowing "any person" to recover treble damages, whether or not he has a relationship with the losing gambler or suffered any personal injury from the loss. D.C. Code § 16-1702; 720 Ill. Comp.

Stat. 5/28-8; Mass. Gen. Laws ch. 137, § 1; S.C. Code Ann. § 32-1-20.

Even States with comparable laws have adopted narrowing constructions that would preclude the type of mammoth judgment the Kentucky Supreme Court endorsed here. South Carolina limits a plaintiff's recovery to actual losses, once winnings are deducted. *See McCurry v. Keith*, 481 S.E.2d 166, 168 (S.C. Ct. App. 1997) ("A proper measure of loss requires an adjustment for amounts gained or saved."). And Illinois does not permit suits against the host of a poker game—a rule that effectively disables plaintiffs from recovering aggregated losses from a single defendant. *See Sonnenberg v. Amaya Grp. Holdings (IOM) Ltd.*, 810 F.3d 509, 510-11 (7th Cir. 2016) (holding that "gambling sites" that collected a rake were not "winners" under materially identical Illinois law).

Significantly, none of the States with laws similar to Kentucky's has ever brought an action in its own name to recover the combined gambling losses of its citizens. Pet.App.61a. Nor has any court in any of these jurisdictions allowed a *private* plaintiff to sue for the aggregated losses of multiple other individuals. In this case, the Kentucky Supreme Court endorsed a claim unprecedented under the laws of any State, gifting its own executive branch a windfall judgment far out of proportion to actual injury. The Excessive Fines Clause does not permit this naked cash grab by the State.

III. The Constitutional Issues Presented Are Exceptionally Important

1. The questions presented in this case are exceptionally important. While the billion-dollar judgment is of utmost significance to Stars and REEL, the Court's review

of this award would have implications well beyond the confines of this case. Kentucky reached the enormous damages figure in part by aggregating thousands of individual poker losses of $5 or more. In other contexts, from the Copyright Act to the Cable Communications Policy Act to the California Labor Code, plaintiffs have likewise attempted to combine thousands of claims for fixed statutory damages into a single, "devastatingly large damages award, out of all reasonable proportion to the actual harm." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003). This case presents an opportunity for the Court to impose constraints on a practice that has drawn concern from lower courts and commentators. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103 (2009); Vikram David Amar & David Reis, *Are Large Civil Fines for Minor Violations Unconstitutional? Applying Proportionality Standards Outside the Punitive Damages Context*, June 11, 2004, tinyurl.com/ma2wm2j8.

These concerns are magnified by the particular abuse of state power at issue in this case: a *parens patriae* action for the aggregated losses of Kentucky residents that manifestly would not survive as a private class action in state or federal court. Had a private plaintiff brought this case in federal court, many of the purported class members would not have met Article III standing requirements. That is because many players for whom the State sought recovery suffered no injury-in-fact—they may have experienced a few fleeting losses, but they ultimately emerged from their poker games as a winner. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 140 S. Ct. 2190, 2208 (2021) (quoting reference omitted). But because Kentucky brought this action in its own name in state court, the constitutional limits

on federal jurisdiction provided no barrier to its recovering the "losses" of players who experienced no concrete injury.

Similarly, had a private plaintiff brought this case as a class action in federal *or* state court, he would have had to satisfy multiple threshold requirements—numerosity, typicality, and commonality—before the court would certify the class. Fed. R. Civ. P. 23; Ky. R. Civ. P. 23.01. But Kentucky bypassed those barriers by bringing an action in its own name for the combined losses of its residents. In this way, "*parens patriae* litigation can evade virtually all of the class action hurdles that have been erected by Congress and the Supreme Court." Margaret S. Thomas, Parens Patriae *and the States' Historic Police Power*, 69 S.M.U. L. Rev. 759, 764 (2016); *see also* William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 Tul. L. Rev. 1885, 1901 (2000) (describing abuses associated with *parens patriae* suits, including "dubious legal theories").

The Excessive Fines Clause provides a constitutional failsafe where these other constitutional and statutory provisions provide no limit on the State's power. And this case exemplifies the very type of abuses that the Excessive Fines Clause aims to prevent. As this Court has recognized, States may be motivated to pursue fines "in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a State money." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (cleaned up). It is for precisely these reasons that the Excessive Fines Clause requires the Court to "scrutinize governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991).

The Kentucky Supreme Court failed to apply the required scrutiny here. Kentucky officials have made no secret that they are vigorously pursuing the billion-dollar judgment to plug holes in the state budget. In its brief seeking discretionary review before the Kentucky Supreme Court, the State emphasized that the size of the award, representing "more than 10% of the Commonwealth's annual budget," provided a "special reason" for the court's intervention. And after the Kentucky Supreme Court reinstated the damages, the governor pledged to "take aggressive steps to collect the judgment" in order to "help our businesses, provide quality health care to more Kentuckians, strengthen our public schools and keep our promise[s] to educators and other public employees." Office of the Governor, Press Release (Dec. 17, 2020), https://tinyurl.com/2m7vsy74. Notably absent from the governor's list of priorities was addressing the gambling-related problems that supposedly justified the billion-dollar judgment. And nothing in the Kentucky Supreme Court's order constrains the State from using the money for any purpose it wishes—including easing the tax burden on voters at the expense of a foreign defendant.

2. This Court's intervention is also warranted because the excessive judgment below creates serious federalism concerns. The Kentucky Supreme Court imposed a calamitous fine in order to punish and deter what it repeatedly described as "illegal internet gambling." Pet.App.21a. But online poker is legal in at least three States, and multiple others are considering bills to allow online gaming. *See* Nev. Rev. Stat. § 463.016425(1)(a); N.J. Stat. Ann. § 5:12-95.17(*l*); Pa. Cons. Stat. § 13B11. The billion-dollar judgment in this case will have inevitable spillover effects on petitioners' ability to conduct business in States where its activity is perfectly legitimate. Kentucky has no power to dictate policy for its sister States. This Court has made precisely that point in *Philip*

Morris USA v. Williams, 549 U.S. 346 (2007), where it invalidated a $79.5 million judgment against a cigarette manufacturer in light of "the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.,* banning cigarettes) upon other States." *Id.* at 355; *accord Gore*, 517 U.S. at 571 (instructing that States' power to punish is "constrained by the need to respect the interests of other States").

3. This case provides an ideal vehicle in which to consider the important questions raised in the petition. Each of the questions presented is outcome-determinative and would independently require vacatur of the Kentucky Supreme Court's decision. Moreover, as it comes to the Court, there are no lingering questions of state law presented in this case that could jeopardize this Court's ability to reach the merits of the federal questions.

In sum, the numerous errors in the Supreme Court of Kentucky's treatment of important questions of constitutional law call out for this Court's intervention, and this is the case in which to grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHERYL G. SNYDER
THERESA A. CANADAY
GRIFFIN TERRY SUMNER
JASON P. RENZELMANN
FROST BROWN TODD LLC
400 W. Market Street
32nd Floor
Louisville, KY 40202

LISA S. BLATT
Counsel of Record
CHARLES L. MCCLOUD
KATHERINE MORAN MEEKS
FARRAH BARA
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

AUGUST 23, 2021