No. A16-0874

State of Minnesota
In Supreme Court

Timothy Hall, Jr., et al.,

Appellants-Plaintiffs,

vs.

State of Minnesota, et al.,

Respondents-Defendants.

BRIEF OF AMICI CURIAE AARP & AARP FOUNDATION IN SUPPORT OF APPELLANTS

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Amici Identity, Interest, & Authority to File[1]

A. Identity of AARP & AARP Foundation

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. AARP and AARP Foundation also fight illegal or abusive practices that threaten the financial security and well-being of older people. This mission has led AARP and AARP Foundation to participate as amici curiae in state and federal courts nationwide.[2]

B. AARP & AARP Foundation's Interest in *Hall*

On a daily basis, older individuals contact AARP and AARP Foundation seeking assistance to protect their financial security from a myriad of threats. Every dollar counts for older individuals, the majority of whom live on a low and fixed income. Tens of millions of older people

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[1] Amici certify under Minn. R. Civ. App. P. 129.03 that: (1) no counsel for a party authored this brief in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of this brief other than Amici, its members, and its counsel.

[2] *See, e.g., Wayside Church v. Van Buren Cnty.*, 847 F.3d 812 (6th Cir. 2017) (challenging the constitutionality of a Michigan law that let a taxing authority keep surplus home equity after tax foreclosures); *Coleman v. District of Columbia*, No. 1:13-cv-01456-EGS, slip op. (D.D.C. Feb. 9, 2017) (preliminary order approving class action settlement) (addressing a Fifth Amendment takings claim, brought as a class action, that sought the return of surplus home equity after tax sales of homes).

have insufficient financial resources to meet their daily needs in terms of food, housing, adequate heating/cooling, and healthcare, let alone the costs of increased medical services. Their resources must also last longer than they may have anticipated due to increased longevity.

As a result, more and more people are taking steps to save for retirement—especially since defined pension benefit plans have become less and less common. Such steps include setting aside funds in saving accounts that are intentionally left dormant or purchasing insurance policies, certificates of deposit, and other financial instruments that can be stored in safe deposit boxes for decades. Wealthier individuals may similarly store valuable property for long periods of time to provide for their families or pass family heirlooms on to their progeny.

Such property is increasingly threatened by state laws that re-designate private property as abandoned or unclaimed, especially when these laws are coupled with aggressive government efforts to identify and take such re-designated property into state custody. In this regard, unclaimed property laws pose disproportionate risks to vulnerable older adults. Providing such adults with direct notice that the government is holding their property is essential to limit the property damage caused by unclaimed property laws and to alleviate the shock, fear, hardship, and significant frustration that these adults otherwise must endure as they try to discover and reclaim any property taken by the State.

Thus, AARP and AARP Foundation have a substantial interest in ensuring that Minnesotans receive effective, timely notice and just compensation for the State's seizure and public use of Minnesotans'

private property under the Minnesota Unclaimed Property Act, including bank accounts, insurance proceeds, securities, and inheritances.

C. AARP & AARP Foundation's Authority to File in *Hall*

On April 18, 2017, this Court granted AARP and AARP Foundation's request for leave to file an amici brief in *Hall*.

Introduction and Summary of Argument

The Minnesota Unclaimed Property Act ("MUPA"),[3] Minn. Stat. §§ 345.31–345.60, violates the due process requirements of the U.S. and Minnesota Constitutions.[4] MUPA requires banks, financial institutions, insurance companies, and other entities—on threat of criminal penalty—to surrender to the State any private property that MUPA presumes to be abandoned, including bank accounts, securities, and even the contents of safety deposit boxes. At the same time, MUPA does not require the State to mail notice of this seizure to affected owners or to use some other equally effective method of notice. MUPA instead leaves the State free to rely on a publicly-searchable website as the State's sole means of letting affected owners know that their property has been taken—even when the names and addresses of these owners are known to the State.

This violates due process. Rather than telling affected owners what they need to do to get their property back, the State expects affected owners to discover on their own that their property has been taken. This passive approach is not "notice" of any kind: it is the mere publication of government records. And even if this approach were considered a form of notice, it is not *constitutionally adequate* notice because it is not the best means practicable under the circumstances to inform affected owners

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[3] The full title of the law is the Minnesota Uniform Disposition of Unclaimed Property Act. *See* Minn. Stat. § 345.60.

[4] This Court has determined that "[t]he due process protection provided under [Article I, § 7 of] the Minnesota Constitution is identical to the due process guaranteed under the [U.S.] Constitution." *Sartori v. Harnischfeger Corp.,* 432 N.W.2d 448, 453 (Minn. 1988).

about the seizure of their property or how they can get it back. Indeed, website-only posting of MUPA-related information is guaranteed not to reach many affected owners, including many older individuals who: (1) have not yet adopted or learned to use Internet technology; or (2) have physical, cognitive, or other impairments that present major barriers to searching public websites to recover private property.

MUPA also violates Article I, § 13 of the Minnesota Constitution, which prohibits uncompensated government damage to private property. The State makes extensive use of all the private property that it seizes under MUPA. Yet, when the true owner of this property comes to reclaim it, MUPA lets the State return the value of the property as of the day the State seized it sans interest. By stripping private property of its ability to generate interest or grow in value while in state custody, MUPA damages this property, requiring just compensation under Article I, § 13.

Thus, AARP and AARP Foundation (together AARP) respectfully urge this Court to declare that MUPA is unconstitutional given its failure to afford Minnesotans due process and just compensation. MUPA lets the State seize private property without providing the best notice practicable to affected owners about how to recover their property. MUPA also lets the State maintain custody of private property and use it without paying interest to affected owners or accounting for increases in the property's value, damaging this property without just compensation.

Argument

I. The Minnesota Unclaimed Property Act violates due process by allowing the State to seize private property without providing affected owners reasonable notice of this seizure.

This case presents the Court with a constitutional issue of first impression in Minnesota. The Minnesota Unclaimed Property Act (MUPA), Minn. Stat. §§ 345.31–345.60, compels third-party custodians of private property to surrender this property to the State under threat of criminal penalties. Does the State afford due notice of this seizure to affected owners simply by posting information about the seizure on a website for the owners to discover? AARP and the AARP Foundation (together AARP) urge this Court to answer "no."

To begin with, the mere posting of information on a searchable website so that it may eventually be discovered by affected property owners in no way constitutes "notice." *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It is rather the opposite of notice: affected owners must discover on their own if the State has taken their property via affirmative and regular Internet searches. By contrast, notice would be a State letter mailed to each owner whose name and address is known to the State. MUPA thus violates due process because the mere opening of government records to public inspection is not the same thing as "appris[ing] interested parties … and afford[ing] them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

But even if website-only posting of information is a form of notice, such notice still falls far short of the kind of notice that due process

requires. This is because *all* Minnesotans are entitled to due process—not just those Minnesotans who happen to have the experience, skill, and capacity to navigate the Internet and discover that the State is holding their property. Website-only posting of information, in turn, is highly unlikely to apprise *all* Minnesotans of their rights, especially many older individuals who: (1) have not yet adopted or cannot afford to buy Internet-connected technology[5] (e.g., smartphones and broadband); (2) do not know about www.missingmoney.com or how to search it; or (3) face a variety of other technological, physical, or cognitive barriers.[6]

In sharp contrast, more traditional means of direct notice, such as service by first-class mail, are far more likely to apprise affected owners of their property rights, regardless of the unique circumstances noted above. *See Mullane*, 339 U.S. at 313 ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding."). For this reason, MUPA fails to provide the "notice" that all Minnesotans are entitled to as a matter of due process under both the U.S. Constitution and the Minnesota Constitution.

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[5] *See* Monica Anderson & Andrew Perrin, *Tech Adoption Climbs Among Older Adults,* PEW RESEARCH CTR., May 2017, at 3, *available at* http://pewrsr.ch/2qOAO4s ("[D]espite … [recent] gains, many seniors remain largely disconnected from the digital revolution.").

[6] *See* NAOMI KARP & RYAN WILSON, AARP PUB. POL'Y INST., PROTECTING OLDER INVESTORS: THE CHALLENGE OF DIMINISHED CAPACITY 1–4 (2011), http://bit.ly/2qeCPYS; Daniel Marson & Charles Sabatino, *Financial Capacity in an Aging Society*, GENERATIONS: J. OF THE AM. SOC. ON AGING, July 2, 2012, http://bit.ly/1moAJIL (discussing the prevalence of various medical conditions that impact financial capacity).

A. Use of a searchable website alone to inform individuals about seizures of their property denies due process, as this puts the burden on owners to find their seized property.

Notice is an essential element of due process. In *Baldwin v. Hale*, 68 U.S. 223 (1863), the U.S. Supreme Court made this clear:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.

Id. at 233. In short, the "right to be heard has little reality or worth unless one is informed" of this right. *Mullane,* 339 U.S. at 314.

Due process therefore requires notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present their objections." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010). This means "timely and accurate notice," including a detailed explanation of the proceeding or deprivation at issue. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *see Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). The notice must also be "the best practicable" in terms of explaining an affected party's rights. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Due process also requires that "notice be reasonably calculated to reach interested parties." *Goldsworthy v. State Dep't of Pub. Safety*, 268 N.W.2d 46, 48 (Minn. 1978). "[D]ue process requires notice to *all* affected parties"—reaching only *some* affected parties will not do. *Batinich v. Harvey*, 277 N.W.2d 355, 358 (Minn. 1979) (italics added) (holding that

due process was denied when notice was not provided to all owners and occupants of the land at issue); *see Etzler v. Mondale*, 123 N.W.2d 603, 611 (Minn. 1963) (requiring service to be made upon owners or occupants of land, and rejecting publication and posting as inadequate notice even though it was expressly permitted by Minn. Stat. § 505.14).

Against these due process principles, the State's sole reliance on a publicly searchable website—www.missingmoney.com—to inform property owners about MUPA seizures cannot stand. (*See* Hall.Add.03.) Rather than directly tell property owners (e.g., via mail delivered to their last known addresses) about the seizure of their property under MUPA, the State deems it reasonable to burden these owners to conduct diligent, regular searches of a public website. But to expect that individuals whose property was seized precisely because it seemed abandoned will conduct such Internet searches is inherently unreasonable. Many people may even be surprised to learn that MUPA lets the State deem the property in their bank accounts or safe deposit boxes as abandoned and then seize it.[7]

It is further unreasonable for the State to assume that posting information on a website is adequate to inform affected owners about the redesignation and seizure of their property. Such an assumption amounts to a belief in "the vagaries of 'word of mouth' referral" that was rejected in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.14 (1978). Notwithstanding the handful of MUPA-related events at the State Fair

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[7] *See* Paul Demko & Briana Bierschbach, *State's Unclaimed Property Cache Grows*, MINN. LAWYER, Feb. 15, 2013, http://bit.ly/2qPEIu2.

and the Mall of America every year that the State hosts to educate the public at large about www.missingmoney.com (*see* Hall.Add.03.), the owners of property seized under MUPA are not given constitutionally adequate notice merely because they may learn about the website.

Moreover, many older people do not drive and have inadequate access to other forms of transportation, thus preventing them from attending educational events on MUPA. People living in residential or nursing facilities are also unlikely to attend such events. Finally, the sheer physical expanse of Minnesota precludes much of the population from attending such events on those few occasions they are held. And so, "in the absence of effective notice" about MUPA, "due process rights … such as the right to a timely hearing … are [being] rendered fundamentally hollow." *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005).

B. In evaluating the sufficiency of electronic forms of notice, the Court must consider the significant digital divde that exists in regard to technology adoption by older adults.

The U.S. Supreme Court has emphasized that due process requires the government to "consider unique information about an intended [notice] recipient *regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case*." *Jones v. Flowers,* 547 U.S. 220, 231 (2006) (italics added) (holding that due process was not satisfied where a taxing authority knew a person did not have notice because a certified letter to him was returned undelivered). Courts must give "due regard for the practicalities and peculiarities of the case" to determine whether due process has been satisfied. *Mullane*, 339 U.S. at 314. In this

regard, the capacities and circumstances of vulnerable older adults have been found relevant to determine if a given form of notice is adequate to satisfy the constitutional requirements of due process.

For example, in *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009), the district court issued an injunction to prevent the government from terminating in-home care benefits, when, in part, notice of the benefits termination did not account for the recipients' needs based upon their advanced age and/or disabilities. As the court explained: "The notice is … difficult to read. The print is small, single-spaced and in all capital letters. It contains unexplained acronyms …. The elderly and disabled individuals reading these notices will have a difficult time understanding them, let alone taking the affirmative action required." *Id.; see also Brown v. Giesecke,* 338 N.Y.S.2d 967, 969 (N.Y. App. Div. 1972) (holding that a notice was constitutionally inadequate based on the intended recipient's "advanced age and lack of experience and understanding").

Likewise, in *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980), participants in a Medicare program brought a class action to challenge federal agency procedures for resolving disputes over Medicare benefits of less than $100. Acknowledging the ages of the putative class members, the D.C. Circuit concluded that neither the notice nor hearing aspect of the government procedures passed muster. "It is universally agreed that adequate notice lies at the heart of due process. [Absent adequate notice], a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process." *Id*. at 170. The court "referr[ed] to the unique

characteristics of the group involved … to appraise the accentuated effects of [the] notice defects." *Id*. The court also drew upon congressional findings that "the elderly, as a group, are less able than the general populace to deal effectively with legal notices and written registration requirements," thus limiting their capacity to enroll for Medicare benefits. *Id*. (citing S. Rep. No. 1230, 92d Cong., 2d Sess. 38 (1972)).

In *Vargas v. Trainor,* 508 F.2d 485 (7th Cir. 1974), the Seventh Circuit concluded that a notice reducing or terminating public assistance was constitutionally inadequate given the capacities and characteristics of the affected individuals. The challenged notice required benefit recipients to "manage to meet" with their caseworkers, process information, and make a reasoned decision within 10 days. *Id*. at 490–91. The court found "[t]he notice is addressed to persons who are aged, blind, or disabled, many of whom defendant could have anticipated, would be unable or disinclined, because of physical handicaps, and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action." *Id*.

Minnesota courts similarly have recognized that "[t]he degree of notice required does not follow one specific, technical definition and varies 'with the circumstances and conditions of each case.'" *Plocher v. Comm'r of Pub. Safety*, 681 N.W.2d 698, 703 (Minn. App. 2004) (quoting *In re Application of Christenson for a Permit to Drain Wetland 47-219*, 417 N.W.2d 607, 611–12 (Minn. 1987)). On this score, the State may argue that website-only posting of MUPA-related information is constitutionally adequate notice based on present circumstances and conditions—i.e., the

seemingly ubiquitous adoption and use of the Internet and other digital technology. But this assertion falls apart when one considers facts related to whether the Internet and digital technology really enable vulnerable older people and others to protect their interests. A recent survey by the Pew Charitable Trusts reveals a significant digital divide when it comes to technology adoption by older adults—a divide that has continued to persist twenty years after digital technology started to become available for everyday uses. Among the survey's remarkable findings:

- "One-third of adults ages 65 and older say they never use the Internet and roughly half (49%) say they do not have home broadband services."[8]
- Only around "four-in-ten (42%) adults ages 65 and older now report owning smartphones."[9]
- Only "one-third (32%) of seniors say they own tablet computers, while about one-in-five (19%) report owning e-readers."[10]
- "[J]ust 26% of internet users ages 65 and over say they feel very confident when using computers, smartphones, or other electronic devices to do the things they need to do online."[11]
- "Older adults may also face physical challenges that might make it difficult to use or manipulate devices."[12]
- "[M]any seniors who are older, less affluent or with lower levels of educational attainment continue to have a distant relationship with digital technology."[13]

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8 Anderson & Perrin, *supra* note 5, at 3.

9 *Id.* at 2.

10 *Id.* at 8.

11 *Id.* at 10.

12 *Id.* at 11.

13 *Id.* at 5.

AARP respectfully urges the Court to consider these realities in deciding the sufficiency of website-only posting of information as a matter of notice and due process. Due process is not guaranteed to *all* if the State does not account for octogenarians and nonagenarians, among others, who may not yet have transitioned to using the Internet as quickly or as easily as tech-savvy Millennials or even many Baby Boomers. Until the digital divide is finally closed, due process demands that the State's provision of notice under MUPA be responsive to the conditions and circumstances of individuals who have not yet made the transition. The State must not be relieved of its obligation to ensure due process to all Minnesotans just because improved technology provides added options for the State to open its records to public inspection.

C. The State should use direct mail to notify owners that their property has been seized under MUPA.

Notice by direct mail satisfies due-process requirements because "[i]t is assumed that mail[,] properly addressed and posted, with postage prepaid, is duly received by the addressee." *Nemo v. Local Joint Exec. Bd. & Hotel & Rest. Emp. Local No. 556*, 35 N.W.2d 337, 339 (Minn. 1948); *see also Mullane*, 339 U.S. at 314. Many older people are more familiar with notice by direct mail as a means of receiving important information. Some may not even recognize that notice through electronic means may affect their rights. As such, the State's experiment with website-only posting of MUPA-related information is constitutionally indefensible. The most that can be said about this experiment is that a large contingent of affected owners—those who have not yet adopted Internet technology or are

unable to use it effectively (e.g., due to vision or capacity impairments)—will receive no notice due under MUPA at all.

In *Meadowbrook Manor, Inc. v. City of St. Louis Park*, this Court held that a published notice of tax assessment violated due process. 104 N.W.2d 540, 544–45 (Minn. 1960). The Court required this notice to be mailed directly to the taxpayer. *Id.* This Court found no "compelling or even persuasive reasons" for the State's failure to provide such notice by mail. *Id*. There are likewise no "compelling or even persuasive reasons" why the State cannot mail letters to the last known address of persons whose private property has been surrendered to the State under MUPA—at least, not so long as "[g]overnment is instituted for the security, benefit and protection of the people." Minn. Const. art. I, § 1.

The constitutional importance of MUPA-related notices being mailed directly to affected property owners is all the more compelling when one considers the purpose of providing such notice: to reunite Minnesotans with their presumptively forgotten—and often highly valuable—private property. As a steward of its citizens' forgotten property, the State bears a responsibility "[i]n the interests of good government" to see that notice is provided to all affected owners in a manner that *the State itself* expects will succeed—and not in a manner that raises doubt about whether the State *wants* notice to be effective. *Meadowbrook Manor, Inc.*, 104 N.W.2d at 545. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish

it." *Mullane,* 339 U.S. at 314–15. Posting records on a website about private property the State has taken is a mere gesture where affected owners, including many older people, are likely never to see it.

II. The Minnesota Unclaimed Property Act violates Article I, § 13 of the Minnesota Constitution, which protects private property against takings more broadly than the U.S. Constitution.

A. Unlike the U.S. Constitution, the Minnesota Constitution mandates just compensation for government conduct that *damages* private property, as well as takes it.

The Fifth Amendment to the U.S. Constitution states: "[N]or shall private property be taken for public use, without just compensation." This Takings Clause sets a "federal baseline" with respect to government takings that resolves many key questions about what is a government taking. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005). For example, this baseline establishes that *all* private property is protected from uncompensated government takings, be it real property or personal property. *See Horne v. U.S. Dep't of Agric.,* 135 S. Ct. 2419, 2426 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

States may subsequently regulate government takings in ways "that are stricter"—i.e., more protective of property rights—"than the federal baseline." *Kelo*, 545 U.S. at 489. The Minnesota Constitution does just this. "The language of the Minnesota Constitution is broader than the Takings Clause of the Fifth Amendment to the U.S. Constitution." *DeCook v. Rochester Int'l Airport Joint Zoning Bd.,* 796 N.W.2d 299, 305 (Minn. 2011).

While the Takings Clause only requires government compensation when private property is "*taken* for public use," Article I, § 13 of the Minnesota Constitution provides that "[p]rivate property shall not be taken, *destroyed or damaged* for public use without just compensation therefor, first paid or secured." (italics added). As a result, "[e]very owner [in Minnesota] is constitutionally entitled to a just and equal application of the rule that what he owns shall not be taken from him *or destroyed or damaged* for public use without just compensation." *State by Lord v. Rust*, 98 N.W.2d 271, 280 (Minn. 1959) (italics added).

Article I, § 13 did not always read this way. When the Minnesota Constitution was enacted in 1858, Article I, § 13 read "[p]rivate property shall not be taken for public use without just compensation therefor, first paid or secured." The words "destroyed or damaged" were absent, and this made a big difference. In *Henderson v. City of Minneapolis*. 20 N.W. 322 (Minn. 1884), the plaintiff sought just compensation for a city's "raising of the grade of [a] street," which rendered the plaintiff's private property "inaccessible" and left its overall value "greatly diminished." *Id.* at 322. This Court found, however, that "[r]aising the grade of [a] [public] street … is not a taking of plaintiff's property for which, under the constitution, compensation must be made" because the "injury complained of is merely a consequence of the exercise of a legal right which the public acquired, and to which plaintiff's [private] land became subject, when the [adjacent] land was taken for a street." *Id.* at 323–24. Put another way, Article I, § 13, did not cover damage done to the value of private property

by changes in the grade of public streets, as this was not a direct, physical appropriation (i.e., "taking") of private property. *See id.*

The people of Minnesota responded to *Henderson* (and related cases) with a constitutional amendment in 1896 adding the words "destroyed or damaged" to Article I, § 13. *See* Act of March 23, 1895, ch. 5, 1895 Minn. Laws 11, 11–12. This Court detailed the groundbreaking force of this amendment in *Dickerman v. City of Duluth*, 92 N.W. 1119 (1903). As the Court explained, "[w]hen this amendment was … adopted by the people, it was well known that the rule which had been laid down by this court …. respecting damages to lot owners arising from a change of grade … was an exceedingly unfair and unjust rule." *Id.* at 1120. This rule meant "[n]o man was safe, when improving his property, by building in conformity with an established grade line, for he was at the mercy of the city authorities, who might practically confiscate his property by raising or lowering the surface or grade line of the street." *Id.*

The addition of "damaged or destroyed" to Article I, § 13 ended this hardship. Now "recovery [could] be had where private property has sustained a substantial damage"; no "trespass or actual invasion" was required. *Id.* at 1120. And this amendment was not confined to changes in street grading but rather spoke of all "damage" to private property in general. Hence, in the 114 years since *Dickerman*, the Court has taken a broad view of the kind of "damage" that Article I, § 13 covers. *See, e.g.*, *Sallden v. Little Falls*, 113 N.W. 884, 885 (Minn. 1907) (Article I, § 13 mandates compensation for damage to private property caused by a

city's initial grading of a street, as much as any later change in grading); *State by Humphrey v. Strom*, 493 N.W.2d 554, 561 (Minn. 1992) (Article I, § 13 mandates compensation for damage to private property in terms of an obstructed view caused by a taking of adjacent property).

Special care is thus required when interpreting Article I, § 13. "[T]he clear intent of Minnesota law is to fully compensate its citizens for losses related to property rights incurred because of state actions." *Strom*, 493 N.W.2d at 559. For this reason, the Court "relies heavily" on "reasoning by analogy to previous takings cases" and on the Court's own precedents "interpreting and analyzing the Minnesota Constitution when property owners have sought compensation under its provisions." *DeCook*, 796 N.W.2d at 305 (punctuation and citation omitted). And through this process, the Court has upheld the "most serious function of a supreme court": "to defend the constitutional safeguards of all the citizens of the state." *State v. Hamm*, 423 N.W.2d 379, 383 (Minn. 1988).

B. The Minnesota Unclaimed Property Act strips unclaimed private property of its ability to grow in value, damaging this property without just compensation.

Under MUPA, certain types of private property are "presumed abandoned" based on a lack of owner interaction for a three-year period. This includes bank accounts (*see* Minn. Stat. § 345.32), life insurance proceeds (*see id.* § 345.33), and even securities (*see id.* § 345.35). In concrete terms, a bank account, for example, may be "presumed abandoned" if the account holder has not done any of the following in three years: altered the account balance; written the bank about the account; given the bank a

standing directive about the management of the account; received regular reports about the account by mail; or otherwise interacted with the bank concerning other accounts. *See* Minn. Stat. § 345.32(a).

Once it is triggered, MUPA requires banks and other institutions to report and "pay or deliver" to the Minnesota Commissioner of Commerce any private property that is "presumed abandoned." *See* Minn. Stat. §§ 345.41 (reporting requirement); 345.43, subd. 2(a) (pay-or-deliver requirement). If this delivered property is money, the Commissioner must deposit it into the state general fund. *See* Minn. Stat. § 345.48. As for tangible property and securities, the Commissioner may sell this property and then must deposit any proceeds in the state general fund. *See* Minn. Stat. § 345.47, subd. 1 & subd. 3. The Commissioner is then responsible in perpetuity for hearing and paying valid claims to this property made by true owners. *See* Minn. Stat. §§ 345.49 & 345.50.

MUPA thus enacts a regime in which the State "assume[s] custody and shall be responsible for the safekeeping" of private property that is presumed abandoned under MUPA. Minn. Stat. § 345.44. In 1945, this Court addressed the constitutional validity of Minnesota laws governing unclaimed bank accounts that predated MUPA but worked in a similar way: presumed abandonment based on account inactivity for a certain period of time (i.e., 20 years) followed by state custodianship of these accounts and repayment of them if claimed by their true owners within 10 years. *See State v. Nw. Nat'l Bank*, 18 N.W.2d 569, 573–74 (Minn. 1945). The Court found this system to be valid only insofar as "the state in

acquiring such [bank] deposits holds them subject to all lawful demands of the true owner." *Id.* at 575. As the Court emphasized, "[w]e have in this case no *alteration* of the contracts of the depositors, no *confiscation* of property or property rights, and no *harshness* in the treatment of either depositor or depository." *Id.* at 577 (italics in original).

The same is not true of MUPA.

Imagine a savings account that contains $100,000 that is subject to a contractual 1% annual interest rate. For every year the bank holds the account, the depositor is entitled to a 1% interest payment ($1,000) from the bank. Once the depositor's account triggers MUPA's presumption of abandonment, however, the bank must hand the depositor's $100,000 over to the State and "the owner is not entitled to receive income or other increments accruing thereafter." Minn. Stat. § 345.45. Put another way, no matter when the depositor comes forward to reclaim his account, he loses the right to recover the 1% interest that his account would have accrued in the interim. *Id*. The depositor can only recover $100,000 total.[14]

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[14] By contrast, Minn. Stat. § 289A.56 requires the Minnesota Department of Revenue to pay interest on tax overpayments—i.e., money paid to the State that the State was not entitled to hold. There is no credible distinction between the State paying interest on a tax refund and the State paying interest to the rightful owners of unclaimed property, especially when the State has enjoyed the benefit of the latter property. *See* Demko & Bierschbach, *supra* note 7 ("[U]nclaimed property proceeds sit available for use in the state's general fund until they are claimed. And while owners can come forward to ask for their assets … the state can use that cash for the budget or other needs in the meantime.").

The depositor also cannot recover this 1% interest from her bank because MUPA establishes that "[a]ny person[15] who pays or delivers abandoned property to the [C]ommissioner … *is relieved of all liability … for any claim … which thereafter may arise or be made … by any claimant."* Minn. Stat. § 345.44 (emphasis added). MUPA thus effects an "alteration of the contract[] of the depositor[]" by rendering unenforceable the contractual requirement that 1% interest be paid to the depositor. *Nw. Nat'l Bank*, 18 N.W.2d at 577. And so long as the State has custody of the $100,000, the depositor cannot recover any interest on it.

This constitutes government damage to and destruction of private property, no different from the street-grading cases of yesteryear. *Cf. DeCook*, 796 N.W.2d at 305 (explaining this Court "relies heavily" on "reasoning by analogy to previous takings cases"). While cities had every right to set the grade of public streets, this Court recognized that the exercise of this right had nevertheless damaged the value of adjacent private property and just compensation was required. *See Dickerman,* 92 N.W. at 1120. The same goes here. The State undoubtedly has the power to assume custody of bank accounts and similar funds "when they have been inactive so long as to be presumptively abandoned." *Nw. Nat'l Bank*, 18 N.W.2d at 575. But this power does not excuse the damage that MUPA does by eliminating the interest that presumed-abandoned funds would otherwise generate for their true owners. And under the amended text of Article I, § 13, such "damage" requires just compensation.

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[15] Under MUPA, "person" includes "business associations" and "any other legal or commercial entity." Minn. Stat. § 345.31, subd. 8.

C. The Court of Appeals overlooked Article I, § 13's unique protection against government damage to private property, and instead relied on inapposite federal case law.

In this case, the Court of Appeals had to consider whether MUPA causes an unconstitutional taking insofar as it enables the State to assume custody of presumptively abandoned private property and then avoid "compensat[ing] owners for the loss of use of that property, including the ability to earn interest on the seized property." (Hall.Add.74.) The panel answered this question "no." (Hall.Add.77.) This conclusion, however, reflects a systematic failure to account for the unique text and history of Article I, § 13 in terms of government takings. The errors listed below show this failure. Each merits reversal of the panel's decision.

First, the Court of Appeals misconstrued the plain text of Article I, § 13. According to the panel: "The Minnesota Constitution provides that '[p]rivate property shall not be taken … for public use without just compensation.'" (Hall.Add.74.) The panel literally reads the words "damaged or destroyed" out of Article I, § 13, replacing them with an ellipsis. But as this Court has noted, "[t]he change in our constitution by which compensation is secured where private property is taken 'or damaged' for a public use was for the purpose of awarding appropriate relief *in all instances where public use requires the invasion of private rights.*" *Sallden*, 113 N.W. at 885 (emphasis added). The Court of Appeals was not free to ignore this reality in construing Article I, § 13.

Second, the Court of Appeals' conclusion that MUPA does not violate Article I, § 13 of the *Minnesota* Constitution is based entirely on

federal case law. As the panel states: "Based on United States Supreme Court precedent, MUPA does not result in an unconstitutional taking." (Hall.Add.77.) But the fundamental duty of Minnesota courts in construing the Minnesota Constitution is "to ascertain and give effect to the intent of the constitution as indicated by the framers and the people who ratified it." *Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005).[16] That duty is even more vital when the language of the Minnesota Constitution "is different from"—and broader than—"the language used in the U.S. Constitution." *Id.* at 828. As explained above, that duty readily applies to Article I, § 13. *Cf. DeCook*, 796 N.W.2d at 305 ("[W]e rely upon our cases interpreting and analyzing the Minnesota Constitution when property owners have sought compensation under its provisions.").

Third, to the extent the Court of Appeals saw fit to rely on federal case law to interpret Article I, § 13, it relied on the wrong cases. The panel relied solely on the U.S. Supreme Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which upheld a state law governing the abandonment of mineral leases. (Hall.Add.75–77.) The panel cited *Texaco*'s holding that "private property may be deemed to be abandoned and to lapse upon failure of its owner to take reasonable actions imposed by law, [and] this Court has never required the State to compensate the owner for the consequences of his own neglect." *Id.* at 530. (Hall.Add.75.)

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[16] The Court of Appeals further disregarded this Court's admonition that "[w]hile a decision of the [U.S.] Supreme Court … may be persuasive, it should not be automatically followed or our separate constitution will be of little value." *Hamm*, 423 N.W.2d at 382.

But when it comes to private property like bank accounts, the U.S. Supreme Court has established that the state cannot expropriate such property based on a statutory presumption of abandonment triggered by account inactivity—i.e., dormancy. *See Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 250–52 (1944). Dormancy only permits a state to "tak[e] inactive bank accounts into its custody, [with] the state assuming the bank's obligation to the depositors" (e.g., payments of interest). *Id.* at 251–52. By contrast, confiscation occurs when a law declares "escheat of depositors' accounts merely because of their dormancy for the specified period, without any determination of abandonment in fact." *Id.* at 251.

This reasoning tracks Minnesota law. As this Court has observed, a "fallacy … lies in assuming that a failure to use and occupy [private property] for a certain period of time conclusively establishe[s] the design to abandon, as well as a complete abandonment." *Rowe v. Minneapolis*, 51 N.W. 907, 908 (Minn. 1892). Abandonment must be *proven*, not *presumed*, before the government may expropriate private property without paying just compensation. *See Anderson Nat'l Bank*, 321 U.S. at 250 ("It will be noted that the statute required no proof that the forfeited accounts had been in fact abandoned, or that their owners were unknown or had died without heirs or surviving kin."). The Court of Appeals thus erred in conflating MUPA's presumption of abandonment (dormancy) with actual abandonment, and then holding that the latter concept vindicates MUPA under Article I, § 13 because the State is not required to "compensate the owner for the consequences of his own neglect." (Hall.Add.75.)

In summary, based on the unique text and history of Article I, § 13, as well as relevant case law (both state and federal), the Court of Appeals should have recognized that MUPA executes an unconstitutional taking. "If valuable property rights can … be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property." *Schussler v. Bd. of Comm'rs*, 70 N.W. 6, 7 (Minn. 1897); *see also Burger v. St. Paul*, 64 N.W.2d 73, 82 (Minn. 1954) ("[Article I, § 13] means that just compensation for property taken for public use is addressed to every sort of interest the citizen may possess."). For this reason, the Court should reverse the decision below, as "there is no constitutional guaranty that … [has] to be more jealously guarded against encroachment than" just compensation for government takings. *Weaver v. Miss. & Rum River Boom Co.,* 11 N.W. 114, 114 (Minn. 1881).

Conclusion

AARP and AARP Foundation respectfully urge this Court to hold that: (1) the State's use of website-only notice under MUPA contravenes state and federal due-process requirements; and (2) MUPA's denial of interest and other compensation to the true owners of unclaimed property upon returning it—after the State has made public use of this property—violates Article I, § 13 of the Minnesota Constitution. The Court should then remand this case for further proceedings.

Respectfully submitted,

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Certification of Brief Length

The undersigned counsel certifies that this *amici* brief conforms to the requirements of Minn. R. App. P. 132.01 in that it is printed using 13–point, proportionally-spaced fonts. The length of this document is 6,845 words according to the Word Count feature of the word-processing software used to prepare this brief (Microsoft Word 2010).

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