

NO. 111903
IN THE
SUPREME COURT OF ILLINOIS

<p>W. Rockwell Wirtz, an individual, and Wirtz Beverage Illinois, LLC, an Illinois limited liability company, on behalf of and for the benefit of the Taxpayers of the State of Illinois,</p>)	
<p>Plaintiffs-Appellants-Respondents,</p>)	<p>On Petition for Leave to Appeal from the Illinois Appellate Court, First District, Nos. 1-09-3163 & 1-10-0344</p>
<p>v.</p>)	
<p>Hon. Patrick Quinn, in his official capacity as Governor of the State of Illinois; Daniel W. Hynes, in his official capacity as Comptroller of the State of Illinois; Alexi Giannoulis, in his official capacity as Treasurer of the State of Illinois; The Illinois Department of Revenue and its Director Brian Hamer; The Illinois Gaming Board and its members Hon. Aaron Jaffe, Charles Gardner, Rev. Eugene Winkler, Joe Moore, Jr. and Hon. James E. Sullivan in their official capacities; the Illinois Lottery and its Superintendent Jodie Winnett,</p>)	<p>There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division, Tax and Miscellaneous Remedies Section, No. 09 CH 30136 (transferred to Law Division)</p>
<p>Defendants-Appellees-Movants.</p>)	<p>Honorable Lawrence O’Gara, Judge Presiding</p>

**RESPONSE TO MOTION FOR ACCELERATED DOCKET
AND FOR CONTINUED STAY OF APPELLATE COURT JUDGMENT**

Plaintiffs-Appellants-Respondents W. Rockwell Wirtz and Wirtz Beverage Illinois, LLC (collectively, “Plaintiffs”), for their Response to Defendants-Appellees-Movants’ (the “State Parties”) Motion for Accelerated Docket and Continued Stay of Appellate Court Judgment (the “Motion”), state as follows:

FILED

FEB 23 2011

CHICAGO
SUPREME COURT CLERK

INTRODUCTION

This is a Response to the arguments made by the State Defendants with respect to the appropriateness of a stay and an accelerated docket and does not address the merits of the State Defendants' Petition for Leave to Appeal as of Right ("PLA"). Plaintiffs are filing simultaneously herewith an Answer to the PLA, which shows that the Appellate Court opinion should be affirmed and includes a chronology of events and some discussion on the merits, which are not included here.

ARGUMENT

Plaintiffs filed this taxpayer action to challenge the constitutionality of four Public Acts that became law in 2009, claiming these acts violated the Illinois Constitution's Single Subject Rule, Uniformity Clause, and prohibition against including substantive language in an appropriation bill, as well as the Illinois Constitution's provisions on separation of powers, the effective date of laws, presentment, and veto. (C 6-10, 12-13.)

In the order from which this appeal is taken, the Appellate Court found that one of the four acts, Public Act 96-34, "An Act concerning revenue," violates the Single Subject Rule, and declared it unconstitutional and void in its entirety. The Appellate Court concluded its single subject analysis by further holding that, because each of the other acts by their express terms is contingent upon Public Act 96-34 being law, the other three acts were invalid, as well.

The State Parties have moved this Court to accelerate the docket in this case under Supreme Court Rule 311(b) and to expand and continue, until this Court makes a final disposition in this case, the limited stay previously entered by this Court on February 1, 2011 staying, pending only disposition of the State Parties' Petition for Leave to Appeal, the enforcement of the Appellate Court's judgment.

Plaintiffs do not object to the briefing schedule proposed by the State Parties. However, while Plaintiffs in order to give the State Parties an opportunity for an orderly response to the Appellate Court's decision did not oppose the initial, limited stay that the State Parties requested, they oppose the indefinite stay requested here. Their reasons are as follows.

In the Circuit Court, the State Parties characterized Public Act 96-34 as a revenue act. At oral argument before the Appellate Court, they argued that Public Act 96-34 was a budget implementation act. Currently, the State Parties lump all four of the Public Acts together and characterize them as the Capital Projects Acts, with capital initiatives as their subject. Each of these characterizations, as demonstrated in Plaintiffs' Response to the PLA being filed contemporaneously with this Response, is quickly dispelled upon an examination of the actual content of the acts. For instance, the fact that substantial amounts of the revenue raised by these acts has been transferred to the General Revenue Fund and may be expended for any state purpose under the State Financial Act, 30 ILCS 105/7, refutes the contention that the acts relate only to capital projects. Further, Public Act 96-34 contains both revenue and expenditure provisions as in the bill found void in *People v. Olender*, 222 Ill. 2d 123 (2005).

Plaintiffs' rights in this controversy are protected by an existing escrow fund created for the liquor taxes pursuant to the Protest Monies Act, 30 ILCS 230/2a. However, the acts the Appellate Court invalidated imposed many other taxes and fees. The taxpayers paying those unconstitutional taxes are not similarly protected by any court-created escrow fund.

As yet at least, none of the acts invalidated by the Appellate Court have been re-enacted by the State. As shown below, large sums of money — over \$400 million — have been collected and expended by the State already. Taxpayers face the possibility of total loss of the money they have paid out under unconstitutional laws unless an escrow is now created.

Nonetheless, the indefinite stay the State Parties seek would subject the taxpayers to the taxes payable under these unlawful acts without offering any protection or relief. Accordingly, if this Court enters a stay, Plaintiffs ask this Court to modify the stay to protect all other taxpayers by instructing the State Parties to establish an escrow fund for all other tax and fee payments so that such taxpayers are protected if this Court affirms the Appellate Court.

Creating an escrow is a fair balance between the capital projects described by the state and the rights of taxpayers to refunds of unconstitutional taxes. The State has re-enactment readily available and even if only some or a portion of the acts at issue are re-enacted, those funds could be dedicated to capital projects — as the opposed to the situation now where the majority of funds go to General Revenue.

The acts Plaintiffs challenge impose substantial new taxes and fees. Tens of millions have been collected to date pursuant to their terms. Indeed, in a 14-month period, over \$402 million was deposited to and over \$249 million has been transferred to the General Revenue Fund. These acts purportedly create a special fund called the Capital Project Fund, and the taxes and fees they impose have been paid into that special fund since its creation. (*See* Public Act 96–34 creating Capital Project Fund; C 84; Supp. R. 4.)

The funds are then disbursed by the terms of Public Act 96–34, which mandates a series of initial transfers of hundreds of millions of dollars to the General Revenue Fund and that thereafter the first \$244 million each year is earmarked for transfer to the General Revenue Fund. It is only the remainder which is to be available for capital projects, and only if appropriated. (*See* Public Act 96–34; C84; Supp. R. 4.)

State records show that during the pendency of this action, from December 2009 through January 2011, over \$402 million was collected in this special fund and dispersed, with over \$249 million transferred directly to the General Revenue Fund. (Supp. R. 5–7.)

The State Finance Act, 30 ILCS 105/1, *et seq.*, provides that money deposited in the General Revenue Fund is used to pay for any state appropriation unless otherwise provided by law. 30 ILCS 105/7. Therefore, to date, more than half the money expended has been transferred to General Revenue Funds for use in normal state operations.

It should be noted that, while the State has argued to this Court that the bill is a capital projects bill, to date, its funds have been used primarily for General Revenue purposes. Public Act 96–34 by its terms annually provides \$244 million — nearly a quarter of a billion dollars — to the General Revenue Fund for any kind of general purpose expenditure.

While the PLA warns of the dire consequences attendant to the invalidity of the challenged acts, in the four weeks since the Appellate Court decision issued, it appears that the General Assembly has made no attempt to re-enact in constitutional form even the popular parts of these bills. If there is a compelling public need for certain provisions of these bills, those popular components could be re-enacted in constitutional form.

The State's inaction here indicates that unpopular measures are included in these acts, and that but for their unlawful joinder with the popular measures, they have insufficient support to be passed.

The State, while failing to take any action to re-enact the subject bills in a format that comports with the Single Subject Rule, continues sweeping into its funds tens of millions of dollars a month pursuant to these bills, the majority of which, by statute, has been re-directed into the General Revenue Fund for ordinary expenses.

In that regard, while this case is pending, tens of millions of dollars of taxes are being assessed and collected pursuant to these acts. The State goes to great lengths to show the protest fund for the liquor taxes exists, but there are tens of millions of dollars being collected each month pursuant to these acts not related to the liquor taxes. Plaintiffs note that the Attorney General has failed to take action to account for and protect taxpayer rights in the taxes collected that are not protected by Plaintiffs' protest fund. The State itself has pled that the only way for a taxpayer to recover moneys paid for an unconstitutional tax is pursuant to the Protest Money Act, which requires that an escrow in the State treasury be established for money paid the State subject to legal challenge. (*See C 1105, State's Additional Authority in Support of Memorandum of Law in Opposition to Petition for Leave to File Verified Complaint.*) Plaintiffs hereby waive any objection to the Attorney General establishing an escrow for all funds being collected from all other Illinois taxpayers whose taxes are not protected by the existing protest fund. Plaintiffs also hereby ask for, and seek an order requiring, an escrow of all taxes collected under the acts at issue to protect the public. Plaintiffs had no opportunity prior to this appeal to seek to establish an escrow as they were unlawfully denied leave to file their complaint below.

Any stay this Court orders should also order the State to establish an escrow in the State Treasury into which all moneys authorized to be collected under the substantive laws challenged here (Public Acts 96-34, 96-37, and 96-38) shall be paid, on a going-forward basis, until the final adjudication of this matter.

While a review of a decision declaring a statute unconstitutional is as of right, the fact the statute violates constitutional mandates is paramount to the review. The bills here violate our Constitution in several ways. This Court has steadfastly maintained that Illinois's constitutional supremacy doctrine forbids subordinating State constitutional provisions to legislative

expediency. See *People ex rel. Miller v. Hotz*, 327 Ill. 433, 437 (1927); *People v. Humphreys*, 353 Ill. 340, 342 (1933); *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 460 (1976). In *Hotz*, the Court stated:

The constitution is the supreme law, and every citizen is bound to obey it and every court is bound to enforce its provisions. It is a most extraordinary doctrine that the court has a discretion to enforce or not enforce a provision of the constitution according to its judgment as to its wisdom or whether the public good will be subserved by disregarding it.

327 Ill. at 437.

The State is raising arguments not embracing the gist and importance of steadfast adherence to the supremacy of our Illinois Constitution, citing legislative expediencies.

The Governor's Illinois Fiscal Year 2012 State Budget Book, published recently and after the Appellate Court ruling, proposes a budget for 2012 using the funds from these acts despite a judicial ruling that the challenged acts are unconstitutional and void. (Supp. R. 10, 12.)

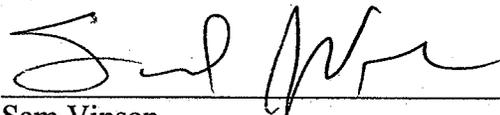
The purpose of a stay is to maintain the *status quo*. Collecting \$25 million a month and spending it on an unconstitutional law is not maintaining the status quo. Building a 2012 budget based on these bills after an Appellate Court has declared them unconstitutional demonstrates a blind commitment to tax and spend. Moreover, a stay in the form the Attorney General has proposed does nothing to protect taxpayer interests. Instead, it will require severe efforts to refund and unwind the harm of continued collection and spending of revenue unlawfully collected pursuant to the challenged acts.

CONCLUSION

FOR THESE REASONS, either independently or in combination, this Court should enter such orders as it deems just and proper and, should it choose to enter a stay, order the State and the State Treasurer to establish an account for the escrow of funds collected pursuant to the acts challenged herein.

Dated: February 23, 2011

Respectfully submitted,



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*Attorneys for Plaintiffs-Appellants-
Respondents W. Rockwell Wirtz and
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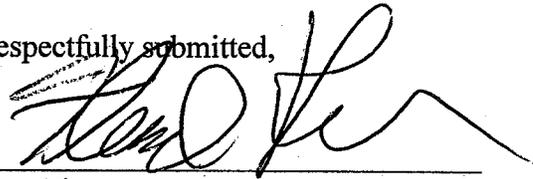
NOTICE OF FILING

TO: The Office of the Illinois Attorney General Hon. Steven M. Ravid, Clerk
100 W. Randolph Street Illinois Appellate Court, First District
Chicago, Illinois 60601 160 N. LaSalle St. Room S1400
Attn: Richard Huszagh, Assistant Attorney General Chicago, Illinois 60601

PLEASE TAKE NOTICE that on February 23, 2011, the undersigned caused to be filed with the Clerk of the Supreme Court of Illinois the accompanying **Response to Motion for Accelerated Docket and for Continued Stay of Appellate Court Judgment and Supporting Record to Response to Motion for Accelerated Docket and for Continued Stay of Appellate Court Judgment**, copies of which are submitted with this Notice.

Dated: February 23, 2011

Respectfully submitted,



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*Attorneys for Plaintiffs-Appellants-
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Wirtz Beverage Illinois, LLC*

PROOF OF FILING

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109, the undersigned, an attorney, certifies that, on February 23, 2011, she caused true and correct copies of the accompanying:

- (1) **Response to Motion for Accelerated Docket and for Continued Stay of Appellate Court Judgment;**
- (2) **Supporting Record to Response to Motion for Accelerated Docket and for Continued Stay of Appellate Court Judgment; and**
- (3) **Notice of Filing**

to be filed in accordance with Illinois Supreme Court Rules 361(c) and 373 by causing an original and five copies of the same to be sealed in a package addressed to:

Clerk of the Supreme Court of Illinois
Satellite Office
160 North LaSalle Street, 20th Floor
Chicago, Illinois 60601

and by causing single sets of copies of the same to be sealed in packages addressed to:

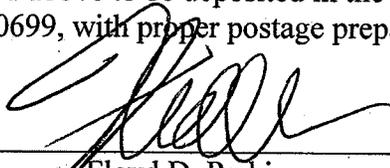
Honorable Robert R. Thomas, Justice
Supreme Court of Illinois
1776 South Naperville Road
Building A, Suite 207
Wheaton, Illinois 60187

Honorable Lloyd A. Karmeier, Justice
Supreme Court of Illinois
1100 South Mill Street
P.O. Box 266
Nashville, Illinois 62263

Honorable Rita B. Garman
Supreme Court of Illinois
3607 North Vermilion, Suite 1
Danville, Illinois 61832

Honorable Thomas L. Kilbride, Justice
Supreme Court of Illinois
1819 Fourth Avenue
Rock Island, Illinois 61201,

and then causing all of the packages referenced above to be deposited in the United States mail at 433 West Harrison Street, Chicago, Illinois 60699, with proper postage prepaid.



Floyd D. Perkins

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109, the undersigned, an attorney, certifies that, on February 23, 2011, she caused the accompanying:

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- (3) **Notice of Filing**

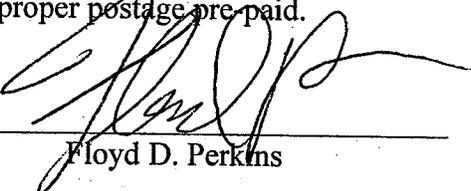
to be served on:

The Office of the Illinois Attorney General
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
Attn: Richard S. Huszagh, Assistant Attorney General

by causing true and correct copies of the same to be: (1) placed in a properly sealed envelope addressed to the counsel listed above and deposited in the United States mail at 433 West Harrison Street, Chicago, Illinois 60699, with proper postage prepaid; (2) delivered to the counsel listed above by electronic mail; and on:

Hon. Steven M. Ravid, Clerk
Illinois Appellate Court, First District
160 N. LaSalle St. Room S1400
Chicago, Illinois 60601

by causing true and correct copies of the same to be placed in a properly sealed envelope addressed to the individual listed above and deposited in the United States mail at 433 West Harrison Street, Chicago, Illinois 60699, with proper postage pre-paid.



Floyd D. Perkins