No. 111903

IN THE
SUPREME COURT OF ILLINOIS

W. ROCKWELL WIRTZ and WIRTZ BEVERAGE ILLINOIS, LLC, as taxpayers, Petitioners-Appellees, v. 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 GIANNOULIAS, in his official capacity as the 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; and the ILLINOIS LOTTERY and its Superintendent JODIE WINNETT, Respondents-Appellants.	))	On Appeal from the Appellate Court of Illinois, First Judicial District Nos. 1-09-3163 & 1-10-0344, 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), The Honorable LAWRENCE O'GARA, Judge Presiding.

REPLY BRIEF OF RESPONDENTS-APPELLANTS

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ARGUMENT

I. Public Act 96–34 Satisfies the Single Subject Clause.

Public Act 96–34 satisfies both requirements of the Single Subject Clause. It has a permissible single subject: the 2009 capital program. And each provision has a natural and logical connection to that subject. Contrary to Plaintiffs' claims, Public Act 96–34 is not filled with discordant provisions related only by a "tortured connection" to a subject that is hopelessly nebulous — and consequently meaningless — like "governmental matters." *Arangold Corp. v. Zehnder,* 187 Ill. 2d 341, 353 (1999).

In contrast to Plaintiffs' cramped reading of the Single Subject Clause, *Arangold* reaffirms that "[t]he term 'subject' is *comprehensive* in its scope," and that a law "may include all matters germane to a *general* subject, including the means reasonably necessary or appropriate to the accomplishment of a legislative purpose." 187 Ill. 2d at 352 (emphasis added, citation and internal quotation marks omitted). Thus, the Single Subject Clause does not "handicap the legislature by requiring it to make unnecessarily restrictive laws." *Cutinello v. Whitley,* 161 Ill. 2d 409, 423 (1994). Yet that is what Plaintiffs' approach would do, unduly impeding the General Assembly's ability to address significant public concerns with solutions commensurate to the corresponding need. The Constitution does not mandate piecemeal responses to major economic and infrastructure issues. A statewide capital program is a proper single subject of legislative action.

Plaintiffs seek to avoid the broad principles announced in *Arangold* by arguing that they do not extend beyond the unique category of budget implementation bills, which they characterize as nothing more than one-year budget plans whose provisions are confined to ensuring that program expenditures do not exceed revenues and appropriations. (Pl. Br. at

29-31.) That category, Plaintiffs insist, does not include a capital program that initiates and provides revenues and funding mechanisms for several multi-year projects. Quoting the Governor's fiscal year 2010 budget, Plaintiffs emphasize that "capital budgets are not limited to a particular fiscal year." (Pl. Br. at 33, n. 10; see also *id.* at 36.) That is true, but beside the point. While the Illinois Constitution specifically exempts appropriation bills from the Single Subject Clause, Ill. Const., art. IV, § 8(d), there is no similar exemption for budget implementation bills, which must therefore meet the same standards as other legislation. In addition, the Court has recognized the validity and utility of multi-year spending commitments by the State. *Graham v. Illinois State Toll Highway Auth.*, 182 Ill. 2d 287, 301-07 (1998). Thus, there is no talismanic significance under the Single Subject Clause to whether a bill's provisions relate to implementing a budget only for one year, or instead relate to implementing a capital program intended to produce assets with a longer economic benefit to the State and people of Illinois. In fact, the significant planning and construction time that go into any major infrastructure project is bound to cut across multiple fiscal years.[1]

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[1] The budget document relied on by Plaintiffs (part of which is included in their Separate Appendix, at 154-56) also states:

> A capital budget is a spending blueprint that identifies capital projects that generate assets with a long economic life, such as roads and bridges, transit facilities, schools, economic development projects, environmental infrastructure, energy programs and state facilities.
>
> Types of expenditures in the capital budget include financial and physical planning, land acquisition, architecture and engineering, construction, purchases of durable equipment, and grants and loans to other entities for capital purposes. The capital budget also recommends funding sources including bond proceeds, federal funds and current revenues.

See *www.state.il.us/budget/FY2010/FY2010_Capital_Budget.pdf.* It is relevant, too, that Public Act 96–37 says its purpose is "to make changes in state programs that are necessary to implement the Governor's Fiscal Year 2010 budget recommendations concerning capital." 2009 Ill. Laws 784.

Nor is there merit to Plaintiffs' contention that not all of the provisions of Public Act 96–34 have a sufficient connection to the subject of the 2009 capital program. In support of this position, Plaintiffs focus on only two aspects of the Act, which they claim "divert revenue raised by the Act to the GRF [General Revenue Fund]" where they "may be used for any purpose," and so do not relate to capital projects. (Pl. Br. at 32.) Plaintiffs are wrong.[2]

Plaintiffs first point to the provisions in Public Act 96–34 changing the sales and use taxes on candy, soft drinks, and grooming and hygiene products from a reduced 1% rate to the standard 6.25% rate, with 5% of the 5.25% increase payable into the Capital Projects Fund. (Pl. Br. at 32.) Plaintiffs claim that the remaining 0.25% (or one-twentieth of what is paid into the Capital Projects Fund) goes to "other purposes" including "the Common School Fund," with payments into that Fund "serv[ing] as a credit" against transfers to that Fund from the GRF, "meaning that GRF is the actual fund beneficiary of this provision." (*Id.*) However, while Plaintiffs devote a full page of their brief to this argument, they never mentioned it in the appellate court or in the circuit court, and therefore forfeited it for purposes of the appeal in this Court. See *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006); *Garza v. Navistar Int'l Transp. Corp.*, 172 Ill. 2d 373, 383 (1996).

Plaintiffs' argument is without merit in any event, as none of the proceeds from these taxes go to the GRF — directly or indirectly. Under the law in effect before Public Act

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[2] Plaintiffs also argue at length that various provisions in Public Act 96–34 do not relate to the subject of "revenue" or to the subject of implementing an annual budget. (Pl. Br. at 26-31.) These arguments knock down a straw man, and so are not addressed here. Moreover, Plaintiffs' conclusory (and often inaccurate) references to these provisions (see, e.g., *id.* at 28-29) also fail to satisfy Supreme Court Rules 341(h)(7) and 341(i), and are therefore forfeited. See *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 95-96 (2002). And, to the extent these provisions could be deemed relevant to an argument *not* made by Plaintiffs that they lack a sufficient connection to the subject of the 2009 capital program, that argument is addressed in Defendants' opening brief (at 21-24).

96–34, the entire tax on items subject to the 1% rate was payable into the Local Government Fund, whereas taxes subject to the normal 6.25% rate were divided three ways: 5% to the State; 1% to the Local Government Fund; and 0.25% to the County and Mass Transit District Fund. 35 ILCS 105/9 (2008). Public Act 96–34 merely (1) transferred the affected items (candy, etc.) from the former category to the latter (2009 Ill. Laws 498-99, 515), and (2) provided that the State's 5% share would go to the Capital Projects Fund (2009 Ill. Laws 509, 519-20). For the non-State portion, therefore, the consequence is that the Local Government Fund still gets exactly the same amount, and the additional 0.25% on these items goes to the County and Mass Transit District Fund — *not* the GRF.[3]

Plaintiffs next claim that Public Act 96–34 provides for "a $245 million transfer from the Capital Projects Fund to GRF" that may then be used "for any State expenditure," and that only $81.7 million of this amount — "not $245.2 million, as asserted by the State" — is offset by the elimination of Road Fund diversions to pay for operations of the State Police and Secretary of State. (Pl. Br. at 33-34.) Plaintiffs are wrong. When the General Assembly simultaneously made sure that Road Fund monies would no longer be used to pay for operations of the State Police and Secretary of State and provided alternative funding for those operations from new revenues (which was equivalent to devoting those revenues

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[3] Sales taxes in this 6.25% category are not separately reported to the Department of Revenue or classified by retailers based on the specific product involved, and the obvious reason for the arrangement adopted by Public Act 96–34 (under which the State's 5% share going to the Capital Projects Fund is based on a Department estimate) was that doing anything else with the additional 0.25% would have required a massive overhaul of the current structure for processing the relevant sales and collecting the corresponding taxes. Moreover, a large share of the monies in the County and Mass Transit District Fund is distributed to the Regional Transportation Authority (the "RTA"), which builds, maintains and operates mass transportation facilities in the Chicago metropolitan area. 70 ILCS 3615/1.01 *et seq.* (2008).

directly to the Road Fund), it was justified in treating the relevant baseline as what it had actually done — namely, using $245.2 million in Road Fund monies for these operations. Plaintiffs acknowledge that Public Act 96–34 amended Section 8.3 of the State Finance Act (30 ILCS 105/8.3) to provide that, beginning in fiscal year 2010, no Road Fund monies shall be appropriated to the Department of State Police or to the Secretary of State. 2009 Ill. Laws 495-96. What they dispute is the effect this had on Road Fund monies payable to the State Police and Secretary of State, and in each case they ignore the change's real-world impact.

Plaintiffs derive their $87.1 million figure from two incorrect sources. With respect to Road Fund appropriations to the State Police, Plaintiffs emphasize that, under the law in effect before passage of Public Act 96–34, that appropriation limit was scheduled to revert to the level in place in 1990. (Pl. Br. at 33.) What Plaintiffs ignore is that the General Assembly had annually overridden that limitation and progressively increased it — to $97.31 million for fiscal years 2003 through 2007, $106.1 million for fiscal year 2008, and $114.7 million for fiscal year 2009. (See 2005 Ill. Laws 1300; 2006 Ill. Laws 2407; 2007 Ill. Laws 9592; 2008 Ill. Laws 783; 2009 Ill. Laws 495.) And in drafting the budgeting component of Public Act 96–34, the General Assembly was legitimately entitled to take into account those *actual* increases, as opposed to a default provision that remained inoperative for many years.

The relevant background is similar for the Road Fund appropriations to the Secretary of State. Although the annual limit on such appropriations for the seven fiscal years through 2009 stayed the same, at $130.5 million, 2009 Ill. Laws 495-96, Plaintiffs emphasize that, before passage of Public Act 96-34, this amount was scheduled to drop to $30.5 million for fiscal year 2010 (*Id.*). But that contemplated reduction, included in Public Act 95–744, had no real-world effect, because when it actually came time to provide fiscal year 2010 funding

for the Secretary of State (whose total appropriations went up, not down), the General Assembly, in Public Act 96–42, appropriated "$130,500,000 . . . from the General Revenue Fund to the Secretary of State for the purpose of replacing spending previously appropriated from the Road Fund." 2009 Ill. Laws 1518. Again, for budgeting purposes the General Assembly was justified in looking at what Road Fund monies it had *actually* appropriated to the Secretary of State, and that perspective is likewise relevant for evaluating Plaintiffs' constitutional attack on the legislature's action.[4]

Relying on their inaccurate view of the fiscal impact of Public Act 96–34, Plaintiffs conclude with the claim that "it is simply not the case that the revenue generated from the Omnibus Act [Public Act 96–34] has been used to finance capital programs." (Pl. Br. at 34.) Plaintiffs could not be more wrong. Their corresponding argument fails, and the appellate court's decision declaring Public Act 96–34 unconstitutional should be reversed.

II. Public Acts 96–35, 96–37, and 96–38 Do Not Violate the Single Subject Clause.

Although the appellate court did not address the question, this Court should hold that the other Acts challenged by Plaintiffs — Public Acts 96–35, 96–37, and 96–38 — also satisfy the Single Subject Clause.[5]

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[4] Plaintiffs also argue that monies in the Road Fund can be used for operational expenses as well as actual road, highway and bridge construction. (Pl. Br. at 34.) This does not advance their claim. That was just as true, if not more so, of the Road Fund monies previously appropriated to the State Police and Secretary of State. And, since the beginning of fiscal year 2010, the State has issued more than $1.6 billion in bonds payable with Road Fund monies pursuant to Section 15(a) of the General Obligation Bond Act.

[5] Plaintiffs inaccurately assert that the appellate court "agreed" with their argument that Public Acts 96–34, 96–35, 96–37 and 96–38 "collectively, as tied, violate the Single Subject Rule." (Pl. Br. at 38; see also *id.* at 1 (Issue 3), 8.) The appellate court expressly stated that it "need not consider plaintiffs' *constitutional* challenges" to Public Acts 96–35, 96–37, and 96–38. (A 18, emphasis added.)

A. Public Act 96–37 Satisfies the Single Subject Rule.

Plaintiffs claim that Public Act 96–37 violates the single subject rule because it "creates entirely new acts, launches wholly new programs, and initiates laws that have nothing to do with implementation of the State budget." (Pl. Br. at 35.) But nothing in the single subject rule prevents the General Assembly from creating "new programs" or "new acts," and, not surprisingly, Plaintiffs offer no authority to that effect. Indeed, *Arangold*, in addition to rejecting an attempt to engraft a new requirement onto the Single Subject Clause (namely, that the individual provisions in an Act "be related to each other"), 187 Ill. 2d at 356, also upheld Public Act 89–21 although one of its many provisions "establish[ed] a school technology program," *id.* at 350. Likewise, *Geja's Café v. Metropolitan Pier & Exposition Auth.*, 153 Ill. 2d 239, 246, 256 (1992), upheld an act that authorized construction of a new exhibition hall at McCormick Place and the rerouting of Lake Shore Drive.

To the extent that Plaintiffs separately complain that individual provisions in Public Act 96–37 lack a natural and logical connection to the subject of the capital projects initiative (see Pl. Br. at 35-36), those complaints are either raised for the first time in this Court, and therefore forfeited, see *Pendleton*, 223 Ill. 2d at 476, or adequately addressed in Defendants' opening brief (at 25-27). (See also above at 2, n.1.)

B. Public Act 96–38 Does Not Violate the Single Subject Rule.

Plaintiffs' Single Subject Clause challenge to Public Act 96–38, based on the claim that two of its provisions "relate neither to revenue nor capital projects," fares no better. Those provisions are amply addressed in Defendants' opening brief (at 27-29) and warrant no further discussion here.

C. Public Acts 96–34, 96–35, 96–37, and 96–38 Do Not Collectively Comprise a Single Bill that Violates the Single Subject Rule.

Plaintiffs base their claim that Public Acts 96–34, 96–35, 96–37, and 96–38 *collectively* violate the Single Subject Clause on provisions making the effectiveness of some of these Acts, or specific provisions in them, dependent on whether another bill "becomes law." (See Def. Br. at 29-30.) Contrary to Plaintiffs' contentions, however, such provisions do not "incorporate" the content of one bill into another. Nor do they make the effectiveness of any Act or provision dependent on whether another bill that is ultimately *upheld* against a judicial challenge, as opposed to just being *enacted* into law in accordance with the applicable procedural requirements. (See *id.* at 29-32.) In any event, where, as here, the provisions of all of the relevant Acts have a natural and logical relation to a common, permissible subject, the adoption of such clauses — which avoids establishing revenues or appropriating funds for projects that are not authorized, appropriating funds without supporting revenues, or establishing new revenues for particular projects without an appropriation of the necessary funds — are both sensible and constitutionally proper. (See also below at 15-17.)

III. The Court Should Reverse or Limit the Appellate Court's *Sua Sponte* Ruling that Public Acts 96–35, 96–37, and 96–38 "Cannot Stand" if Public Act 96–34 Is Unconstitutional.

Apart from claiming, incorrectly, that the appellate court found Public Acts 96–35, 96–37, and 96–38 unconstitutional (see above at 6, n.5), Plaintiffs make no effort to defend the appellate court's ruling that these Acts "cannot stand" if Public Act 96–34 violates the Single Subject Clause. As explained in Defendants' opening brief (at 30-33), that ruling is unsound and should be reversed. Nor do Plaintiffs offer any response to Defendants'

argument that, even if that ruling were correct, the Court should limit its scope to avoid invalidating good faith actions already taken pursuant to any of those Acts. Accordingly, if the Court reaches this issue, it should follow that course.[6]

IV. Public Act 96–34 Does Not Violate the Uniformity of Taxation Clause.

The circuit court properly rejected Plaintiffs' argument that the wholesale taxes on alcoholic beverages established by Public Act 96–34 violate the Uniformity of Taxation Clause of the Illinois Constitution, Ill. Const. art. IX, § 6. The Uniformity Clause requires only that a non-property tax classification "(1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp. v. Zehnder,* 204 Ill. 2d 142, 153 (2003)("*Arangold II*"). A Uniformity Clause claim, unlike an equal protection claim, does not require the claimant to negate every conceivable justification for the challenged tax distinction. *Id.* at 156; see also *State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 666 (2005). Thus, if a party advances a good-faith uniformity challenge to a tax classification, the taxing body must assert a justification for the classification. *Arangold II,* 204 Ill. 2d at 153; *Filan*, 216 Ill. 2d at 666. This does not impose on the taxing body a duty "to produce *facts* justifying the tax classification," *Arangold II,* 204 Ill. 2d at 156 (emphasis added), however, or require it to "bear[] an *evidentiary* burden in justifying the tax," *id.* (emphasis in original). On the contrary, when the taxing body has articulated a justification for the law, the party challenging it has the burden to persuade the court "that the taxing body's explanation is insufficient as a matter of law or unsupported by the facts." *Id.* (internal quotes

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[6] The following sections of Defendants' reply brief respond to Plaintiffs' arguments regarding issues not addressed by the appellate court or encompassed by Defendants' PLA in case this Court elects to resolve those issues.

omitted). Moreover, the "scope of a court's inquiry" is narrow, and "if a state of facts can be reasonably conceived that would sustain it, the classification must be upheld." *Empress Casino v. Giannoulias*, 231 Ill. 2d 62, 73 (2008) (internal quotes omitted). It is not the courts' role to second-guess the legislature's judgment. *Id.* at 75.

Plaintiffs contend that the taxes established by Public Act 96–34 are unreasonable and thus nonuniform because the new tax rates are progressively higher on alcoholic beverages with a higher alcohol content. The new rates per gallon (beer – $0.231; wine – $1.39; liquor – $8.55) amount to a wholesale tax per drink of about 2.2¢ for beer, 5.4¢ for wine, and 10¢ for liquor, based on the following drink size and alcohol content: beer – 12 oz. at 5%; wine – 5 oz. at 12%; and liquor – 1.5 oz. at 40%. The constitutionality of imposing higher taxes on alcoholic beverages that have a higher alcohol content is both well-settled, see *Timm v. Harrison*, 109 Ill. 593, 600-01 (1884) (noting that minimum tax on vendor of malt beverages less than half of that on seller of "more intoxicating drinks," was "quite natural" and "reasonable" for uniformity purposes); *Federated Distribs., Inc. v. Johnson*, 125 Ill. 2d 1, 19-20 (1998) (recognizing validity of taxing "lower alcohol level products at lower rates"), and consistent with the longstanding, common-sense judgment that stronger drink contributes to overconsumption and its associated ills, while higher taxes on beverages with higher alcohol content promotes temperance and generates public funds. See *Federated Distribs.*, 125 Ill. 2d at 20 (noting with approval legislature's graduated taxing scheme on alcohol devised to promote temperance); see also *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 746-47 (4th Cir. 2010) (State could reasonably restrict consumption or tax drinks with higher alcohol content based on their greater propensity for intoxication which translated into higher levels of negative social effects); *Horton v. Cook*, 538 S.W.2d 221, 222 (Tex. App.

1976) (sustaining different tax levels on establishments selling only beer and wine and those selling mixed drinks). Accordingly, the new rates are constitutional.

Because temperance is a valid goal, see *Federated Distribs.*, 125 Ill. 2d at 20, and the differentials established by Public Act 96–34 in furtherance of that goal are plainly reasonable, see *Timms*, 109 Ill. at 600-01, the legitimacy of the legislature's judgment about the relationship between alcohol taxes and temperance is not subject to judicial second-guessing, nor should it be subject to factual refutation, see *Empress Casino*, 231 Ill. 2d at 75. Rather, it was proper to dispose of Plaintiffs' Uniformity Clause claim as a matter of law. See *Dewoskin v. Loew's Chi. Cinema, Inc.*, 306 Ill. App. 3d 504, 523 (1st Dist. 1999).[7]

V. Plaintiffs' Claim that Public Act 96–35, which Appropriated Funds for Fiscal Year 2010, Impermissibly Enacted Substantive Law Is Moot and Unfounded.

Plaintiffs effectively admit that their separate challenge to Public Act 96–35, which appropriated funds for the fiscal year ending June 30, 2010, is moot, and they offer no valid reason for the Court to resolve that claim now, after the authority in Public Act 95–35 has expired and the relevant funds have been spent. Article IV, Section 8(d) of the Illinois Constitution provides: "Appropriation bills shall be limited to the subject of appropriation." Plaintiffs' complaint, based on their standing as taxpayers to enjoin the unlawful expenditure of public funds, alleged that Public Act 96–35 contains several provisions that violate this constitutional provision. (C 37-38.) The Court can take judicial notice, however, that the

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[7] *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18 (2004), on which Plaintiffs rely (Pl. Br. at 43), is inapposite. There, the Court merely held that, for purposes of determining standing under the provision in the Protest Monies Act allowing suit by a "taxpayer," the Court was not legally *required* to assume that taxes legally imposed on wholesalers were actually paid by the plaintiff, who was a retail consumer. 211 Ill. 2d at 25-27. That holding does not mean that, for purposes of promoting the goal of temperance, the General Assembly *cannot* assume that increased wholesale taxes normally will result in increased prices for retail consumers.

fiscal year for these appropriations, along with the authority to make them pursuant to Public Act 96–35, expired many months ago. As a practical matter, the Court cannot enjoin expenditures that *already* occurred. See *Fergus v. Russel*, 270 Ill. 304, 314 (1915) ("taxpayers may resort to a court of equity to *prevent* the misapplication of public funds") (emphasis added). This claim by Plaintiffs is therefore moot. See *West Side Org. Health Servs. Corp. v. Thompson*, 79 Ill. 2d 503, 506-07 (1980); *Bluthardt v. Breslin*, 74 Ill. 2d 246, 250-51 (1979).

Plaintiffs vainly seek to avoid this mootness problem by claiming that the alleged flaws in Public Act 96–35 render its appropriations a "nullity," and that this invalidates every subsequent year's "reappropriation" of any of those monies. (Pl. Br. at 17.) Neither premise of this argument is valid. Contrary to Plaintiffs' claim, the remedy for a violation of the prohibition against including substantive law in an appropriation is not "invalidat[ing] the entire bill" (*id.* at 9), but simply denying effect to the substantive law provision. See *Benjamin v. Devon Bank*, 68 Ill. 2d 142, 143-44, 148-49 (1977); *People ex rel. Kirk v. Lindberg*, 59 Ill. 2d 38, 42 (1974).[8] And even if the appropriation bill itself could be declared a nullity, Plaintiffs do not identify any case adopting their further theory that this would automatically nullify all future reappropriations of unexpended funds authorized in the earlier bill. In any event, Plaintiffs' complaint never sought relief against expenditures authorized by any appropriation law after Public Act 96–35, and such a claim therefore is not

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[8] It is doubtful that Plaintiffs' standing, as taxpayers, would allow them to obtain even that relief, which their complaint never requested. Nor do Plaintiffs identify any basis for them to obtain an injunction against expenditures pursuant to appropriations unrelated to the provisions they claim are substantive law, none of which appears to have any connection to Plaintiffs personally. See *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 161-62 (1956) (holding that plaintiffs must have individual standing for claims that did not seek "to enjoin an expenditure of the general revenue").

a part of this case. In addition, because their theory under which such relief can be granted is one that they never raised below, and that the circuit court and appellate court therefore never considered, the Court should not reach out to decide it. See *Boatmen's Nat'l Bank v. Direct Lines, Inc.*, 167 Ill. 2d 88, 107 (1995); see also *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 105 (2006).[9]

These claims by Plaintiffs are without merit in any event. Plaintiffs appear to advocate the absolutist position that when the General Assembly makes an appropriation, it may not attach any limiting condition or qualification, and that such conditions may be contained only in the law authorizing the activity to which the appropriation corresponds. That position goes much too far. An appropriation is the setting apart of public funds for a specific purpose. *Board of Trustees v. Burris*, 118 Ill. 2d 465, 477 (1987). While an appropriation law may neither "command the performance of an act," *id.* at 481; *People ex rel. Director of Fin. v. YWCA*, 86 Ill. 2d 219, 238-39 (1981), nor change the substance of statutes in place, *YWCA*, 86 Ill. 2d at 238-39, it may include conditions that "restrict and qualify" an appropriation and that must be fulfilled before the authorized funds are spent, *Devon Bank*, 68 Ill. 2d at 148; see also *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 982 (N. Mex. 1974) (holding that legislature may make "hold harmless" appropriation to agency

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[9] Nor is there any basis to apply either of the mootness exceptions Plaintiffs invoke: "the public-interest exception and the capable-of-repetition-yet-evading review exception." (Pl. Br. at 17-19.) Plaintiffs do not identify any future controversy in which adjudicating the validity of an expenditure affected by one of the allegedly substantive provisions in Public Act 96–35 will be necessary, and they therefore cannot make the requisite "clear showing" on each element of the "public interest" exception. See *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 292 (2005); see also *People v. Jackson*, 231 Ill. 2d 223, 228 (2008). And, for the "evading review" exception, Plaintiffs fail to explain either why *they* will be affected in the future by one of those expenditures or appropriations, see *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998), or, under their novel theory of successive-year invalidity, why such a claim would escape judicial resolution due to the quick passage of events.

if present federal funding is cancelled); 1978 Ill. Att'y Gen. Op. S-1349; 1975 Ill. Att'y Gen. Op. S-936; cf. 1973 Ill. Att'y Gen. Op. S-630 (Governor's power to reduce item of appropriation may not be used to alter or eliminate conditions on the expenditure). The provisions of Public Act 96–35 that Plaintiffs contest do not run afoul of these rules, but instead merely establish permissible conditions for the corresponding appropriations.

In support of their claim, Plaintiffs place undue reliance on *Devon Bank*, which is distinguishable. There, the governing statute authorized the Director of the Department of Labor, "in his discretion and with the approval of the Governor," to open offices "at places other than the seat of government." 68 Ill. 2d at 148. After the Director entered into a lease for an unemployment insurance office at a specific location in Chicago, the General Assembly, in a transparent attempt to block the lease, included in an appropriation bill the proviso that none of the Department's appropriated funds could be used to open or staff an unemployment insurance office "located within 500 feet of a school in any city with a population over 1,000,000." *Id.* at 143. Finding this provision to be unconstitutional "substantive law," the Court "agree[d] that the General Assembly may restrict and qualify the use to which appropriated funds may be put" but held that, in these circumstances, the contested provision impermissibly operated to "change existing statutes." *Id.* at 148.

Defendants have no quarrel with the holding in *Devon Bank*, which reflects the common-sense notion that the legislative function of appropriating money, including setting conditions on such appropriations, may not either change substantive statutes directly or accomplish the same result indirectly by controlling the specific manner in which executive branch officials exercise their functions under existing law. See *Anderson v. Lamm*, 579 P.2d 620, 623-24 (Colo. 1978). That, however, is not the case for any of the provisions about

which Plaintiffs complain, which do not purport to amend current statutes, command any action, or control how authorized actions are taken, but merely condition the expenditure of appropriated funds on the presence of specified criteria.[10]

VI. Public Acts 96–34, 96–35, 96–37, and 96–38 Do Not Violate the Constitution's Separation of Powers, Veto, Presentment, or Effective Date Provisions.

For similar reasons, there is no merit to Plaintiffs' claim that the effectiveness clauses in Public Acts 96–34, 96–35, 96–37, and 96–38 violate the Separation of Powers, Presentment, Veto, and Effective Date Clauses of the Illinois Constitution, Ill. Const. art. II, § 1; art. IV, §§ 9(a),(b); 10. Although the legislative power is vested in the General Assembly, Ill. Const. art. IV, § 1, the checks and balances of our Constitution include a limited ability by the Governor to veto laws passed by the General Assembly, Ill. Const. art. IV, § 9. The Presentment Clause in Article IV, Section 9 sets in motion the Governor's ability to exercise this veto power by providing that a bill passed by the General Assembly must be "presented to the Governor within 30 calendar days after its passage." Ill. Const. art. IV, § 9(a). This provision then states: "If the Governor approves the bill, he shall sign it and it shall become law." According to Plaintiffs, the last clause of this provision means that once a bill is signed by the Governor, it must be fully operative, and any contrary provision in the bill (even if it is signed by the Governor) renders it unconstitutional. (Pl. Br. at 49.) Plaintiffs are wrong.

Illinois courts have long held that the legislature may direct an Act to take effect only upon fulfillment of a future contingency. *People ex rel. Thompson v. Barnett*, 344 Ill. 62,

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[10] Plaintiffs also make a generic argument that Public Act 96–35 "incorporates" all of Public Act 96–34 because it takes effect only if Public Act 96–34 becomes law. (Pl. Br. at at 11-12, 25.) As discussed below (at 15-17), the premise of that argument is wrong.

72 (1931); *Rogers v. Desiderio*, 274 Ill. App. 3d 446, 449 (3rd Dist. 1995). Consistent with this approach, courts in other jurisdictions have held that a permissible contingency is the effectiveness of another law. *Shehane v. Wimbish*, 131 S.E. 104, 105-06 (Ga. App. 1925); see also *Marr v. Fisher*, 187 P.2d 966, 970 (Ore. 1947); *Gillum v. Johnson*, 62 P.2d 1037, 1039-42 (Cal. 1936); *Johnson v. State*, 60 P.2d 681, 682 (Wash. 1936). The Florida Supreme Court, addressing a question virtually identical to the one raised here, held that making the effectiveness of an appropriation law subject to passage of another law to raise revenues did not violate the Governor's veto authority where that other law is "reasonably related to the appropriation and . . . there is a direct and relative interdependence between them." *In re Opinion to the Governor*, 239 So.2d 1, 9 (Fla. 1970). These authorities are extensively discussed in an Opinion by the Michigan Attorney General that so-called "tie-barring" statutes, whose effectiveness is conditioned on the passage of other laws, do not infringe the Governor's veto power where the relevant laws are reasonably related to each other. 1979-1980 Mich. Op. Attorney 128, 1979 WL 368810 (Apr. 4, 1979).[11]

Plaintiffs offer no contrary authority that such conditions are invalid on the ground that they violate the constitutional provisions respecting the separation of powers or the Governor's authority to veto legislation. Nor is the argument logical. Every bill challenged in this case was presented to, and signed by, the Governor, whose veto powers were in no way diminished by these provisions.

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[11] The legislative logic of these conditional effectiveness clauses further supports their validity. It made perfect sense not to raise new funds unless they would be spent, and vice-versa. Thus, it was eminently reasonable to have Public Act 96–34, which raised new revenues for the Capital Projects, take effect only if Public Act 96–35, which appropriated funds for those projects, also took effect. And it was likewise sensible not to have that appropriation law take effect unless the law providing revenues to pay for those appropriations also became effective.

Plaintiffs' challenge to some of the Capital Projects Acts based on Article IV, Section 10 of the Illinois Constitution, relating to the effective date of laws, is equally without merit. Plaintiffs claim: "When the Constitution states that a bill passed under certain circumstances shall take effect on a date certain, the General Assembly may not change that date without Passage, Presentment, and Enactment of a subsequent bill." (Pl. Br. at 49.) But Plaintiffs do not explain how that principle relates to the effective date provisions in any of the Acts they challenge, as each one was passed by the General Assembly and presented to and approved by the Governor.

VII. The Provisions of Public Act 96-34 Concerning Video Gaming and the State Lottery Do Not Violate the Constitutional Requirement that Public Funds Be Used for Public Purposes.

There is also no basis for Plaintiffs' claim that the lottery management and video gaming provisions of Public Act 96–34 violate the requirement that "public funds . . . be used only for public purposes." Ill. Const. art. VIII, § 1. Invoking federal criminal statutes against private lotteries, Plaintiffs, relying on a Department of Justice opinion, alleged that these provisions in Public Act 96–34 cause the State's lottery and video gaming laws to fall outside the federal statutes' exemption for lotteries "conducted by [a] State under the authority of State law." (C 981.) That reliance is misplaced for several reasons.

First, this claim cannot possibly affect the provisions of Public Act 96–34 relating to video games, which are defined to include games like "video poker" and "blackjack." (C 46.) By contrast, the federal statute on which Plaintiffs rely defines a "lottery" as "the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds . . . by chance to one or more chance takers or ticket purchasers." 18 U.S.C. § 1953(e). While Plaintiffs list several cases holding that miscellaneous games of chance fall within

various *state law* definitions of a lottery, those definitions are materially different from the *federal law* definition, and those cases thus provide no support for Plaintiffs' claim.[12]

Second, with respect to the state lottery, Plaintiffs simply assume that if it does not comply with *federal* criminal laws relating to the conduct of lotteries, that necessarily means that any share of the lottery proceeds paid to a private manager is not being used for a "public purpose" within the meaning of *Illinois'* Constitution. That assumption is unsound. The meaning of a unique provision in our Constitution does not take its content from unrelated federal laws. Thus, if paying some share of the State's lottery proceeds (after payouts to winning ticket purchasers and ticket vendors) to private managers would satisfy the Illinois Constitution without regard to federal law, the substance of federal law ordinarily would not change that conclusion. And there is little doubt that, as a matter of Illinois law, the presence of some benefit to private parties is not enough to condemn a program where the public also significantly benefits. See *Empress Casino*, 231 Ill. 2d at 85-90 (2008) (upholding statute imposing surcharges on state-licensed casinos to be paid to private horse racing tracks); *Friends of Parks v. Chicago Park Dist.*, 203 Ill. 2d 312, 320-25 (2003) (upholding public financing of renovations to stadium owned and operated by city park district but used by privately owned professional football team).

Third, authorizing Plaintiffs to seek a ruling that the Illinois lottery violates federal anti-lottery statutes would be tantamount to giving private parties the right to enforce federal

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[12] Even if Plaintiffs overcame that hurdle, they incorrectly assume that *all* revenues from state-authorized and regulated gaming activities — apparently including the income received by licensed establishments conducting those activities — are *public* funds that can be used only for public purposes. But for video gaming, the public purposes limitation properly applies only to the 30% tax on net terminal income, which unquestionably is devoted solely to public purposes.

criminal laws where the federal government has not seen fit to do so. Only the federal government can prosecute federal crimes, *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 86-87 (2d Cir. 1972), and federal criminal statutes generally do not create a private right of action, *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007); *Frison v. Zebro*, 339 F.3d 994, 999 (8th Cir. 2003). Plaintiffs therefore cannot have the ability to achieve the same result and invalidate the State's lottery statute on the basis that it allegedly violates federal criminal laws — especially where Plaintiffs themselves do not claim to be directly affected in any way by the lottery.

Fourth, even if the Department of Justice opinion on which Plaintiffs rely were persuasive as to Congress's intent about the meaning of a lottery "conducted by a State under the authority of State law,"[13] Plaintiffs have not come close to establishing that having a private company handle the day-to-day operations of the Illinois lottery would violate the federal law making it a crime to run a private lottery. The relevant provisions of the Illinois act specify "that the Department shall exercise actual control over all significant business decisions," and that the private manager's compensation shall be "no more than 5% of Lottery profits" 2009 Ill. Laws 844. The notion that allowing a private company to assist in the management of the State's lottery under these conditions would make it a criminal enterprise is plainly untenable.

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[13] That opinion concludes that "[i]t is permissible . . . for a State to contract with private firms to provide goods and services necessary to enable the State to conduct its lottery, including management services," but that the State must "exercise actual control over all significant business decisions made by the lottery enterprise and retain all but a *de minimis* share of the equity interest in the profits and losses of the business." (C 981.) While the opinion further states that there may not be a "bright-line rule" for determining what is more than a *de minimis* interest, it gives several examples from other contexts where 5% is deemed below this threshold. (C 989 n.9.)

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, the Court should reverse the appellate court's holdings that Public Act 96–34 violates the Single Subject Clause and, therefore, Public Acts 96–35, 96–37, and 96–38 "cannot stand." The Court should further hold that Public Acts 96–35, 96–37, and 96–38 satisfy the Single Subject Clause. In the alternative, the Court should limit the scope of the appellate court's ruling invalidating Public Acts 96–34, 96–35, 96–37, and 96–38 so that this ruling does not affect the validity of good faith actions already taken pursuant to those Acts. In addition, if the Court elects to address Plaintiffs' other constitutional challenges to these Acts, it should uphold all of these Acts against those challenges.

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Rule 341(c) Certificate of Compliance

I certify that this Brief conforms to the form and length requirements of Supreme Court Rules 341(a) and (b), as modified by Rules 315 and 317. The length of this Brief, excluding the cover, table of points and authorities, this certificate of compliance, the certificate of filing and service, and the appendix, is 20 pages.

Richard S. Huszagh

Certificate of Filing and Service

The undersigned, an attorney, certifies that on May 2, 2011, he caused the foregoing Reply Brief of Appellants to be filed by mail with the Clerk of the Supreme Court of Illinois, and three copies thereof to be served by personal delivery to:

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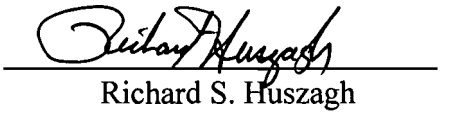

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