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No. 111801

JAN 28 2011

IN THE  
SUPREME COURT OF ILLINOIS

CLERK  
SUPREME COURT  
CHICAGO

W. ROCKWELL WIRTZ, on Behalf of and for the  
Benefit of the Taxpayers of the State of Illinois,  
and WIRTZ BEVERAGE ILLINOIS, LLC,

Petitioners-Respondents,

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-Petitioners.

) On Petition for  
) 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)

) Honorable  
) LAWRENCE O'GARA,  
) Judge Presiding

**AMENDED MOTION BY RESPONDENTS-PETITIONERS FOR A  
STAY OF ENFORCEMENT OF THE APPELLATE COURT'S JUDGMENT**

Respondents-Petitioners Illinois Governor Patrick Quinn, *et al.* (the "State Parties") respectfully move for a stay of enforcement of the Appellate Court's January 26, 2011 judgment declaring unconstitutional and invalid Public Acts 96-34, 96-35, 96-37, and 96-38, which, along with Public Act 96-36 (collectively the "Capital Projects Acts"), authorized, established revenues for, and appropriated funds for \$31 billion in capital development projects throughout the State in 2009. Pursuant to Supreme Court Rule 317, the State Parties intend promptly to file a petition for review "as of right" of

the Appellate Court's judgment in this case, which involves issues of great significance for the State's operations and finances. In support of this motion, the State Parties are submitting a Supporting Record and state as follows.

### **Introduction and Summary of Grounds for Motion**

1. Review in this Court of the Appellate Court's judgment is authorized "as of right" by Supreme Court Rule 317, which provides for such review "in cases in which a statute . . . of this state has been held invalid . . . for the first time in and as a result of the action of the Appellate Court." 210 Ill. 2d R. 317. (A copy of the Appellate Court's opinion is included in the Supporting Record ("SR") at SR 36-53.) Given the importance of the issues raised in this case, the State Parties intend to file their petition for such review by February 14, 2011, rather than waiting the full 35 days (or until March 2, 2011) as permitted by Rule 317. Particularly in light of the authority for review as of right under Rule 317, a stay of the Appellate Court's judgment is justified while this matter is pending before this Court.

2. Under the principles set forth in *Stacke v. Bates*, 138 Ill. 2d 295, 308-09 (1990), a stay is warranted to preserve the status quo pending this Court's review of the Appellate Court's decision. That decision has far-reaching consequences and, if not stayed, will have serious adverse effects on the State's operations and finances, including (i) \$31 billion in capital development projects currently underway that were authorized by the Capital Projects Acts (e.g., construction and improvement of public schools, hospitals, libraries, parks, and roads), providing substantial employment for Illinois citizens, (ii) revenue sources for those projects established by Public Act 96-34, including

increased taxes on wholesale sales of alcoholic beverages, as well as new revenue sources (e.g., from private management of the day-to-day operations of the Illinois State Lottery), and (iii) which revenue sources could be used for servicing the debt financing of these projects. Conversely, petitioners Wirtz Beverage Illinois, LLC, *et al.* (“Petitioners”) would suffer no material prejudice from a stay, as they have also filed separate “protest monies” actions (Circuit Court of Cook County Case Nos. 09 L 51244 & 09 L 51392) in which the additional taxes that Public Act 96–34 imposes on them are being held in a protest fund pending an ultimate resolution of the constitutionality of that Act. (SR 54-60.)

### **Factual Background**

3. The Capital Projects Acts were all signed into law on the same day in July 2009 (SR 8, 12, 14, 15), when the State’s economy was suffering from the severe recession affecting the entire nation. Those Acts authorized and funded \$31 billion in capital development projects throughout the State of Illinois, including construction and improvement of public schools, hospitals, libraries, parks, and roads. Public Act 96–34 established revenue for those projects, including increased taxes on the wholesale sale of alcoholic beverages. Public Act 96–37 authorized new capital projects. And Public Act 96–35 appropriated funds for the capital projects. In addition, Public Act 95–35 provided that it would not “take effect” unless Public Act 96–34 “becomes law.” (Public Act 95–35, Art. 140, § 99.) Public Act 96–37 likewise provided that some of its provisions would not take effect unless Public Act 96–34 “becomes law.” (Public Act 95–37, Art. 60, §§ 60–5, *et seq.*) Similar language was contained in parts of Public Act 96–38, which

amended certain provisions in the other Capital Projects Acts. (Public Act 95-38, §§ 5, *et seq.*)

4. This case originated with a petition by Petitioners, who are a major distributor of alcoholic beverages and its manager (SR 3-4), for leave to file a taxpayer standing suit pursuant to Section 11-303 of the Code of Civil Procedure (735 ILCS 5/11-303 (2008)) seeking to enjoin enforcement of Public Acts 96-34, 96-35, 96-37 and 96-38 on the basis that they are unconstitutional. (SR 2-3, 5.) Petitioners' proposed complaint alleged, among other things, that those Acts violate the Single Subject Clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)). (SR 16-19.) The circuit court denied leave to file the suit, ruling that it did not meet Section 11-303's "reasonable grounds" standard for proceeding. (SR 34, 41-42.)

5. Reversing, the Appellate Court's opinion and judgment held that Public Act 96-34 "was enacted in violation of the single subject rule and is, therefore, void in its entirety." (SR 53.) The Appellate Court further concluded that, "[a]s a result, Public Acts 96-35, 96-37, and 96-38 cannot stand." (*Id.*)

6. Relying on this Court's decisions in *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341 (1999), and *Geja's Café v. Metropolitan Pier & Exposition Authority*, 153 Ill. 2d 239 (1992), the State Parties argued on appeal that a proper single subject to which all of the provisions of Public Act 96-34 relates is the "capital projects initiative" advanced by all of the Capital Projects Acts. (State Parties' Br. at 28-33.) However, the Appellate Court's opinion did not mention or discuss this argument, which the State Parties intend to present in this Court.

## Discussion

7. Whether to stay an appealable order is a discretionary decision. *Stacke*, 138 Ill. 2d at 301. Relevant factors include the likelihood of success on appeal, the balance of hardships, and the public interest. *Id.* at 302-09. A stay is most commonly granted to preserve the status quo pending review. See, e.g., *Jojan Corp. v. Brent*, 307 Ill. App. 3d 496, 509 (1st Dist. 1999). The ultimate determination involves balancing the relevant interests. *Stacke*, 138 Ill. 2d at 308-09. A party seeking a stay need not show a probability of success, but only “a substantial case” on the merits, and must further show that the balancing of equitable factors weighs in favor of granting the stay. *Id.* In the present case, all factors weigh in favor of granting a stay that preserves the status quo pending further action by this Court.

8. The State Parties have a substantial case on the merits. In *Arangold*, this Court upheld against a single subject challenge the State’s budget implementation act for fiscal year 1996, which contained a wide variety of statutory provisions creating and amending state programs and revenues in multiple acts. 187 Ill. 2d at 347-56. The State Parties argued below that the Capital Projects Acts were similarly related to a permissible single subject — the capital projects initiative — that was narrower in scope than implementation of a full year’s budget. (State Parties’ Br. at 28-33.) That argument clearly presents a substantial case on the merits.

9. The public interest and the balance of equities — which involves weighing the potential harm to the State Parties and the public from erroneously denying a stay against the potential harm to Petitioners from erroneously granting a stay, cf. *Kanter*

*& Eisenberg v. Madison Assoc.*, 116 Ill. 2d 506, 510 (1987) (stating that, on motions for temporary injunction, “the aim of the analysis must be to minimize the risk of choosing wrongly”) — also weigh in favor of a stay. Staying the Appellate Court’s judgment should cause no material prejudice to Petitioners because, in separate litigation presenting the same claims, the additional taxes imposed on them by Public Act 96–34 are being deposited in a protest fund, and if the Appellate Court’s judgment is ultimately affirmed and controls the outcome of these other suits, Petitioners’ rights are fully protected. (SR 54-60.)

10. On the other hand, denying a stay if the Appellate Court’s judgment is ultimately reversed will cause immediate and drastic hardship to the State Parties and similar injury to the public interest. An Appellate Court judgment is generally deemed effective immediately, even before the mandate issues. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 304-05 (1981). Giving immediate effect to the Appellate Court’s decision in this case, which ruled that Public Act 96–34 is unconstitutional and “void” and further declared invalid three other Public Acts, would wreak havoc on critical state operations and finances. Not only would the various capital projects authorized by Public Act 96–37 be subject to immediate cessation, with all the disruption and inefficiency that would cause, but the revenue-creating provisions of Public Act 96–34 would be subject to sudden suspension, risking an irretrievable loss of tens of millions of dollars in state revenues. In addition, debt service for the bonds already issued under the authority of the Capital Projects Acts would have to be paid from a different revenue source, putting a further strain on state finances.

11. In sum, the relevant factors support a stay of the Appellate Court's judgment in this case pending further review by this Court, which the State Parties will promptly request.

WHEREFORE, the State Parties respectfully pray for entry of an order granting a stay of the Appellate Court's judgment in this case until this Court disposes of this matter or orders otherwise.

Respectfully submitted,

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January 28, 2011

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	)	County Department, Law Division,
	)	Tax and Miscellaneous Remedies
HON. PATRICK QUINN, in his	)	Section No. 09 CH 30136
official capacity as Governor of the	)	(Transferred to Law Division)
State of Illinois, <i>et al.</i> ,	)	
	)	Honorable
	)	LAWRENCE O'GARA,
Respondents-Petitioners.	)	Judge Presiding

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**ORDER**

This matter having come before the Court on the amended motion of Respondents-Petitioners Illinois Governor Patrick Quinn, *et al.*, for a stay of enforcement of the Appellate Court's January 26, 2011 judgment until this Court disposes of this matter or orders otherwise;

It is hereby Ordered that the motion is GRANTED / DENIED.

Date: \_\_\_\_\_

\_\_\_\_\_  
JUSTICE