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No. 02-695

In The
Supreme Court of the United States

MICHAEL FITZGERALD,
Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA,
IOWA GREYHOUND ASSOCIATION,
DUBUQUE RACING ASSOCIATION, LTD.
and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF OF THE CITY OF BETTENDORF, IOWA, THE CITY OF BURLINGTON, IOWA, THE CITY OF CLINTON, IOWA, THE CITY OF DAVENPORT, IOWA, THE CITY OF FORT MADISON, IOWA, THE CITY OF MARQUETTE, IOWA, AND THE CITY OF SIOUX CITY, IOWA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Cities of Bettendorf, Iowa, Burlington, Iowa, Clinton, Iowa, Davenport, Iowa, Fort Madison, Iowa, Marquette, Iowa and Sioux City, Iowa ("the Cities"), Amici Curiae,[1] have a special interest in supporting the Petitioner. First, the Cities depend on state revenue sharing, and the decision below wreaks havoc with the State's budget by mandating a tax refund exceeding $100 million and the loss of over $40 million in future annual tax revenues. Second, the Cities derive substantial direct and indirect revenues and economic benefits from the gambling excursion boats ("riverboat casinos") based in their communities. The Cities anticipate that the Iowa Legislature will be forced to increase taxes on riverboat casino gaming revenues if this Court does not reverse the decision below. The Cities are concerned that history may repeat itself, with their local riverboat casinos already operating in a highly competitive environment,[2] electing literally to sail away to lower-tax jurisdictions. Just over a decade ago, faced with uncompetitive business conditions, the owners of several of Iowa's riverboat casinos operating on the Mississippi River, including the Diamond Lady docked in Bettendorf and the Emerald Lady docked in Burlington and Fort Madison, Iowa, ceased operations and moved their vessels to the State of Mississippi to operate

[1] Pursuant to Supreme Court Rules 37.4 and .6, no motion for leave to file this brief is required, as this brief is submitted on behalf of cities by their authorized law officers.

[2] Competing riverboat casinos operate in the bordering states of Illinois and Missouri. Land-based casinos also operate on Indian reservations in Iowa and within the bordering states of Minnesota and Wisconsin.

as dockside casinos. *See*, *e.g.*, *City of Fort Madison, Iowa v. Emerald Lady*, 990 F.2d 1086, 1087 (8th Cir. 1993) (noting that "in a bid to attract tourists and stimulate local economies, Iowa legalized riverboat gambling;" describing the City's failed attempt to arrest the departing riverboat after its owner invoked a "financial infeasibility" clause to escape its lease). Iowa statutory amendments enacted in response to the departure of the first wave of riverboats led to the revival of that peripatetic industry, to the benefit of Iowa's river communities.

Cities where riverboat casinos are docked receive one-half of one percent of the adjusted gross receipts, with another one-half of one percent remitted to the county. Iowa Code § 99F.11(1) (2001). The Cities also receive admission fees paid on a per passenger, per excursion basis. *Id.* § 99F.10(3). Davenport and Bettendorf have each received over $12 million in direct gaming tax revenue with an additional $10.2 million remitted to Scott County (where both Cities are located) since 1991. Significantly, riverboat casino licensees partner with non-profit entities which distribute gaming proceeds to local charities, schools and community organizations. *Id.* §§ 99F.1(14) and 99F.6(4)(a). Over $52 million has been distributed in Scott County alone to over 440 educational institutions, non-profit organizations and community groups since 1991. Moreover, the riverboat casinos based in Davenport and Bettendorf collectively employ over 1,500 persons with a total payroll exceeding $400 million since 1991.[3] The river

[3] Scott County's population in the 2000 census was 158,668. Since 1999, the Catfish Bend Casino, which operates in both Burlington and Fort Madison, Iowa, has collectively paid nearly $900,000 in taxes to

(Continued on following page)

communities naturally enjoy the ripple effects from that economic spending and from the influx of tourist dollars. Tourist spending in turn increases local option sales tax revenues. These mobile gaming operations also have sparked land-based development, increasing local employment and property tax revenues. Accordingly, the Cities have a great stake in the vitality and continued existence of the riverboat casino industry and, therefore, add their voices to the chorus calling for reversal of the decision below.

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the cities of Burlington and Fort Madison and counties of Lee and Des Moines, with populations of 38,052 and 42,351 respectively. Charitable contributions of over $3 million have been made to local schools, charities and community organizations there. The Catfish Bend Casino employs nearly 350 people, with a payroll since 1999 exceeding $26.5 million. The Mississippi Belle II Casino, located in Clinton, Iowa, similarly has paid over $800,000 in taxes collectively to the city of Clinton and county of Clinton, population 50,149. Over $2.7 million in charitable contributions have been made to local charities, community organizations and schools, and the Mississippi Belle II currently employs nearly 375, with a payroll since 1999 exceeding $22.1 million. The Isle of Capri Casino–Marquette, located in Marquette, Iowa, has paid over $1 million collectively to the city of Marquette and county of Clayton, population 18,678. The Marquette Isle of Capri has contributed over $1 million to local schools, charities and community organizations, and currently employs over 500, with a payroll exceeding $37.7 million since 1999. Finally, the Belle of Sioux City, located in Sioux City, Iowa, has paid over $1 million in taxes collectively to the city of Sioux City and county of Woodbury, population 103,877. The Belle of Sioux City has made over $2.7 million in contributions to local charities, community organizations and schools since 1999. In addition, the Belle of Sioux City employs nearly 375, with a payroll exceeding $29.8 million since 1999.

SUMMARY OF ARGUMENT

The issue is whether the Equal Protection Clause permits the State of Iowa to tax the revenue from all casino games, including slot machines, on floating riverboats at a rate lower than that imposed on slot machines at land-based racetracks. In a nutshell, this comparison of slot machine revenue at racetracks to all gaming revenue at floating riverboat casinos compares apples to oranges. For the reasons that follow, this Court should reverse the decision of the Iowa Supreme Court in *Racing Association of Central Iowa v. Fitzgerald,* 648 N.W.2d 555 (2002), *cert. granted*, 123 S. Ct. 963 (Jan. 17, 2003) (No. 02-695), by holding that the narrow majority erred in its equal protection analysis and subsequent finding of an Equal Protection Clause violation.

First, the majority decision conflicts with this Court's precedent mandating "rational basis" review of equal protection challenges to tax statutes. Because no fundamental right or suspect class is at issue, the legislature must be given broad leeway in determining the classes affected by tax legislation. *Nordlinger v. Hahn,* 505 U.S. 1, 11 (1992) (citing *Williams v. Vermont,* 472 U.S. 14, 22 (1985)). The challenger has the burden of disproving the legitimacy of a classification, and must negate every conceivable basis for the legislation. *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). When, as here, the classification is rationally related to a legitimate state end, the legislation is constitutional. *Id.* The Iowa legislature taxed casino games on riverboats and slot machines at racetracks at different rates for multiple legitimate reasons. The Iowa Supreme Court essentially ignored the analysis set forth by this Court, and redrafted a new analysis for equal protection challenges.

Second, the decision below opens the floodgates to equal protection challenges to numerous other tax statutes. Such challenges threaten the operating budgets of state and municipal governments.

Third, this Court may correct a state court ruling misconstruing the federal constitution when, as here, there is no adequate and independent state law ground for the judgment below. *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). The Iowa Supreme Court applies the same analysis in reviewing equal protection claims under the Iowa constitution as is applicable under the federal constitution. Accordingly, reversal of its erroneous federal ruling necessarily reverses the judgment below.

ARGUMENT

I. The Majority Opinion Is in Direct Conflict with this Court's Precedent.

In the area of "economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a reasonable basis for the classification*." *Beach Communications,* 508 U.S. at 313 (emphasis added). The state has no obligation to produce evidence which sustains the rationality of a classification. *Heller v. Doe,* 509 U.S. 312, 319 (1993). So long as a "plausible reason" exists for the congressional action, no further inquiry should occur. *Beach Communications,* 508 U.S. at 313-14. Further, classifications which do not involve a suspect class or fundamental right are afforded a strong presumption of validity. *Heller,* 509 U.S.

at 319. Thus, a classification will "not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequity." *Id.* at 321. The court is compelled to accept the generalizations of the legislature even if the fit between the means and ends is inaccurate. *Id.*

Respondents' burden was to negate "every conceivable basis which may support 'the legislative reason for the enactment.'" *Beach Communications,* 508 U.S. at 315. In cases alleging discriminatory taxation, a presumption of constitutionality exists "which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.'" *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973) (quoting *Madden v. Kentucky,* 309 U.S. 83, 88 (1940)). Here, Petitioner advanced several reasonable bases for the differential tax, and the district court agreed that Respondents failed "to negate every conceivable basis for upholding the taxing statute." Pet. App. at 32-34. The district court identified three rational bases the legislature may have had in granting a lower tax rate, including: (1) promotion of economic development in towns bordering the river; (2) development of new riverboats and preservation of Iowa's riverboat heritage; and (3) promotion of a useful or beneficial industry within the state. *Id.* at 34.

A. Flaws in the Majority's Analysis.

The majority seized on one of many possible purposes for the legislation–"to help the racetracks recover from economic distress"–and concluded the state flunked the rational basis test because the higher tax rate hurt the

racetracks financially in subsequent years. *Racing Ass'n,* 648 N.W.2d at 560. The majority erred by ignoring the fact that the racetracks were better off with some slot revenue, albeit heavily taxed, than without any slot revenue at all, and further erred by ignoring other conceivable purposes for the differing tax rates. By authorizing a new source of revenue for racetracks, the legislature recognized that the benefit of slot revenue outweighed the increase in taxation. In essence, the majority substituted its policy judgment for that of the legislature. Such a substitution violates rational basis review. *See Hodel v. Indiana,* 452 U.S. 314, 331, 333 (1981) (noting that in substituting its policy judgment for that of the legislature, the court acted as a superlegislature and improperly passed "on the wisdom of congressional policy determinations").

The Iowa Supreme Court majority not only performed independent factfinding that amounted to a substitution of its judgment for that of the legislature's, but improperly considered how post-enactment economic events purportedly contradicted the alleged legislative purpose. *Racing Ass'n,* 648 N.W.2d at 561. The purpose of rational basis review is to determine whether a reason for the differential tax treatment is plausible *at the time the statute was enacted*, not whether such a legislative purpose remains valid years later. The legislature is not a soothsayer, and it is inappropriate for the court to review a statute using hindsight. The Iowa court's majority essentially concocted a "back to the future" test in which it second-guessed legislative policy choices in light of subsequent events. This standard is unworkable and subjects a broad array of statutes to equal protection challenge.

At the time the statute was enacted, a rational legislator could have found a number of valid reasons to tax

riverboat casino and racetrack slot revenue differently. The majority below disregarded the admonitions of this Court in *Beach Communications*:

> [B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "legislative facts" explaining the distinction "[o]n the record," has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and ability to function."

508 U.S. at 315 (quoted citations omitted).

The dissent below correctly recognized several valid reasons the legislature could have had for taxing gaming revenue from riverboat casinos at a different rate than the land-based racetracks:

> Riverboats are not the same as racetracks. From an entertainment perspective, they speak to different cultural traditions–river lore versus agriculture. The majority questions these distinctions once gaming is attached to the enterprise. But there is no constitutional impediment to a legislature favoring diversity in cultural attractions for its citizens and tourists. And, rightly or wrongly, a legislative majority could rationally determine that a riverboat casino holds more

> romantic tourist appeal than a casino stuck in a dog track.
>
> To advance these policy decisions, a reasonable legislature would also want to recognize a very pragmatic distinction between the two gambling venues: riverboats are mobile, racetracks are not. If the economic climate turns unfavorable here, a riverboat merely unties its lines and sails elsewhere. So it is not unreasonable for the legislature to create economic incentives to develop or retain riverboat gambling while maintaining the status quo with respect to other forms of the sport.

Racing Ass'n, 648 N.W.2d at 563 (Neuman, J., dissenting). Legislators also could have chosen to favor riverboat casinos offering table games, as well as slots, over land-based slot machine parlors because the riverboats draw a larger number of tourists from border states. In addition, rational legislators could have considered the fact that floating riverboat casinos have significantly higher operating costs than land-based racetracks.[4]

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[4] Floating riverboat casinos are subject to extensive government regulation, beyond those governing land-based racetracks, including additional equipment requirements, such as availability and maintenance of personal flotation devices, visual distress signals, markings and ventilation equipment; increased documentation and certification and inspection of equipment, hull, boilers and machinery; and increased manning requirements including a master (captain), mates, pilots, engineers, radio and staff officers, and seamen. *See generally*, 33 C.F.R. § 175.1 et seq. (2000) (equipment requirements); 46 C.F.R. § 15.101 et seq. (1999) (crew manning requirements); 46 C.F.R. § 67.1 et seq. (1999) (documentation of vessel requirements); 46 C.F.R. § 71.01 et seq. (1999) (inspection and certification requirements). In addition to these federally mandated requirements, floating casinos incur additional

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Here, the majority speculated to find a single "irrational" purpose for the legislation, then disregarded all remaining conceivable bases, ignoring the well-settled principle that legislation may have more than one rational purpose.[5] *See DeLeon-Reynoso v. Ashcroft,* 293 F.3d 633, 640-41 (3d Cir. 2002) (discussing five independent rational bases for classification when only one basis would be sufficient to uphold the statute); *Turner v. Glickman,* 207 F.3d 419, 425 (7th Cir. 2000) (addressing three rational bases for the enactment of the statute).

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practical operational costs associated with fuel consumption, higher insurance rates due to the risk of sinking, and increased legal costs associated with compliance with the laws of multiple jurisdictions. *See*, *e.g.*, *Frederick v. Harvey's Iowa Mgmt. Co.*, 177 F. Supp. 2d 933, 936-37 (S.D. Iowa 2001) (reviewing conflicting rulings by federal courts and Iowa Workers' Compensation Commissioner on question of whether injury claims of riverboat casino employees are governed by Jones Act or Iowa Workers' Compensation Act).

[5] This Court has previously determined the legislature has wide latitude in crafting legislation. Specifically,

> [a] state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

Lehnhausen, 410 U.S. at 364-65 (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937)).

The Respondents also relied heavily on the alleged motives of a single legislator to infer improper motivation for the tax. Brief in Opposition to Petition for Writ of Certiorari at 6.[6] However, not only did the single legislator's alleged motive involve the enactment of a different statute, but use of the words or actions of a single legislator to infer statutory purpose is improper.[7] Instead, it is reasonable to assume that different legislators had different motivations–that is simply democracy at work–as elected members of the Iowa House and Senate balance competing interests and strike compromises in enacting legislation. In *Iowa State Education Association–Iowa Higher Education Association v. Public Employment Relations Board,* 269 N.W.2d 447, 448 (Iowa 1978), the Court observed:

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[6] *See also Racing Ass'n*, 648 N.W.2d at 557 n.2 ("A state representative from a riverboat county offered the original proposed amendment, H-5391 which proposed a forty percent gross-receipts tax on gambling games at racetracks. There was no stated reason for imposing the higher rate on racetracks.").

[7] *See Bread Political Action Comm'n v. Fed. Election Comm'n*, 455 U.S. 577, 581 n.3 (1982) (refusing to give weight to affidavit of senator regarding the meaning of statutory language); *Lindland v. U.S. Wrestling Ass'n*, 227 F.3d 1000, 1008 (7th Cir. 2000) (stating "Legislative history is a chancy subject; subsequent legislative history is weaker still.") (citing *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) and *Weinberger Reg. Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974)); *Donnelly v. Bd. of Trs. of Fire Ret. Sys.*, 403 N.W.2d 768, 771 (Iowa 1987) (stating "We must look at what the legislature said, rather than what it should or might have said. . . . [W]e will not consider a legislator's own interpretation of the language or purpose of a statute. . . . "); *Ruthven Consol. Sch. Dist. v. Emmetsburg Cmty. Sch. Dist.*, 382 N.W.2d 136, 138 (Iowa 1986) (stating "we will not consider a legislator's private interpretation of a statute, even if the legislator was actively involved in drafting and enacting the legislation.").

> The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.[8]

B. Legitimate Grounds Exist to Differentiate Racetracks and Riverboats.

The Fourteenth Amendment does not prohibit legislation merely because it differentiates among types of businesses or is limited in its application to particular geographical or political subdivisions of the state. Rather, the Equal Protection Clause is offended only if the statute's classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 70-71 (1978) (citation omitted). The majority concluded that the goal of raising revenue "is not rationally served by a taxing scheme that discriminates against certain slot machines simply because of their geography." *Racing Ass'n,* 648 N.W.2d at 562.[9] However, this conclusion conflicts with this Court's

[8] It has long been said "the making of laws is like the making of sausages–the less you know about the process the more you respect the result." Frank W. Tracey, *The Report of the Committee on Uniform Laws of the American Bankers' Association*, 15 Banking L.J. 542, 542 (1898); *see generally In re Graham*, 104 So. 2d 16, 18 (Fla. 1958).

[9] Contrary to the majority's conclusion, the classification at hand is rationally related to increasing state revenue. If the racetracks can bear the higher rate, and so far they have been able to, the higher rate increases the amount of money paid to the State in taxes by the

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precedent. The differential tax rate serves multiple rational purposes, including the economic development of river communities, promotion of Iowa riverboat heritage, and helping Iowa riverboat casinos compete with casinos in neighboring states. Respondents failed to present sufficient evidence to prove that the tax differential "rests on grounds wholly irrelevant to the achievement" of the above objectives. *Holt,* 439 U.S. at 471 (citation omitted).

Moreover, geography indeed can play a role in determining the economic or fiscal status of a person or organization to permit differing tax rates. *See Hodel,* 452 U.S. at 333 (holding legislation providing different coal mining restrictions based on geographic location did not violate equal protection clause; "[a] claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact"); *Holt,* 439 U.S. at 70-71 (stating that the Equal Protection Clause does not prohibit legislation merely because it limits its application to a particular geographical region of a state).

Here, the majority erred by holding the same activity performed by different classes of business cannot be taxed at different rates. It is a fundamental rule of equal protection law that statutes which permit or prohibit specific acts in a geographical area do not violate the Equal Protection Clause merely because the application is not equal among regions. 16B Am. Jur. 2d *Constitutional Law*

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racetracks. Similarly, if the riverboats had sailed to states with more favorable tax rates, a higher tax rate would have resulted in no revenue from the riverboats. Therefore, the legislature rationally could have believed that this tax structure maximized revenue from both the riverboats and the racetracks.

§ 844, at 396 (1998). The mere fact that a statute differentiates among the same class located in different geographical regions is permissible so long as some reasonably conceivable basis for the distinction exists. *Id.* at 397. This Court has duly noted that "where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen,* 410 U.S. at 358.

In addition to the ability of the legislature to vary the rates of taxation based on geographic location or nature of the business, the overall discretion of a state to lay taxes is wide. *Id.* at 526. In fact, the Equal Protection Clause "imposes no iron rule of equality," nor does it prohibit the "flexibility and variety that are appropriate to reasonable schemes of state taxation." *Id.* (quoting *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-27 (1959)). In *Lehnhausen*, this Court upheld an Illinois taxing statute which imposed a higher tax on property owned by corporations than that same property owned by individuals. In reversing the Illinois Supreme Court, this Court quoted Justice Holmes' dissenting opinion in *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 403 (1928):

> If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger business may not be taxed and the small one disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. . . . Furthermore, if the State desired to discourage this form of activity in corporate form and express its desire by a special

> tax, I think that there is nothing in the Fourteenth Amendment to prevent it.

Lehnhausen, 410 U.S. at 361 (quoting *Quaker City Cab,* 277 U.S. at 403 (Holmes, J., dissenting)). Further, in *Lehnhausen*, this Court quoted at length *Flint v. Stone Tracy Co.,* 220 U.S. 107 (1911), in which the Court stated:

> It could not be said . . . that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. . . . It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

Lehnhausen, 410 U.S. at 361-62 (quoting *Flint,* 220 U.S. at 161-62). Thus, this Court has long recognized that states can tax at different rates revenue from the same service provided by different classes of businesses. The majority opinion below erred in holding that the state tax scheme violated the Equal Protection Clause by levying a higher rate on land-based casinos than that levied on riverboat casinos floating on the state's border rivers.

The majority opinion is strikingly out of step with federal Equal Protection jurisprudence and cries out for reversal.

II. The Majority Decision Opens Numerous Tax Laws to Equal Protection Challenge.

This Court has traditionally given considerable deference to the States in designing their tax systems. *Lehnhausen,* 410 U.S. at 359. This deference comes from recognition of the authority of State legislatures to consider numerous factors in setting taxes, including economic incentives to promote or discourage certain types of activities, incentives to encourage development, and other economic, historic, social and geographic factors. Flexibility and variety, as a result of the above factors, are necessary components to create a reasonable scheme of state taxation. *Id.* (citing *Allied Stores,* 358 U.S. at 526-27). This Court has specifically recognized that, because of these various factors, legislatures can set different tax rates for revenues derived from the same types of services provided by different classes of taxpayers. *Id.* at 358.

The decision of the Iowa Supreme Court turns this tradition on its head. By holding that tax rates on slot machines at land-based racetracks must be the same as tax rates on all gaming operations, including slot machines, at floating riverboat casinos, the Iowa Supreme Court has disregarded or misapprehended longstanding precedent. To affirm the majority decision would essentially nullify *Lehnhausen* and require legislatures to tax equally all businesses offering a particular service regardless of any independent economic, historic, social, or geographic considerations. The result: endless litigation over legislative line-drawing in tax statutes.

Litigation has already been filed in *Coalition for a Common Cents Solution v. Iowa,* No. EQCV26737 (Iowa Dist. Ct. October 8, 2002) (Pet. App. at 71-76), challenging

on equal protection grounds, the constitutionality of Iowa Code Chapter 422E, a local option sales tax. The district court cited the majority opinion in this case in denying a motion to dismiss. *Id.* at 75. Such litigation undermines the ability of Iowa municipalities to tax citizens for improvements to local educational facilities. The *Coalition* lawsuit is only the first of many anticipated challenges to differential tax rates on the basis of the majority opinion in this case.

The decision below opens numerous other statutes to challenge. For example, the following Iowa statutes could face equal protection challenges under the Iowa Supreme Court's new analysis. *See* Iowa Code §§ 422.5(j)(2) (providing the benefit of apportionment to the taxable income of resident shareholders of S Corporations, but not partners, shareholders or members of partnerships, C Corporations or limited liability companies); 422.45(21) (providing an exemption from the tax imposed on the sale of tangible personal property for "printers" engaged in the sale of certain printing materials, but no similar exemption for other businesses selling the same printing materials); 422.45(27) (providing an exemption on the gross receipts from the sale of "computers used in the processing or storage of data or information by an insurance company, financial institution, or commercial enterprise," but not for computers used for processing or the storage of data by a profession, occupation or nonprofit organization); H.F. 2622, 79th Gen. Assem., Reg. Sess. (Iowa 2002) (providing for the abatement of "unpaid sales and use taxes and local sales and services taxes owed by any foundry located in Lee or Jefferson county on the purchase of tangible personal property used by the foundry in making patterns, molds, or dies which purchases occurred between July 1,

1997" and May 6, 2002, without abating taxes on foundries located in other counties).

This litigation quagmire should be averted by this Court's reversal of the decision below. The potential ramifications from this case are not confined to Iowa. If the decision of the Iowa Supreme Court is allowed to stand as a valid interpretation of the Equal Protection Clause, it will support similar challenges to other state and federal tax schemes. As this Court's precedent has made clear, the line-drawing in these tax schemes should be performed by legislatures who are free to consider any legitimate state interests, not courts, and therefore, the Iowa court's decision in this case must be corrected.

III. No Adequate and Independent State Ground Supports the Majority's Decision.

There is no impediment to this Court reversing the Iowa Supreme Court's decision, even though that decision considered, in part, the Iowa Constitution. This Court may reverse a state supreme court decision on federal law when no adequate and independent state ground exists for the holding below. *Michigan v. Long,* 463 U.S. 1032, 1040 (1983). This Court will assume "there are no independent state grounds when it is not clear from the opinion itself that the state court relied on an adequate and independent state ground and when it fairly appears the state court rested its decision primarily on federal law." *See id.* at 1042 (concluding that references to state constitution did not constitute independent state ground for that decision).

Equally important to the determination of whether an independent and adequate state ground exists is the examination of whether the state court decision appears to

rest on primarily federal law or to be interwoven with federal law. *Illinois v. Rodriguez,* 497 U.S. 177, 182 (1990) (citing *Long,* 463 U.S. at 1040, 1042). Under these circumstances, this Court requires that the state decision "contain a '"plain statement" that [it] rests upon adequate and independent state grounds,' otherwise, '[it] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'" *Id.* (quoting *Long,* 463 U.S. at 1041). Like *Rodriguez,* the Iowa Supreme Court's decision in *Racing Association,* did not contain a plain statement that the decision rested on state law.

In *Arizona v. Evans,* 514 U.S. 1, 10 (1995), this Court found that no jurisdictional hurdle was present when the state court decision rested "squarely on the interpretation of federal law," and the court failed to state the "references to federal law were 'being used only for the purpose of guidance, and d[id] not themselves compel the result [it] reached.'" *Id.* (quoting *Long*, 463 U.S. at 10:41). In *Pennsylvania v. Libran,* 518 U.S. 938, 941 (1996), this Court found independent and adequate state grounds to be lacking where the state court failed to specifically note that in the context of search and seizure law, no state "automobile exception" exists. Thus, because the law of the commonwealth appeared "interwoven with federal law," the "adequacy and independence of any possible state law ground [was] not clear from the face of the opinion," and jurisdiction was not precluded. *Id.*

Here, no adequate and independent state ground exists to support the decision below. The Iowa Supreme Court has repeatedly held that the Iowa and federal equal protection clauses are deemed "to be identical in scope, import and purpose." *Bowers v. Polk County Bd. of Supervisors,* 638

N.W.2d 682, 689 (Iowa 2002); *Exira Cmty. Sch. Dist. v. Iowa,* 512 N.W.2d 787, 792 (Iowa 1994). Further, Iowa's high court applies the "same analysis" to state equal protection claims as is applied in federal cases. *Johnson v. Lewis*, 654 N.W.2d 886, 890 (Iowa 2002); *Master Builders of Iowa, Inc. v Polk County,* 653 N.W.2d 382, 398 (Iowa 2002); *Bowers,* 638 N.W.2d at 689; *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Prods., Inc.,* 522 N.W.2d 607, 614 (Iowa 1994); *Bruns v. Iowa,* 503 N.W.2d 607, 609 (Iowa 1993); *Rudolph v. Iowa Methodist Med. Ctr.,* 293 N.W.2d 550, 557 (Iowa 1980). Indeed, as the decision below reiterated, "Iowa courts are to 'apply the same analysis in considering the state equal protection claims as . . . in considering the federal equal protection claim.'" *Racing Ass'n,* 648 N.W.2d at 558 (quoting *In re Morrow,* 616 N.W.2d 544, 547 (Iowa 2000)). Every Iowa equal protection case cited in the decision below reached the same conclusion and rested on its interpretation of federal law.[10]

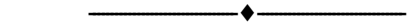
To make a separate state law interpretation, the court must make its intention clear. *Rodriguez,* 497 U.S. at 182. On those rare occasions the Iowa Supreme Court has elected to diverge from federal precedent in construing the Iowa Constitution, it has gone to great lengths to explain

[10] *See Bowers*, 638 N.W.2d at 689 (holding the same analysis applies to federal and state equal protection claims); *Morrow*, 616 N.W.2d at 547 (Iowa 2000) (same); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 156 (Iowa 1988) (same); *Bierkamp v. Rogers*, 293 N.W.2d 577, 580 (Iowa 1980) (noting the standard for equal protection review stems from federal law); *Gleason v. City of Davenport*, 275 N.W.2d 431, 435 (Iowa 1979) (stating an unreasonable classification which lacks a reasonable relationship to a legitimate state interest violates both state and federal constitutions).

why. *See Bierkamp v. Rogers,* 293 N.W.2d 577, 579 (Iowa 1980). Strikingly absent from the majority's opinion here, is any confirmation that a "separate analysis" would apply to taxation of these racetracks. Although the majority cites *Bierkamp*, its reference is to a general proposition of equal protection law, not to the proposition that the Iowa Court *may* interpret the state constitution differently than the federal constitution. The language of *Bierkamp* does not in any way preclude the Iowa Supreme Court from interpreting both state and federal equal protection issues in the same manner. Thus, the majority's decision essentially was guided by decisions of this Court. *See Oregon v. Kennedy,* 456 U.S. 667, 671 (1982) (noting that with only one exception, the cases cited by the Oregon Court rested on an interpretation of federal law; the cases cited outline that the general rule of the case clearly rested upon and were guided by federal law.) The fact the majority relied heavily upon federal grounds enables this Court to review and reverse the decision below. *Id.*

This Court has not hesitated to reverse a state supreme court decision expressly based on both federal and state equal protection grounds when, as here, the state's high court applies the same analysis in construing the state constitution and has misinterpreted federal precedent. In *American Ass'n of University Professors v. Central State University,* 699 N.E.2d 463 (Ohio 1998), the Ohio Supreme Court held that a state statute violated the equal protection clauses of *both* the state and federal constitutions, *id.* at 470, just as the Iowa Supreme Court did in the case at bar. The Ohio Supreme Court, just like Iowa's high court, applies the same analysis in determining whether a statute allegedly offending federal equal protection standards also violates the state constitution. *Id.* at 467 (stating

"These two provisions are functionally equivalent, and the standards for determining violations of equal protection are essentially the same under state and federal law.") Likewise, the dissenting justices of the Ohio Court, like the dissenting justices of the Iowa Court, made it clear that the methodology and conclusion reached by the majority conflicted with federal standards for rational basis review of equal protection challenges. *Id.* at 471-72. This Court, concluding that the Ohio Supreme Court had misinterpreted federal law, reversed *per curiam* on the ground that the Ohio Court's holding cannot be reconciled with the requirements of the Equal Protection Clause. *Cent. State Univ. v. Am. Ass'n of Univ. Professors,* 526 U.S. 124 (1999). Just as this Court found no independent state ground precluding reversal in that case, it should find no independent and adequate state law removes jurisdiction in this case, and it should reverse the Iowa Supreme Court's decision.



CONCLUSION

For the foregoing reasons, the decision of the Iowa Supreme Court should be reversed.

Respectfully submitted,

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