Case No. 123667

**IN THE SUPREME COURT OF ILLINOIS**

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| CHARLES D. YAKICH,<br><br>Petitioner-Appellee,<br><br>v.<br><br>ROSEMARY A. AULDS,<br><br>Respondent-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | On Appeal from the Eighteenth Judicial Circuit Court, Du Page County, Illinois<br><br>Circuit Case No. 15 F 651<br><br>Circuit Judge: Hon. Thomas A. Else |

# BRIEF OF THE APPELLEE, CHARLES D. YAKICH

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E-FILED
5/9/2019 12:03 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

**ORAL ARGUMENT REQUESTED**

## POINTS AND AUTHORITIES

## STATEMENT OF FACTS

The Respondent-Appellant, Rosemary A. Aulds, ("Aulds"), and Petitioner-Appellee, Charles D. Yakich ("Yakich") (collectively "Parties") were never married. (C562). They are the biological parents of Dylan Yakich ("Dylan") (C562) who was born on July 23, 1995. (Sup C14). On February 6, 1997, the parties entered into an Agreed Order, which granted them joint custody and equal parenting time, reserved child support, and was silent with regard to Dylan's post-secondary educational expenses ("college expenses"). (C157-63). With respect to joint decision making, paragraph two of the Agreed Order states, in relevant part, that "the parties shall confer with each other about and jointly decide all important matters pertaining to [Dylan]'s . . . education and upbringing . . . ." (C158).

On August 6, 2015, Aulds filed her Petition for Contribution to College Expenses and for Other Relief under Section 13.1 of the Illinois Parentage Act and Section 513 of the Illinois Marriage and Dissolution of Marriage Act ("Section 513"). (C89-91). Her Petition for Contribution alleged that Dylan had been accepted to Florida Gulf Coast University ("FGCU"), that the anticipated college expenses for the 2015-2016 academic year were $39,316, and that Yakich had the financial ability to contribute to Dylan's college expenses. (C89-91). On February 4, 2016, Yakich filed his response to Aulds' Petition for Contribution and stated that he was not a party to or included in any tours or applications to Dylan's prospective colleges. (C197-200).

On June 9, 2016 and July 22, 2016, the circuit court heard testimony pertaining to Aulds' Petition for Contribution. (R2-81; R82-104). Ever since Dylan was a young girl, her dream was to become a marine biologist and Yakich fostered her interest by enrolling

Dylan into scuba diving classes and taking her on many diving trips. (R61; R92). However, Yakich was not included or involved in Dylan's selection of colleges. (R97-98). The testimony further highlighted that *only* Aulds and Dylan decided that she should attend FGCU, and that Dylan informed Yakich of her choice one week before FGCU orientation. (R93; R98; Sup C47).

Dylan mistakenly enrolled in the marine science program at FGCU believing that she would be earning a degree equivalent to a degree in marine biology. (R60; R91). FGCU does not offer a degree in marine biology. (R27). Yakich offered to pay all of Dylan's tuition and college expenses if she transferred to Scripps Institution of Oceanography at the University of California, San Diego, or University of Hawaii at Manoa, both of which offer bachelor's degrees in marine biology and have prestigious reputations. (C562-63; R93). Yet, Aulds and Dylan refused Yakich's offer. (C563).

On July 22, 2016, subsequent to the evidentiary hearing, the court ordered Yakich and Aulds to each contribute to 40% of the college expenses, and that Dylan should be responsible for the remaining 20%, which could be in the form of grants, scholarships, work-study, or employment ("July 22, 2016 Order"). (C238-39). However, Dylan did not apply for grants or scholarships or get a job, and Aulds paid Dylan's remaining portion of the college expenses. (C394).

On September 23, 2016, Yakich initially filed his Motion to Declare 750 ILCS § 5/513 Unconstitutional, with an attached memorandum of law. (C331-43). On October 6, 2016, the Illinois Attorney General gave notice it would refrain from intervening in the dispute. (C559). On January 11, 2017, Yakich filed a motion seeking to have his obligation of support terminated or modified based on Dylan's non-compliance with the July 22, 2016

Order. (C393-401). The circuit court denied his motion based in part on a determination that Yakich was not monetarily damaged by his daughter's actions. (C475).

On August 1, 2017, Yakich filed his instant Motion to Declare 750 ILCS § 5/513 Unconstitutional and memorandum in support of his motion on September 29, 2017 (C516-30). On December 29, 2017, the circuit court entered an Order taking Yakich's Motion to Declare 750 ILCS § 5/513 Unconstitutional under advisement. (C554).

On May 4, 2018, the circuit court entered a Memorandum Opinion and Order ("May 4, 2018 Order") finding that (1) equal protection was denied to Yakich; (2) Section 513 was unconstitutional as applied to him; (3) Section 513 could not reasonably be construed in a manner that would preserve its validity in this case; and (4) this finding of unconstitutionality was necessary to the court's decision and its decision cannot rest on an alternative ground. (C562-68).

On May 31, 2018, Aulds filed her Notice of Appeal in an attempt to appeal the May 4, 2018 Order in the Circuit Court of Du Page County, Illinois, which granted Yakich's Motion to Declare 750 ILCS 5/513 Unconstitutional. (C576-87).

## ARGUMENT

"[S]tatutes are presumed constitutional, and courts have a duty to construe legislative enactments so as to uphold their validity if reasonably possible." *People v. Chairez*, 2018 IL 121417, ¶ 15 (citing *People v. Aguilar*, 2013 IL 112116, ¶ 15). To overcome this presumption, the party challenging the constitutionality of a statute must clearly establish that it violates the Constitution. *People v. Mosley*, 2015 IL 115872, ¶ 22. The question of whether a statute is unconstitutional is a question of law subject to *de novo* review in this Court. *Chairez*, 2018 IL 121417, ¶ 15. The Court should uphold the

Circuit Court of Du Page County's ruling that Section 513 is unconstitutional because the statute violates the Equal Protection Clause.

## I. SECTION 513 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION CLAUSE.

The United States and Illinois Constitutions guarantee all citizens the equal protection of the law (collectively "the Equal Protection Clause"). U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. "A court uses the same analysis in assessing equal protection claims under both the state and federal constitution." *People v. Reed*, 148 Ill. 2d 1, 11 (1992). The Equal Protection Clause aims to ensure that "like persons in like circumstances are treated similarly" in relation to the laws of the state. *Curtis v. Kline*, 666 A. 2d 265, 267 (Pa. 1995). It protects against intentional and arbitrary discrimination. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Violations of the Equal Protection Clause usually arise when a state permits a specific group of individuals the right to partake in an activity but denies other individuals the same right.

Post-secondary support statutes, such as Section 513, create a statewide classification in which only unmarried parents are required to provide college subsidies and not married parents. Section 513 unreasonably creates four classes of persons: (1) married parents; (2) unmarried parents;[1] (3) children of married parents; and (4) children of unmarried parents. Section 513 unconstitutionally discriminates against unmarried parents by requiring them to contribute to their child's college expenses, where married parents are not required to pay for their children's college.

[1] For the purpose of this brief, the term "unmarried parents" includes both divorced parents and parents who never married.

In order to evaluate whether Section 513 violates the Equal Protection Clause, the Court must first determine the nature of the right purportedly infringed upon by the statute. *In re D.W.*, 214 Ill. 2d 289, 310 (2005). Proper "classification of the right affected is crucial because the nature of the right dictates the level of scrutiny courts employ in determining whether the statute passes constitutional muster." *Id*. Unless the discrimination is against a suspect class or infringes upon a fundamental right, "the rational basis test applies, and the statute will be upheld as long as it bears a rational relationship to a legitimate state interest." *Id*. "However, where the constitutional right at issue is one considered 'fundamental,' courts must subject the statute to the more rigorous requirements of strict scrutiny analysis." *Id*. To pass strict scrutiny, the statute "must be necessary to serve a compelling state interest, and must be narrowly tailored thereto, i,e., the legislature must use the least restrictive means consistent with the attainment of its goal." *Id*.

### A. Discrimination Against Unmarried Parents is Subject to Strict Scrutiny Under the Equal Protection Clause.

Strict scrutiny should be applied to review the constitutionality of Section 513 because the statute infringes on an individual's right to oversee and guide the upbringing and education of one's child. The Supreme Court of the United States has frequently emphasized the importance of family by considering the right to raise one's child as "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), one of the "basic civil rights of man," S*kinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "perhaps the oldest of the fundamental liberty interests recognized by the Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). *See also Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.");

*Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."); *Prince v. Massachusetts*, 312 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ."). It is established that the fundamental right to raise one's child includes the right to direct the child's education. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing the right of parents to direct their children's education); *Meyer*, 262 U.S. at 401 (parents have the power to "control the education of their own [children]"); *Pierce v. Society of Sisters* 268 U.S. 510, 535 (1925) (parents have the right to direct the education of their children).

Absent abuse and neglect, a parent has the fundamental right to direct the upbringing and education of their children regardless of their marital status. *Curtis,* 666 A. 2d at 272. "If the right of privacy means anything, it is the right of the individual, *married or single*, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person . . . ." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added). *See also Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (finding that a divorced father could not be constitutionally treated differently from a married father). Courts and legislatures may not intrude into the family unit and make parenting decisions, such as choices relating to education. Susan J. Germanio, *When College begins and Child Support Ends: An Analysis of the Pennsylvania Legislature's Response to Blue v. Blue*, 3 WIDENER J. PUB. L. 1109, 1140 (1994). *See also Ex parte Christopher,* 145 So. 3d 60, 79 (Ala. 2013) (Moore, J., concurring) (college expenses "fall within the sphere of family government" and "are not suitable for judicial determination"). Although Illinois courts

have not examined the issue of whether court-ordered support infringes on a parent's fundamental right to raise their child, the Court should apply strict scrutiny to analyze Section 513 because it interferes with Yakich's fundamental right to raise his daughter.

Section 513 obstructed Yakich from exercising basic parental rights with respect to his daughter—he could not discourage Dylan from seeking a marine science degree at FGCU by refusing to pay for such education. Yakich is willing and able to pay the full college expenses of his daughter. (R94). However, he refuses to pay for FGCU because it runs counter-intuitive to Dylan's dream to become a marine biologist—the school does not offer a marine biology degree. (R93; R26). As Dylan's father, Yakich believes it is his responsibility to help his daughter make the best decision for her future career and to ensure her success. (R94). Yakich was unable to use his financial influence to guide Dylan to an appropriate learning institution with a marine biology program, such as Scripps Institute of Oceanography. (R62). He was never consulted by either Aulds or Dylan, and his insight was never considered. (R93). Because Aulds filed a petition in court pursuant to Section 513, Yakich was ordered to contribute to Dylan's college expenses without having any input on the school selected. As a result, Dylan was able to choose any school, regardless of price, academic credentials, or the fields of study offered.

Every parent, married or unmarried, is entitled to be an active and integral part of their child's life. Yakich should have been free to make the parental decisions regarding his daughter's college education which he believed were in her best interests and encouraged her to fulfill her life-long dream of becoming a marine biologist. Because Section 513 infringes upon Yakich's fundamental right to direct the upbringing and

education of his daughter strict scrutiny should be applied; and thus, declare the statute unconstitutional.

**1. If parents are free to disinherit their children for any reason, they should be similarly free to decline to pay for the college expenses of their children.**

Parents have the right to intentionally disinherit their children. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1217-18. Even if parents do not formally disinherit children in their wills, they can accomplish the same result by spending the entire estate during their own lifetimes. Judith G. McMullen, *Father (or Mother) Knows Best: An Argument Against Including Post-Majority Education Expenses in Court-Ordered Child Support*, 34 IND. L. REV. 343, 357 (2001). Some parents use disinheritance (or threats of it) to influence their children's actions. *Id*. at 365. A testator could have several reasons for disinheriting a child: the choice to spend resources rather than save them for the next generation; the preference towards giving property to a surviving spouse rather than descendants; the belief that the children have received enough from the parents already; the desire to keep children loyal and well-behaved; and the desire to make children independent. *Id*. at 358. Even in a non-estate planning setting, parents often have similar reasons to use financial support as a reward or incentive as children grow older. *Id*. at 365.

However, in states that order unmarried parents to contribute to college, those parents are unable to use financial support as a way to impact their child's behavior or guide their decision making. *Id*. Statutes like Section 513 allow children of unmarried parents to ignore their parents' advice—they can choose any school they wish even if a parent thinks it may be a "financial, academic, professional, or personal mistake." Dan Huitink, *Forced Financial Aid: Two Arguments as to Why Iowa's Law Authorizing Courts*

*to Order Divorced Parents to Pay Postsecondary-Education Subsidies is Unconstitutional*, 93 IOWA L. REV. 1423, 1441 (2008).

It is unreasonable to deny unmarried parents the ability to use financial support as a reward to influence their children's behaviors. *Id*. at 366. The possible reasons for disinheritance or for refusal to pay college expenses are similar to each other, and similar as between unmarried and married parents. Therefore, the results should be the same: the state should force neither unmarried or married parents to contribute to their children's college expenses.

### B. Discrimination Against Unmarried Parents is Not A Legitimate State Objective.

If the Court does not apply strict scrutiny, the Court must use rational basis review to determine the constitutionality of Section 513. Therefore, the question turns on whether requiring unmarried parents to contribute to their child's college education is rationally related to a legitimate interest of the State of Illinois.

Nearly 40 years ago, the constitutionality issue of Section 513 was before the Court in *Kujawinski v. Kujawinski*, 71 Ill. 2d 563 (1978). In *Kujawinski*, a father argued that Section 513 denied him equal protection of the law in that it invidiously discriminated against unmarried parents. *Id*. at 577. He claimed that Section 513 permits a court to order "[unmarried] parents to allocate funds for the education of their children beyond the children's minority, and . . . that such burden is not imposed upon [married] parents." *Id*. at 578.

The Court applied the rational basis standard and held that Section 513 does not violate the equal protection guarantees of the United States and Illinois Constitutions—the imposition of such an obligation upon unmarried parents was reasonably related to the

legitimate legislative purpose of minimizing any economic and educational disadvantages to children of unmarried parents. *Id*. at 579-80. The Court relied on the traditional 1959 rationale that:

> In a *normal household*, parents . . . direct their children as to when and how they should work or study. That is on the assumption of a normal family relationship, where parental love and moral obligation dictate what is best for the children. Under such circumstances, natural pride in the attainments of a child . . . would demand of parents provision for a college education, even at a sacrifice.
>
> When we turn to divorced parents a disrupted family society cannot count on normal protection for the child, and it is here that equity takes control to mitigate the hardship that may befall children of divorced parents.

*Id*. at 579–80 (quoting *Maitzen v. Maitzen*, 24 Ill. App. 2d 32, 38 (1st Dist. 1959)) (emphasis added).

The Court further rationalized that "[i]f parents could have been expected to provide an education for their child of majority age absent divorce, it is not unreasonable for the legislature to furnish a means for providing that they do so after they have been divorced." *Kujawinski*, at 580. Accordingly, the Court concluded that it was reasonably related to that legitimate purpose for the legislature to permit a court to order unmarried parents to educate their children to the same extent as might reasonably be expected of nondivorced parents. *Id*.

1. **The rational basis in *Kujawinski* is antiquated and misplaced in today's modern era.**

The rational basis for the *Kujawinsk*i Court's ruling in 1978 no longer exists in view of changed demographics, societal attitudes, and developments in case law in both state and federal courts. In *Weinberger v. Wiesenfeld*, the Supreme Court of the United States held that a distinction based on an "archaic and overbroad" generalizations would not be

tolerated under the constitution. 420 U.S. 636, 636 (1975). *See also Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) ("recognizing that new insights and societal understandings can reveal unjustified inequality within fundamental institutions that once passed unnoticed and unchallenged"); *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (noting considerations like history and tradition are relevant and help guide the analysis of constitutional provisions but do not set its outer boundaries); *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) ("[H]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.").

Our society has significantly changed over the last 40 years. The *Kujawinski* Court's presumed "normal" the two-parent intact family is drastically different than the average family in today's society. Currently, divorce is overwhelmingly prevalent and common—approximately 50% of marriages end in divorce. Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RES. CTR (Sept. 14, 2017), https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/. Since the 1970s, there has been about a fourfold increase in the number of unmarried parents. Gretchen Livingston, *The Changing Profile of Unmarried* Parents, PEW RES. CTR (Apr. 25, 2018), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2018/04/Unmarried-Parents-Full-Report-PDF.pdf. One in four parents living with a child in the United States today are unmarried. *Id*. In fact, only 46% of children currently live in a traditional home like the *Kujawinski* Court described as "normal," compared to 61% in 1980 and 73% in 1960. Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RES. CTR (Dec. 22, 2014), https://www.pewresearch.org/fact-tank/2014/12/22/less-

than-half-of-u-s-kids-today-live-in-a-traditional-family/. This illustrates that the "normal" household is no longer comprised of only married parents and their children. Furthermore, the Supreme Court of the United States noted that "[t]he demographic changes of the past century make it difficult to speak of an *average* American family. The *composition of families varies greatly* from household to household. While many children may have two married parents . . . , *many other children are raised in single-parent households*." 537 *Troxel*, 530 U.S. at 63-64 (emphasis added).

In *Kujawinski*, the constitutionality of Section 513 hinged on the 60-year-old *Maitzen* Court's description of the composition of a "normal" family in 1978. The Court's decision was based on the "archaic and overboard" generalization that unmarried parents were uncommon and less likely to contribute to college expenses for their children than married parents. While this may have been true in 1978, Section 513 is no longer rationally related to a legitimate governmental interest and should be declared unconstitutional.

**2. The *Kujawinski* ruling relies on the assumption that married parents are expected to provide a college education for their children.**

The *Kujawinski* Court's rationale that it is reasonable for the legislature to furnish a means of ensuring college contribution from unmarried parents is derived from the misconception that married parents are expected to provide an education for their child. 71 Ill. 2d at 580. This reasoning assumes that married parents who can afford to pay for their children's college expenses will, in fact, pay for such expenses.

Payment of college expenses is by no means universal, even among parents whose marriages have remained intact. McMullen, *supra* at 364. Even many affluent parents believe that their children should contribute financially to college expenses. Sophia Arzoumanidis, *Why Requiring Parents to Pay for Postsecondary Education is*

*Unconstitutional and Bad Policy*, 54 FAM. CT. REV. 314, 322 (2016). One in 12 affluent parents think that children should pay for the majority of college, and one in 50 believe that children should pay for all of it. Bonnie Kavoussi, *Paying for College: Three in Four Rich Parents Think Kids Should Help Pay Tuition*, HUFFINGTON POST (June 4, 2012), https://www.huffpost.com/entry/paying-for-college-rich-parents-kids-should-help-pay_n_1568237. Some parents think that this will influence their children to work hard, take the most advantage of their education, and teach responsibility and independence. Arzoumanidis, *supra* at 322. Further, many children who receive parental aid tend to have lower GPA's than those whose parents do not provide such aid. Laura T. Hamilton, *More is More or More is Less? Parental Financial Investments During College*, 78 AM. SOC. R. 70, 71 (2013). Meanwhile, the children who are obligated to pay for college themselves feel a need to achieve academic success and do their utmost. *Id*. at 90. Unmarried parents share these same concerns with married parents and should be allowed to make the same considered judgments to address them. Because the *Kujawinski* ruling is inapplicable in today's modern era and erroneously depends on the assumption that married parents are expected to provide a college education for their children, Section 513 should be found unconstitutional.

### C. Discrimination Against Children of Unmarried Parents is Not A Legitimate State Objective

The Court should invalidate Section 513 on equal protection grounds because it classifies children based on the marital status of their parents. The Supreme Court of the United States has struck down similar statutes that created an improper classification based on illegitimacy. *See e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977) (striking down an intestate succession law because it allowed children of unmarried parents to inherit from

their mothers but not their fathers, where children of married parents could inherit from both their mothers and fathers); *Gomez v. Perez*, 409 U.S. 535, 537-38 (1973) (holding it unconstitutional to deny a child the right to obtain child support because the father did not marry her mother). When a court addresses classification based on illegitimacy, and the children affected by the classification have no control over the marital status of their parents, rewarding one group while denying the same benefit to another group is illogical and unjust. *Trimble*, 430 U.S. at 769-70 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

**1. The majority of states do not allow emancipated children to receive college support.**

A disparity exists among states regarding whether a court may even require unmarried parents to contribute to their children's college expenses, or to contribute to their children's support no later than the child's graduation from high school. Madeline Marzano-Lesnevich & Scott Adam Laterra, *Child Support and College: What is the Correct Result?*, 22 J. AM. ACAD. MATRIM. LAW. 335, 335 (2009). Thirty-six states contain no statute requiring parents to contribute toward their children's college expenses. *Id*. at 339 n.21. Some state courts have voiced their opposition of statutes similar to Section 513. *See e.g.*, *Christopher*, 145 So. 3d at 63 (circuit courts are not authorized to require noncustodial parent to pay educational support for children past the age of majority); *Litel v. Litel*, 490 So. 2d 741, 743 (La. Ct. App. 1986) (duty of father to provide college education to emancipated child was not a "natural" or "moral" obligation creating right of action); *Towery v. Towery*, 685 S.W.2d 155, 157 (Ark. 1985) (it is fundamentally unfair to enforce the moral obligation not providing college support only against divorced parents,

while other parents may do as they choose). One court in particular held that college contribution statutes, similar to Section 513, are unconstitutional.

***a. The Court should follow the decision in Curtis v. Kline.***

In 1995, the Supreme Court of Pennsylvania ruled that it was unconstitutional to order divorced parents to support their children after they reach adulthood. *Curtis*, 666 A.2d at 270. *Curtis* involved a challenge to a 1993 Pennsylvania law (23 Pa. Const. Stat. § 4327 (a) (1993)) that gave courts discretion to order separated, divorced, or unmarried parents to pay college expenses of their children. *Id*. at 267. Rather than focusing on the classification of parents, the court focused on the children that were treated differently under the statute. *Id*. at 269. The statute classified children according to the marital status of their parents. *Id*. By creating two groups, this classification established that children of unmarried parents were able to obtain a benefit via court order that was not available to nondivorced children. *Id*.

In the preamble to the statute, the Pennsylvania legislature noted its intention: "a rational and legitimate governmental interest in requiring some parental financial assistance for a higher education for children of [unmarried] parents." 23 Pa. Stat. and Cons. Stat. Ann. § 4327 (1993). Despite the stated legislative purpose of the statute (which appears to have been inserted in order to satisfy a rational basis analysis) the Pennsylvania Supreme Court concluded that the classification was not rationally related to the legitimate governmental interest of easing the struggles of children with unmarried parents. *Curtis*, 666 A.2d at 269. The court stated:

> *It will not do to argue that this classification is rationally related to the legitimate governmental purpose of obviating difficulties encountered by those in non-intact families who want parental financial assistance for post-*

> *secondary education***,** because such a statement of the governmental purpose assumes the validity of the classification. Recognizing that within the category of young adults in need of financial help to attend college there are some having a parent or parents unwilling to provide such help, *the question remains whether the authority of the state may be selectively applied to empower only those from non-intact families to compel such help. We hold that it may not.* In the absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their adult children in obtaining such an education, *we perceive no rational basis for the state government to provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end.*

*Id*. at 269-70 (emphasis added).

To support its decision, the court discussed a hypothetical situation to demonstrate the arbitrariness of the statute. *Id*. at 270. A divorced father could have two children, one from a first marriage and the second from his current marriage. *Id*. Under the statute, the divorced father could be required to provide financial support to the first child, but not the second. *Id*. The second child may even have to sacrifice a college education so that the first child may receive financial assistance from the same parent. *Id*. This hypothetical illustrates how similarly situated children, both in need of funds to receive a higher education, are treated unequally. Both the statute at issue and the Pennsylvania statute arbitrary classify similarly situated children based on their parents' marital status; thus, the Court should follow the *Curtis* decision and declare Section 513 unconstitutional.

**2. Given the state's important interest in children receiving higher education, Section 513 should apply to *all* children regardless of their parents' marital status.**

"With college attendance and tuition reaching record highs, the need to receive a college diploma has never been so vital." Arzoumanidis, *supra* at 315. If encouraging its citizens' higher education is so important to the state, it is troublesome that Section 513 imposes a college-support obligation only upon unmarried parents and not upon married

parents as well. Germanio, *supra* at 1139. *See also Yoder*, 406 U.S. at 213 (noting that the state has a high responsibility for the education of its citizens). Because Section 513 applies only to unmarried parents, the statute establishes underinclusive classifications that are unconstitutional they "do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 16-4, at 1447 (2d ed., 1988). "Certainly, the intended government end—the higher education of its citizens—could be best achieved by applying the [Section 513] to all those who are similarly situated: all parents of children desiring to attend college." Germanio, *supra* at 1141.

Encompassing all children would include children of married widowed parents ("widowed parents"), who like the children of married parents, have no ability to seek an order requiring their remaining parent to pay for college expenses. The rationale for a college contribution statute is that children of unmarried parents are financially disadvantaged. Yet, the children of widowed parents who live in a one parent and one income household are potentially far more economically disadvantaged than the children of two unmarried parents who each could contribute to their child's support. The reasoning behind Section 513 is irrational because the children of widowed parents—arguably the most vulnerable—cannot obtain the benefit of a court order which could require their surviving parent to pay college expenses.

Because Section 513 does not pertain to children of married or widowed parents, they will not have the opportunity for a court to determine that it may be necessary for their parents to contribute to their education. *Id*. If the State truly has a vital interest in this area, Section 513 should apply to all children, regardless of their parents' marital status—or in

the alternative, declare that no parent is obligated to pay for their child's college expenses, unless voluntarily agreed to, in writing, prior to the child entering college. *See generally*, *Zolonz v. Zolonz*, 659 So. 2d 451 (Fla. Dist. Ct. App. 1995); *Hawkins v. Gilbo*, 663 A.2d 9 (Me. 1995); *Zetterman v. Zetterman*, 512 N.W.2d 622 (Neb. 1994). The Court should declare Section 513 unconstitutional because it violates the Equal Protection Clause.

## II. THE CIRCUIT COURT HAD THE AUTHORITY TO DECLARE SECTION 513 UNCONSTITUTIONAL.

The circuit court has the enumerated authority to declare Section 513 unconstitutional and it did not error when it struck down and invalidated the discriminatory statute. Courts should adapt to the social changes and recognize when a targeted group is being treated differently than those who are similarity situated. The Court should not adhere to an antiquated reasoning and follow a prior decision if it finds a technical issue in an appeal. The Court should consider society's current social state while deciding whether Section 513 is unconstitutional.

### A. Courts Interpret the Law with Society's Current Cultural Norms as A Main Part of its Reasoning.

One of the major functions of the Illinois Supreme Court is to interpret the law, determine if the law is constitutional, and to create the "common law." "The interpretation of statutes, the determination of their validity, and the application of the rules and principles of the common law, among others, are inherently judicial functions." *People v. Bruner*, 343 Ill. 146, 158 (1931). The judiciary is an appropriate place to signal to the Legislature that an unconstitutional law can no longer stand in the State of Illinois. The Supreme Court of Illinois has the inherent power to determine if a statute should no longer be valid law.

Courts maintain the rule of law and when social change outpaces the legislators, it is proper for the court to adapt to the current social climate. Courts typically hear the grievances of minority groups or by those who maintain minority opinions, which impact the greater good of society. Historically, when a court has been faced with a large and ingrained cultural change, the court often "rubber-stamps" the change into effect with its ruling. *See Brown v. Board of Education*, 347 U.S. 483 (1954) (because school segregation was diminishing across the country, and only a few states had laws requiring equal education, the Court recognized that society shifted to a lessened racial divide and legalized the integral right to equal education); *Roe v. Wade*, 410 U.S. 113 (1973) (because abortions were on the rise and only a few states had statutes legalizing abortions, the Court reacted and legalized abortions); *Obergefell*, 135 S. Ct. at 2584 (because same-sex marriage was beginning to be adopted by individual states and some states were creating marriage-like unions, the Court realized the societal shift towards the right to marry and adopted the equal right to marriage for all). During these different societal movements, the Court did not initiate social change, it just set the stage for the evolving culture and recognized fundamental rights. Because the Legislature fails to recognize that Section 513 tramples on Yakich's constitutional rights, the Court should interject and recognize that society has shifted towards equal rights for all parents, regardless of their marital status.

### B. Section 513 Orders Are Unique Child Support Awards That Are Not Final and Are Subject to Modification.

The July 22, 2016 Order was modifiable and not final. "It is well settled that orders entered pursuant to section 513 are always modifiable." *In re Marriage of Loffredi*, 232 Ill.App.3d 709, 712 (3d. Dist. 1992). If a court order is subject to modification, it cannot be a final order. On July 22, 2016, the circuit court entered an order pursuant to Section

513. (C238-39). The order required the Parties, and Dylan to contribute to Dylan's college expenses. (C238-39).

Orders entered pursuant to Section 513 are modifiable child support orders. *See* 750 ILCS 5/510 *et seq*. ("Section 510") (which sets the framework for child support modifications). "Given the statute's express language and its history, it is not surprising that Illinois courts have consistently held that section 513 expenses are a form of child support to be read in conjunction with section 505." *In re Marriage of Petersen*, 2011 IL 110984, ¶ 13. Section 510 includes language referencing to both Section 505 and Section 513; therefore, there is no question that Section 513 is a form of a child support award. *Id*. "[A] provision for payment of college expenses is in the nature of child support, rather than property settlement, such provisions are modifiable." *In re Marriage of Dieter*, 271 Ill. App. 3d 181, 190 (1st. Dist. 1995). Because Section 513 orders are clearly child support orders, they are modifiable pursuant to Section 510.

Furthermore, a modifiable Section 513 order cannot be a final order. A Section 513 order is modifiable upon the showing of a substantial change in circumstances has occurred since the entry of the last Section 513 order. *In re Marriage of Saracco*, 2014 IL App (3d) 130741, ¶ 12; 750 ILCS 5/510(a)(1). "Section 513 covers the 'what' of an expense petition, not the 'when.'" *In re Marriage of Chee*, 2011 IL App (1st) 102797, ¶ 14. There is no deadline to file or adjudicate a petition for a child's college expenses and such a petition can be filed after the child has graduated from college. *Id*. at ¶ 15. Section 513 orders are a unique type of court order that cannot not be final and can be modified even after the child, who is indirectly subject to the order, has graduated from college. There are several reasons why a Section 513 order should be modified, such as a parent losing their income

or a child attending a new school that may have a different set of required fees or costs. Section 513 orders cannot be stagnant and must be pliable due to the numerous possibilities that may result in their modification. If an order is modifiable, as a Section 513 order requires, then by its nature it cannot be a final order.

**1. Even if the July 22, 2016 Order was not subject to modification it was not final.**

In the alternative that the Court finds the circuit court's July 22, 2016 Order is non-modifiable, it is still not a final order. The July 22, 2016 Order did not completely dispose of the entire proceeding because all of the claims where not adjudicated and the matter was not taken off the circuit court's docket. (C238-39). Pursuant to Illinois Supreme Court Rule 304(a), if multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the claims only if the circuit court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. Ill. S. Ct. R. 304(a).

On August 5, 2016, Yakich filed a Petition for Rule to Show Cause Against Respondent, which alleged *inter alia*, that Aulds was in violation of the circuit court's June 13, 2011 order. (C242-307). Yakich filed his Petition 14 days after the circuit court entered the July 22, 2016 Order. (C242-307). On August 17, 2016, Aulds issued a Request for Production of Documents to Yakich relating to Dylan's medical insurance. (C309). On August 29, 2016, Aulds filed a Petition for Adjudication of Indirect Civil Contempt, Attorney Fees and for Other Relief. (C312-14). On September 23, 2016, Yakich filed Petitioner's Motion to Declare 750 ILCS §5/513 Unconstitutional. (C327-29) On September 30, 2016, Yakich filed his Answer to [Auld's] Petition for Adjudication of Indirect Civil Contempt, Attorney Fees and Other Relief. (C344-46). On October 25, 2016,

the circuit court entered an order setting a hearing date for the Parties' counter Petitions for Rule to Show Cause. (C357). On October 27, 2016, Aulds filed a Response to Motion to Declare 750 ILCS §513 Unconstitutional. (C358-60). On November 7, 2016 the circuit court reset the hearings for the Parties' Petitions for Rule to Show Cause. (C364). On December 2, 2016 the circuit court entered an order setting a hearing for Yakich's Motion to Declare 750 ILCS §5/513 Unconstitutional. (C365). On December 22, 2016, Yakich filed Petitioner's Reply in Support of Motion to Declare 750 ILCS §5/513 Unconstitutional and Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C366-75). On December 30, 2016, Aulds filed a Motion to Strike a Portion of Petitioner's Reply [in Support of Motion to Declare 750 ILCS § 5/513 Unconstitutional and Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Towards the Educational Expenses of his Adult Child]. (C379-81).

On January 11, 2017, Yakich filed Petitioner's Motion for Leave to Withdraw 12/22/2016 Reply in Support of Petitioner's Motion to Declare 750 ILCS § 5/513 Unconstitutional and for Leave to file Amended Reply. (C382-92). On the same day, Yakich filed Petitoner's Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C393-401). On February 28, 2017, Aulds filed her Response to Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C404-07). Also, on that day, Aulds filed her Sur-Reply to Amended Reply to Response to Motion to Declare 750 ILCS §513 Unconstitutional. (C408-11). On March 14, 2017, Yakich filed his Sur-Response to Sur-Reply to Petitioner's

Motion to Declare 750 ILCS § 5/513 Unconstitutional. (C417-20). Again, on March 14, 2017, Yakich filed his Reply to Respondent's Response to Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C412-16). On March 28, 2017 the circuit court reset the hearing for the Parties' Petitions for Rule to Show Cause, Yakich's Motion to Declare 750 ILCS § 5/513 Unconstitutional and Yakich's Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C421). On April 6, 2017, the circuit court once again reset the hearing for the Parties' Petitions for Rule to Show Cause, Yakich's Motion to Declare 750 ILCS § 5/513 Unconstitutional, and Yakich's Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C422). On June 8, 2017, the circuit court conducted a hearing on the Parties' Petitions for Rule to Show Cause, and reset the hearing on Yakich's Motion to Declare 750 ILCS § 5/513 Unconstitutional and Yakich's Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C422; C443).

On June 13, 2017, Aulds filed a Petition for Modification of Health Insurance Coverage and for Other Relief. (C446-49). On June 16, 2017, the circuit court entered an order finding Aulds in indirect civil contempt of court for failing to pay her 50% share of the cost of the health insurance premiums for Dylan. (C450-51). The circuit court denied Aulds' Petition for Adjudication of Indirect Civil Contempt. (C450-51). On July 11, 2017, Yakich filed his 508(b) Petition for Attorney's Fees and Costs in connection with his Petition for Rule to Show Cause being granted by the circuit court. (C455-70). On July 20,

2017, Yakich filed his Response to Petition for Modification of Health Insurance Coverage and for Other Relief. (C471-74). On July 28, 2017, the circuit court denied Yakich's Petition to Terminate or in the Alternative to Modify Petitioner's Obligation to Contribute Toward the Educational Expenses of his Adult Child. (C475). At the same hearing on July 28, 2017, the circuit court granted Yakich leave to amend, refile, or otherwise file a new Petition regarding the constitutionality of Section 513. (C475). On August 1, 2017, Yakich filed his Motion to Declare 750 ILCS § 5/513 Unconstitutional. (C478-86). On August 24, 2017, Aulds filed her Response to 508(b) Petition for Attorney's Fees and Costs. (C487-491). Four days later, Yakich filed an Amended 508(b) Petition for Attorney's Fees and Costs. (C492-511).

On September 15, 2017, the circuit court entered two separate orders, one modifying how Dylan's health insurance would be split by the Parties, and the other allowing Yakich leave to file a memorandum of law in support of his Motion to Declare 750 ILCS § 5/513 Unconstitutional. (C512-14; C515). On September 29, 2017, Yakich filed a Memorandum in Support of Petitioner's Motion to Declare 750 ILCS § 5/513 Unconstitutional. (C516-30). On October 6, 2017, Aulds filed her Response to Amended 508(b) Petition for Attorney's Fees and Costs. (C531-36). On October 27, 2017, Aulds filed a Response to Motion to Declare 750 ILCS § 5/513 Unconstitutional. (C537-42). On November 17, 2017, Yakich filed his Reply to Respondent's Response to Motion to Declare 750 ILCS § 5/513 Unconstitutional. (C543-53). On December 29, 2017, the circuit court conducted a hearing on Yakich's Amended 508(b) Petition for Attorney's Fees and Costs and his Motion to Declare 750 ILCS § 5/513 Unconstitutional. (R131-73). The circuit court entered an order on December 29, 2017, granting Yakich's Amended 508(b) Petition

for Attorney's Fees and Costs and taking his Motion to Declare 750 ILCS § 5/513 Unconstitutional under advisement. (C554; R131-73). On May 4, 2018, the circuit court issued its Memorandum Opinion and Order stating *inter alia*, that Section 513 is unconstitutional as applied to Yakich as it violates the Equal Protection Clause. (C562-72).

The circuit court's July 22, 2016 Order did not contain Rule 304(a) language or resolve all the issues between the Parties. (C238-39). Multiple petitions, motions, memorandums of law, hearings, and exchanges of discovery took place between the time from the July 22, 2016 Order and the May 4, 2018 Order that ultimately modified and voided the July 22, 2016 Order. Finality does not necessarily turn on whether one or more issue has been decided, rather it depends on if the decided matter closely relates to those matters still pending. *Carle Foundation v. Cunningham Twp.*, 2017 IL 120427, ¶ 18. If the order only disposes certain issues relating to the same basic claim the order is not final. *Id*. The Parties had multiple issues pending that were directly related to the July 22, 2016 Order, all of which were decided by the circuit court over the span of several years. Even if the circuit court makes a special finding and includes Rule 304(a) language in its order, it will have no effect on a nonfinal order. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 24. *See In re Marriage of King*, 208 Ill.2d 332, 344 (2003) (where the court included 304(a) language in an order, but the order was found not to be final when post-judgment motions were pending, and the court made post-judgment findings). The July 22, 2016 Order did not contain Rule 304(a) language, multiple related issues remained pending between the Parties, and the modifiable order was voided by the circuit court. Even if the July 22, 2016 Order was non-modifiable, multiple issues relating to the order remained between the Parties; therefore, it could not have been a final order.

### C. When An Order is Made Pursuant to An Unconstitutional Law, it is A Void Order Subject to Attack at Any Time.

The void July 22, 2016 Order can be attacked at any time and in any court. A judgment, order, or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the order involved, is void, and may be attacked at any time or in any court either directly or collaterally. *Sarkissian v. Chicago Bd. Of Educ.*, 201 Ill. 2d 95, 103 (2002). When an order is void, a reviewing court has the authority to correct it at any time and when doing so, it is not erroneous. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). A petition pursuant to Section 1401 of the Illinois Code of Civil Procedure is not the only way a void order can be challenged. *Id*. at 29. A party may challenge a void order by means other than a 1401 petition. *Id*. Motions to expunge a void order are not subject to any time restriction. *JoJan Corp. v. Brent*, 307 Ill. App. 3d 496, 504 (1st Dist. 1999). Yakich's Motion to Declare Section 513 Unconstitutional was timely as it sought to vacate the circuit court's void July 22, 2016 Order. As such, the circuit court and this Court have the authority to vacate the void July 22, 2016 Order.

When an order is entered by a court under a statute that is subsequently held to be unconstitutional, the court has the authority to *sua sponte* or by motion of a party to vacate the void order that was entered pursuant to the unconstitutional statute. An unconstitutional statute is void from the beginning; therefore, an order entered under the unconstitutional statute is unenforceable in all its applications. *Mosley*, at ¶ 55. If a court enters an order pursuant to a statute that is void *ab initio*, a moving party can seek vacation of the void order at any time. The *Mosley* Court held that a statute was facially unconstitutional and as applied to the defendant and that defendant's post-trial motions were timely. *Id*. at ¶ 61.

Yakich filed a motion with the circuit court arguing that Section 513 violated his constitutional rights because it treated him differently than married persons. The circuit court held Section 513 unconstitutional as applied to Yakich and voided its July 22, 2016 Order. (C562-72). When the July 22, 2016 Order was entered, it was pursuant to an unconstitutional statute; thus, it was proper for the circuit court to vacate the void order.

If a court acts within the authority of an unconstitutional law, it should have no effect on the party since the order that was entered was pursuant to an invalid law. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 415, 442 (1886). If a court makes a ruling pursuant to an unconstitutional law, then that ruling is as if it was never made since it is not founded in the law. An unconstitutional statute is void *ab initio*; void "from the beginning." *Perlstein v. Wolk*, 218 Ill. 2d 448, 455 (2006). When the circuit court entered its July 22, 2016 Order it was pursuant to an unconstitutional statute, thus it was proper for the circuit court to void its order.

The Court should strictly follow the *Norton* rule. Where a parties' constitutionally guaranteed rights are in need of vindication, strict application of the void *ab initio* doctrine is appropriate, but where no such rights are at stake, other equitable and practical factors are appropriate for consideration by the Court. *Id*. at 466-67. If the Court can reach an equitable result to assist the harmed party without strict adherence to the void *ab initio* doctrine and reach a fair result, it should, but if the party was stripped of its constitutional rights, it is only fair to strictly apply the doctrine. Because Yakich was deprived equal protection when the circuit court ordered him to make payments pursuant to Section 513,

the Court should strictly apply the void *ab initio* doctrine and void the July 22, 2016 Order. The Court should not continue the injury that Yakich suffered by the void order that was entered against him; the July 22, 2016 Order should be voided by the Court and prevent this unconstitutional law from continuing to harm him.

### D. The Circuit Court Strictly Complied with Illinois Supreme Court Rule 18 and it Did Not Error When It Declared Section 513 Unconstitutional.

The circuit court is specifically allowed by the Illinois Supreme Court Rules to declare a statute unconstitutional as it did with Section 513. Illinois Supreme Court Rule 18 ("Rule 18") states:

> A court shall not find unconstitutional a statute, ordinance, regulation or other law, unless: (a) the court makes the finding in a written order or opinion, or in an oral statement on the record that is transcribed; (b) such order or opinion clearly identifies what portion(s) of the statute, ordinance, regulation or other law is being held unconstitutional; (c) such order or opinion clearly sets forth the specific ground(s) for the finding of unconstitutionality, including: (1) the constitutional provision(s) upon which the finding of unconstitutionality is based; (2) whether the statute, ordinance, regulation or other law is being found unconstitutional on its face, as applied to the case *sub judice*, or both; (3) that the statute, ordinance, regulation or other law being held unconstitutional cannot reasonably be construed in a manner that would preserve its validity; (4) that the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground; and (5) that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute, ordinance, regulation or other law challenged.

Ill. S. Ct. R. 18.

The May 4, 2018 Order properly followed the requirements enumerated in Rule 18 because it: was written; clearly identified Section 513 to be unconstitutional as applied to Yakich; determined that Section 513 could not be reasonably construed in a manner to preserve its validity; found the unconstitutionality necessary to the circuit court's decision

as it could not rest on alternative grounds; and held that notice was proper pursuant to Illinois Supreme Court Rule 19. (C562-72).

However, even if the circuit court did not strictly comply with Rule 18, the merits of the case can be addressed by the Supreme Court of Illinois on appeal. *See Chairez,* at ¶ 11 (where the circuit court did not include in its ruling declaring a statute unconstitutional if it was as applied or facially unconstitutional and the Court addressed the merits of the case and recognized the statute violated the Second Amendment); *People v. Madrigal,* 241 Ill. 2d 463 (2011) (where the circuit court declared an identity theft statute unconstitutional and the Court upheld the ruling that the statute was facially unconstitutional under the State and United States Constitutions and encouraged the legislature to cure the defect); *Jones v. Mun. Employees' Annuity & Ben. Fund of Chicago,* 2016 IL 119618, ¶ 24 (where the circuit court held that an amendment to the Illinois Pension Code was unconstitutional and the Court confirmed that the statute violated the Illinois Constitution). As such, even if there was a minor deficiency in an order, the Court can determine the merits of the unconstitutional statute on appeal. The circuit court followed the Rule 18 requirements; therefore, the Court should address the merits of Yakich's constitutional claims and declare that Section 513 violates the Equal Protection Clause.

### E. The Court Should Not Adhere to *Stare Decisis* Because its Prior Line of Reasoning Has No Application to Present Day Circumstances.

The doctrine of *stare decisis* is a principal of law and not an absolute requirement. An inferior court's adherence to precedent is required unless it is shown that "serious detriment is likely to arise that will prejudice the public interest." *O'Casek v. Children's Home & Aid Soc. of Illinois,* 229 Ill. 2d 421, 439 (2008) (quoting *People v. Worden,* 299 Ill. App. 3d 836, 838 (1998)). The circuit court recognized the serious detriment that

Section 513 caused to Yakich and halted any further prejudice that the public would suffer from the harmful effects of Section 513.

Yakich's argument for the Court to declare Section 513 unconstitutional was made in good-faith. A party may advance their position, if the party has a good-faith argument for the extension, modification, or reversal of existing law. Ill. S. Ct. R 137(a). Yakich requested the circuit court to not follow an antiquated ruling that was issued in a different era. The circuit court recognized the hardship that Section 513 caused to Yakich and declared Section 513 to be unconstitutional so that the public would not be further prejudiced with the detrimental effects of Section 513.

The Court should not follow its prior ruling in *Kujawinski* because it hinged on a discriminatory application of the law. Ridding the common law of errant precedent rather than affirming or extending it will preserve the law's coherence even when considering the doctrine of *stare decisis*. *Christopher*, 145 So. at 68. In *Christopher*, the Alabama Supreme Court declined to follow its prior decision in *Ex parte Bayliss* and reasoned that the strict application of *stare decisis* does not help the uniformity of precedent when a prior case misapplied the law. *Id*. A nearly identical issue was before the Supreme Court of Alabama as it is here, when the Alabama Supreme Court declined to adhere to its previous ruling and re-decided that the college expenses statute could not be prospectively enforced. *Id*. at 72. The Court should not reaffirm the *Kujawinski* case and should depart from the doctrine of *stare decisis* because it is necessary for the Court to clear up this misapplied and discriminatory reasoning that the *Kujawinski* Court's decision relied upon.

The circuit court did not error when it declared Section 513 unconstitutional. The circuit court recognized that Section 513 was unconstitutional and deviated from the

*Kujawinski* ruling because it was decided in an era that current society has moved far away from. The circuit court intended to stop the negative effects of Section 513. The Court should overrule *Kujawinski*, abandon *stare decisis*, declare Section 513 unconstitutional, and stop the public from the harmful effects of Section 513.

### F. ***Res Judicata* is Irrelevant Because the Circuit Court Never Re-Decided the Merits of the Issues Between the Parties.**

The doctrine of *res judicata* is inapplicable to the issues presented in the instant case. There are three requirements for *res judicata* to apply: (i) a final judgment on the merits was rendered by a court of competent jurisdiction; (ii) an identity of cause of action exists; and (iii) the parties or their privies are identical in both actions. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars subsequent actions between the same parties for the same cause of action. *Id*. The circuit court did not determine the constitutionality of Section 513 until May 4, 2018. (C562-72). Prior to this date, the circuit court did not make any findings on the constitutionality of Section 513 or issue a final order. All the elements of *res judicata* are not satisfied; therefore, *res judicata* is inapplicable to the circuit court rendering an opinion on the constitutionality of Section 513.

Further, Yakich was not injured-in-fact by Section 513 until the circuit court entered its ruling under the unconstitutional law; therefore, he could not request Section 513 to be declared unconstitutional until his injury arose. Yakich was injured again by Section 513 when the circuit court denied his motion to modify or terminate his obligation to contribute towards Dylan's college expenses. Each time that Yakich made a payment towards her college expenses he was injured by Section 513. Yakich did not and could not

raise the constitutionality of Section 513 at the July 22, 2016 hearing, since his injury had not arisen at that time. *See Eisenstadt*, 92 S. Ct. at 1038 (where the defendant was unable to advance a constitutional challenge until he was arrested and his injury accrued from an unconstitutional law); *Travis v. County of Santa Cruz*, 94 P.3d 538, 544 (Cal. 2004) (where the plaintiff's facial attack on the ordinance's validity was found to be timely when he brought his action after the law was applied to him). Yakich was unable to successfully raise that Section 513 was unconstitutional as applied to him in the circuit court until his injury arose by the unconstitutional statute.

Yakich's motion to declare Section 513 unconstitutional did not request that the circuit court rehear or reconsider the issues raised during the Section 513 hearing, or during his hearing on his motion to modify or terminate his Section 513 obligations. Yakich's motion was only for the circuit court to declare Section 513 unconstitutional because it violated the Equal Protection Clause. Prior to Yakich's motion, the circuit court did not make a finding on the merits of his motion to declare Section 513 unconstitutional. The circuit court only entered one order about the constitutionality of Section 513—there was no other proceedings between the parties for the constitutionality issue and no other judgment on the merits was entered between the Parties with respect to the constitutionality of Section 513. Because Yakich's initial injury by Section 513 did not occur until the college expenses contribution award was entered against him, the *res judicata* elements were not all fulfilled; therefore, *res judicata* is unfounded here.

### G. The Court Should Enact its Supervisory Authority to Decide the Constitutionality of Section 513 and Not Abstain from Ruling Due to A Procedural Issue.

Alternatively, should the Court hold that it lacks jurisdiction due to a technicality, the Court should determine the merits of Yakich's claim that Section 513 is unconstitutional under the Court's supervisory authority. The Supreme Court of Illinois' supervisory authority is unlimited and not hindered by any specific rule for it to be exercised. *In re Estate of Funk*, 221 Ill. 2d 20, 97 (2006). It is appropriate for the Court to exercise its supervisory authority and determine the constitutionality of Section 513 considering the current posture of our modern society.

The Court should elect to use its supervisory authority because the constitutionality of Section 513 is of substantial importance and requires the Court's direction. "An order need not be final and appealable in order that this court exercise its supervisory authority." *Vasquez Gonzalez v. Union Health Serv., Inc.*, 2018 IL 123025, ¶ 16 (quoting *People v. Heddins*, 66 Ill. 2d 404, 406 (1977)). When a circuit court declares an Illinois statute unconstitutional, the Court has the express authority to guide the lower courts on the merits of the constitutional issues at the heart of the matter. *Id*. at ¶ 18. *See George D. Hardin, Inc. v. Village of Mount Prospect*, 99 Ill. 2d 96 (1983) (where the Court exercised its supervisory authority and upheld the circuit court's ruling that a tax statue was in violation of the United States and State Constitutions); *People v. Salem*, 2016 IL 118693 (where the Court used its supervisory authority due to the importance of the merits of the case and the fundamentals instilled in the Constitution to overlook a technicality in an appeal). The Court should look beyond a technical flaw that it may find and issue a ruling on the merits

and overrule its forty-plus-year-old opinion that is inapplicable in today's modern culture.

## CONCLUSION

WHEREFORE, for the above and foregoing reasons, Petitioner-Appellee, Charles D. Yakich, respectfully requests that the Court affirm the circuit court's Memorandum Opinion and Order entered on May 4, 2018, declare Section 513 of the Illinois Marriage and Dissolution of Marriage Act unconstitutional as requested herein, and grant such other and further relief as this Court deems equitable and just.

Respectfully submitted,

CHARLES D. YAKICH,

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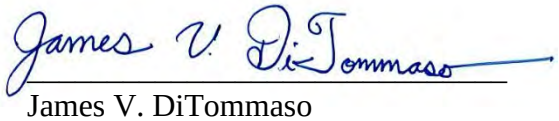
## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 34 pages.



James V. DiTommaso

Case No. 123667

**IN THE SUPREME COURT OF ILLINOIS**

| | | |
|---|---|---|
| CHARLES D. YAKICH,<br>Petitioner-Appellee,<br>v.<br><br>ROSEMARY A. AULDS,<br>Respondent-Appellant. | )<br>)<br>)<br>)<br>)<br>) | On Appeal from the Eighteenth Judicial Circuit Court, Du Page County, Illinois<br>Circuit Case No. 15 F 651<br>Circuit Judge: Hon. Thomas A. Else |

## NOTICE OF FILING

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YOU ARE HEREBY NOTIFIED that on May 9, 2019, the undersigned attorney filed with the Clerk of the Supreme Court of Illinois, via electronic means, a ***Brief of the Appellee, Charles D. Yakich***, a copy of which are attached hereto.

James V. DiTommaso
One of the Attorneys for Charles D. Yakich

## CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct and that on May 9, 2019, he served the this ***Notice of Filing*** and ***Brief of the Appellee, Charles D. Yakich***, both of which were filed by electronic means with the Clerk's Office to be served upon:

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