No. 130288

IN THE
SUPREME COURT OF ILLINOIS

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| REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois, | ) | Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-22-0387 |
| Plaintiffs-Appellees, | ) | There Heard on Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, No. 12 CH 5275 |
| v. | ) | |
| ANDREA LYNN CHASTEEN, *et al.*, | ) | The Honorable JOHN C. ANDERSON, |
| Defendants-Appellants. | ) | Judge Presiding. |

**(Full Caption on Next Page)**

# OPENING BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS 18 CLERKS

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REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,

Plaintiffs-Appellees,

v.

ANDREA LYNN CHASTEEN, Clerk of the Circuit Court of Will County; CANDICE ADAMS, Clerk of the Circuit Court of DuPage County; ERIN CARTWRIGHT WEINSTEIN, Clerk of the Circuit Court of Lake County; THOMAS A. KLEIN, Clerk of the Circuit Court of Winnebago County; MATTHEW PROCHASKA, Clerk of the Circuit Court of Kendall County; THERESA E. BARREIRO, Clerk of the Circuit Court of Kane County; LORI GESCHWANDNER, Clerk of the Circuit Court of Adams; PATTY HIHER, Clerk of the Circuit Court of Carroll County; SUSAN W. McGRATH, Clerk of the Circuit Court of Champagne County; AMI L. SHAW, Clerk of the Circuit Court of Clark County; ANGELA REINOEHL, Clerk of the Circuit Court of Crawford County; JOHN NIEMERG, Clerk of the Circuit Court of Effingham County; KAMALEN JOHNSON ANDERSON, Clerk of the Circuit Court of Ford County; LEANN DIXON, Clerk of the Circuit Court of Livingston County; KELLY ELIAS, Clerk of the Circuit Court of Logan County LISA FALLON, Clerk of the Circuit Court of Monroe County;

Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-22-0387

There Heard on Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, No. 12 CH 5275

| | | |
|---|---|---|
| CHRISTA S. HELMUTH, Clerk of the Circuit Court of Moultrie County; KIMBERLY A. STAHL, Clerk of the Circuit Court of Ogle County; and SETH E. FLOYD, Clerk of the Circuit Court of Piatt County, | ) | The Honorable JOHN C. ANDERSON, Judge Presiding. |
| Defendants-Appellants. | ) | |

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## POINTS AND AUTHORITIES

## NATURE OF THE ACTION

Plaintiffs-Appellees Reuben D. Walker and M. Steven Diamond, individually and as class representatives, initiated this class action claiming that a statutory provision imposing a filing fee on mortgage foreclosure actions was unconstitutional. Plaintiffs sought declaratory and injunctive relief, as well as the return of all filing fees they had paid. This Court ultimately held that the filing fee requirement violated the Free Access Clause of the Illinois Constitution.

On remand, plaintiffs pursued their remaining claim for a refund of the fees that were paid against the 102 circuit court clerks of Illinois. The clerks for 18 of those counties ("18 Clerks"), as well as the clerks for Will County and Cook County, filed dispositive motions asserting that the circuit court lacked subject matter jurisdiction over plaintiffs' remaining claim for monetary relief under the State Lawsuit Immunity Act ("Immunity Act"), 745 ILCS 5/0.01 *et seq.* (2022).[1] The circuit court concluded that the Immunity Act deprived it of subject matter jurisdiction and dismissed this action.

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[1] The 18 Clerks are Candice Adams, Clerk of the Circuit Court of DuPage County; Erin Weinstein, Clerk of the Circuit Court of Lake County; Thomas Klein, Clerk of the Circuit Court of Winnebago County; Matthew Prochaska, Clerk of the Circuit Court of Kendall County; Theresa Barreiro, Clerk of the Circuit Court of Kane County; Lori Geschwandner, Clerk of the Circuit Court of Adams County; Patty Hiher, Clerk of the Circuit Court of Carroll County; Susan McGrath, Clerk of the Circuit Court of Champagne County; Ami Shaw, Clerk of the Circuit Court of Clark County; Angela Reinoehl, Clerk of the Circuit Court of Crawford County; John Niemerg, Clerk of the Circuit Court of Effingham County; Kamalen Anderson, Clerk of the Circuit Court of Ford County; LeAnn Dixon, Clerk of the Circuit Court of Livingston County; Kelly

On appeal, the appellate court reversed and remanded. The appellate court concluded that: (1) the Court of Claims would lack jurisdiction over the refund claim — the only remaining issue in the case — because it could not decide constitutional matters or grant equitable relief; and (2) the refund claim fell within the officer suit exception to sovereign immunity because the complaint here sought restitution, not damages, and an injunction.

This Court granted the Will County Clerk's petition for leave to appeal and allowed the 18 Clerks to join as appellants.

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Elias, Clerk of the Circuit Court of Logan County; Lisa Fallon, Clerk of the Circuit Court of Monroe County; Christa Helmuth, Clerk of the Circuit Court of Moultrie County; Kimberly Stahl, Clerk of the Circuit Court of Ogle County; and Seth Floyd, Clerk of the Circuit Court of Piatt County.

## ISSUE PRESENTED FOR REVIEW

Whether plaintiffs' refund claim does not fall within the officer suit exception to sovereign immunity because it seeks retrospective, monetary relief from the State.

## JURISDICTION

On August 30, 2022, the circuit court entered a final judgment dismissing plaintiffs' action for lack of subject matter jurisdiction and disposing of "all matters pending before [it]." C3016-18 V2.[2] On September 28, 2022, plaintiffs filed a timely notice of appeal. C3023 V2; *see* Ill. Sup. Ct. R. 303(a)(1). The appellate court issued its published decision on November 15, 2023, A1-10, and no petition for rehearing was filed. After obtaining one 35-day extension of time, the Will County Clerk filed a timely petition for leave to appeal on January 24, 2024. *See* Ill. Sup. Ct. R. 315(b). This Court granted that petition on March 27, 2024, A11, and allowed the 18 Clerks to join the matter as appellants on May 13, 2024, A12-14.

[2] This brief cites the two-volume common law record as "C__," and the one-volume report of proceedings as "R__." The appendix to this brief is cited as "A__."

## STATUTES INVOLVED

Section 5/1 of the Immunity Act provides:

> Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court.

745 ILCS 5/1 (2022).

Section 505/8(a) of the Court of Claims Act provides:

> The court shall have exclusive jurisdiction to hear and determine the following matters: (a) [a]ll claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency; provided, however, the court shall not have jurisdiction (i) to hear or determine claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation, or (ii) to review administrative decisions for which a statute provides that review shall be in the circuit court appellate court.

705 ILCS 505/8 (2022).

## STATEMENT OF FACTS

Walker filed a class action complaint alleging that a $50 filing fee on residential mortgage foreclosure actions imposed by section 15-1504.1 of the Code of Civil Procedure ("Code"), 735 ILCS 5/15-1504.1 (2012), violated various provisions of the Illinois Constitution. C18-19, 29-35. Later that year, the circuit court certified a class of plaintiffs defined as "all individuals or entities that paid the $50.00 fee at the time that [Walker] filed an action seeking to foreclose on property located in Illinois" and a class of defendants defined as "all Clerks of Court who reviewed these fees." C136. After a direct appeal to and remand from this Court, *see Walker v. McGuire*, 2015 IL 117138, plaintiffs amended their complaint to add Diamond, who paid the $50 fee in Cook County in 2015, as a named plaintiff and class representative, C727-28.

In the operative second amended complaint, plaintiffs alleged that the foreclosure fee violated several provisions of the Illinois Constitution. C970-73. In addition to declaratory and injunctive relief, plaintiffs sought "[a]n order to return all fees collected . . . to [p]laintiffs." C973. The circuit court ruled that the fee was unconstitutional and entered a permanent injunction barring the clerks from collecting the fee. C1726-44. This Court affirmed that judgment, holding that the fee violated the Free Access Clause of the Illinois Constitution. *Walker v. Chasteen*, 2021 IL 126086, ¶¶ 46-49.

On remand, the Will County Clerk, the Cook County Clerk, and the 18 Clerks filed dispositive motions on plaintiffs' remaining refund claim. C2266-

77, 2313-17, 2746-47, 2957-70 V2. Each motion asserted that the Immunity Act deprived the circuit court of subject matter jurisdiction over the claim. C2274-76, 2313-14, 2955-58, 2963-69 V2. They further argued that sovereign immunity applied because the circuit court clerks were state officers, the clerks collected the filing fees as part of their official duties, and plaintiffs sought monetary relief from the clerks for the exercise of those official duties. C2274-76, 2313-14, 2963-69 V2. And, they explained, the officer suit exception to sovereign immunity, which allows a party to seek prospective injunctive relief in the circuit court for alleged violations of statutory and constitutional law, did not apply because the refund claim sought only backward-looking monetary relief for a past wrong. C2314, 2683, 2965-69 V2.

In response, plaintiffs conceded that circuit court clerks were state officers and that they sought the return of previously collected fees from the State. C2391 V2, R255-57. But, plaintiffs maintained, the officer suit exception applied because the filing fee was held unconstitutional, C2390-92, 2655-57, 2819-26, 2860-67 V2, and they sought restitution, rather than damages, C2393-95, 2826-30, 2867-70 V2.

The circuit court dismissed plaintiffs' action for lack of subject matter jurisdiction, holding that the Immunity Act barred their remaining refund claim. C3016-18 V2. After acknowledging that its "prior orders did not resolve issues of damages sought in the complaint," C3016 V2, the circuit court explained that because "the remaining aspects of the case involve[d] a request

for money damages" from state officials, this claim "implicat[ed] sovereign immunity." C3017 V2. Addressing plaintiffs' contention that they sought restitution, not damages, the circuit court agreed that restitution is an equitable remedy and noted that the jurisdiction of the Court of Claims was not limited to "damages at law claims." *Id*. Thus, the circuit court held, it lacked subject matter jurisdiction to award plaintiffs the monetary relief they sought. C3018 V2.

On appeal, plaintiffs began by arguing that the Court of Claims lacked jurisdiction to hear constitutional or class action claims and therefore had no jurisdiction over their refund claim. A41-46. Next, plaintiffs maintained that sovereign immunity did not apply to the refund claim because it was premised on a constitutional violation, and such conduct is not considered to be that of the State for purposes of sovereign immunity. A47-51. Plaintiffs further sought to distinguish their action from *Parmar v. Madigan*, 2018 IL 122265, arguing that unlike *Parmar*, where the plaintiff sought compensatory damages, they sought restitution. A53-56. According to plaintiffs, compensatory damages and restitution are distinct remedies, and only the former is barred by sovereign immunity, so they could seek restitution in the form of a monetary refund in the circuit court. A57-60.

In response, the 18 Clerks argued that sovereign immunity barred plaintiffs' refund claim, even though the clerks' actions were based on an unconstitutional statute, because the clerks were state officers and any refund

would necessarily come from state funds. A80-83. To that end, the 18 Clerks explained that 98% of the fees were transmitted to the State Treasury and the remaining 2% stayed with the circuit court (which are also considered state funds). A83. Plaintiffs could not invoke the officer suit exception, the 18 Clerks argued, because it covers only claims for prospective injunctive relief, not a monetary refund claim — the only remaining issue in this matter. A83-84. And, the 18 Clerks explained, the facts of this case were nearly identical to *Parmar* because plaintiffs sought a monetary refund of a "litigation tax," not prospective injunctive relief. A84-86. Finally, the 18 Clerks asserted that any argument about the jurisdiction of the Court of Claims over constitutional issues and class actions was irrelevant because: (1) no constitutional issues remained; (2) plaintiffs' preference to litigate their claim as a class did not override sovereign immunity; and (3) the contention that the Court of Claims could not handle the numerous individual actions was speculative and, in any event, immaterial because multiple claims could be consolidated into a single action. A98-103.

The Will County and Cook County Clerks also responded, similarly arguing that the officer suit exception applies only to claims for prospective, not retrospective, relief. A117-24, 129-33. Therefore, these defendants explained, plaintiffs could not overcome sovereign immunity by presenting their claim as one for restitution when they sought monetary relief from the State. *Id*.

In reply, plaintiffs maintained that restitution is materially and legally distinct from money damages and, as such, sovereign immunity did not divest the circuit court of jurisdiction to hear their refund claim. A152-56. Plaintiffs further suggested that this Court implicitly understood when it issued its previous decision in *Walker* invalidating the fee provision that the circuit court had jurisdiction over their refund request because all that remained on remand was the refund issue. A161-63.

The appellate court reversed the dismissal of plaintiffs' action, holding that the singular remaining claim — a request to recover the fees paid — fell within the officer suit exception to sovereign immunity. A1-9. The court began by stating that the Court of Claims lacked jurisdiction over plaintiffs' refund claim because it could not hear constitutional claims and did not possess the authority to grant equitable relief. A6-7. Next, the court acknowledged that sovereign immunity would typically bar plaintiffs' refund claim because they sued the circuit court clerks in their official capacities and did not dispute that the clerks were state officers. A7-8. However, the court decided, the claim fell within the officer suit exception to sovereign immunity because this Court had held that the fee was unconstitutional. A8-9. According to the appellate court, because the clerks collected the filing fee in violation of the constitution, their actions could not be considered actions of the State. A8. The court further decided that this case was distinguishable from *Parmar*, which it viewed as holding that the "exception to sovereign

immunity does not apply when the complaint seeks only damages for a past wrong" because plaintiffs' requested relief was framed as restitution, rather than damages, and the complaint also sought injunctive relief. A8-9.

This Court granted the Will County Clerk's petition for leave to appeal and allowed the 18 Clerks to join as appellants. A11-14.

## ARGUMENT

Plaintiffs' refund claim, which seeks monetary relief for a past wrong, is barred by sovereign immunity. The appellate court erred by concluding that plaintiffs' claim fell within the officer suit exception to that doctrine merely because the requested relief was labeled as restitution, rather than damages. Either way, plaintiffs sought retrospective monetary relief. The appellate court's decision thus conflicts with well-established principles of sovereign immunity that prevent claims for retrospective monetary relief from being brought against the State in circuit court, and it is irreconcilable with this Court's precedent. Specifically, the appellate court's conclusion that the officer suit exception reached plaintiffs' refund claim was foreclosed by *Parmar*, where this Court expressly held that the exception applies only to claims that seek to enjoin future unlawful conduct. And while the appellate court determined that the Court of Claims would lack jurisdiction over a restitution claim, that ruling was both immaterial and incorrect. Accordingly, this Court should vacate the appellate court's decision and affirm the circuit court's judgment.

### I. The standard of review is *de novo*.

This Court reviews *de novo* a circuit court's dismissal of a complaint under section 2-619(a)(1), *Leetaru v. Bd. of Trs. of Univ. of Ill.*, 2015 IL 117485, ¶ 41, which allows a party to seek the dismissal of an action on the basis that the circuit court "does not have jurisdiction of the subject matter

of the action," 735 ILCS 5/2-619(a)(1) (2022). In reviewing such a dismissal, this Court construes the pleadings in the light most favorable to the non-moving party. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). When applying *de novo* review, this Court "afford[s] no deference" to the lower courts' rulings, *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009), and may affirm on any basis supported by the record, *Rodriguez v. Sheriff's Mart Comm'n of Kane Cnty.*, 218 Ill. 2d 342, 357 (2006).

## II. Plaintiffs' refund claim does not fall within the officer suit exception to sovereign immunity.

This Court should affirm the circuit court's judgment, and thereby reverse the appellate court, because plaintiffs' sole remaining claim — a request for monetary relief from the State — is barred by sovereign immunity. Specifically, the officer suit exception to sovereign immunity does not apply because plaintiffs' request for a refund of the filing fees, whether categorized as a claim for damages or restitution, seeks retrospective monetary relief.

### A. Plaintiffs' refund claim seeking monetary relief for the circuit court clerks' past collection of filing fees implicates sovereign immunity.

The Illinois Constitution of 1870 granted the State sovereign immunity from suits of any kind. *Coleman v. E. Joliet Fire Prot. Dist.*, 2016 IL 117952, ¶ 25. The Constitution of 1970, however, abolished sovereign immunity "[e]xcept as the [Illinois] General Assembly may provide by law." Ill. Const., art. XIII, § 4. The legislature then exercised that grant of constitutional authority by enacting the Immunity Act, which restored sovereign immunity

and directs, in part, that "[e]xcept as provided in . . . the Court of Claims Act, . . . the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2022). In turn, the Court of Claims Act, 705 ILCS 505/1 *et seq.* (2022), subject to limited exceptions, gives the Court of Claims "exclusive jurisdiction to hear and determine . . . [a]ll claims against the State founded upon any law of the State of Illinois," *id.* § 8; *see S.J. Groves & Sons Co. v. State*, 93 Ill. 2d 397, 399-402 (1982) (providing history of sovereign immunity and Court of Claims jurisdiction over actions against the State), *overruled on alternative grounds by Rossetti Contracting Co., Inc. v. Ct. of Claims*, 109 Ill. 2d 72 (1985). Therefore, the circuit court lacks subject matter jurisdiction over a claim when sovereign immunity applies. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992).

The doctrine of sovereign immunity protects the State from interference in the performance of its governmental functions "and preserves its control over State coffers." *Twp. of Jubilee v. State*, 2011 IL 111447, ¶ 22 (cleaned up). The formal designation of a party's capacity is not dispositive for sovereign immunity purposes and whether an action is against the State, which must be brought in the Court of Claims, depends on "the issues involved and the relief sought." *Parmar*, 2018 IL 122265, ¶ 22.

Because sovereign immunity was designed "to preserve state funds," *Fritz v. Johnston*, 209 Ill. 2d 302, 315 (2004), a claim against a state official in their official capacity, as here, is "no different than a suit against the State,"

*Parmar*, 2018 IL 122265, ¶ 21, and is barred by sovereign immunity if a judgment for the plaintiff could "subject [the State] to liability," *Currie*, 148 Ill. 2d at 158. In other words, sovereign immunity applies if a judgment in the plaintiff's favor would result in "the net effect of entering a money judgment against the State." *City of Springfield v. Allphin*, 82 Ill. 2d 571, 579 (1980).

Here, all parties acknowledged that the clerks were acting in their official capacity as state officers when they collected the unconstitutional filing fees. C960 (naming circuit court clerks in their "Official Capacit[ies]" as defendants); *Drury v. McLean Cnty.*, 89 Ill. 2d 417, 424-27 (1982) (clerks of circuit courts are state, not county, officials). And the return of the filing fees would necessarily draw from state funds because the clerks were statutorily obligated to deposit 98% of the collected money with the State Treasurer, while retaining 2% to cover the administrative costs of collecting the fees. *See* 735 ILCS 5/15-1504.1(a) (2022), *invalidated by Walker*, 2021 IL 126086. In fact, plaintiffs acknowledged before the circuit court that any award would, in effect, come from the State because "the State of Illinois took 100[%]" of the fees. R256. Accordingly, plaintiffs' singular remaining claim — a request for a refund of the filing fees they paid — is barred by sovereign immunity unless an exception to that doctrine applies.

### B. Plaintiffs' refund claim does not fall within the officer suit exception to sovereign immunity.

Plaintiffs' refund claim is not covered by the officer suit exception to sovereign immunity because that exception applies only to claims for

prospective injunctive relief, and plaintiffs' claim seeks retrospective monetary relief. In deciding otherwise, the appellate court incorrectly held that the officer suit exception applied because plaintiffs framed their claim in terms of restitution, rather than damages. But that distinction is immaterial for purposes of sovereign immunity because both theories seek a retrospective remedy, not prospective injunctive relief.

Under the officer suit exception to sovereign immunity — which is also known as the "prospective injunctive relief exception" — a plaintiff may pursue a claim against a state officer in the circuit court if the plaintiff seeks to prospectively enjoin the officer from taking future actions that violate constitutional or statutory law. *Parmar*, 2018 IL 122265, ¶¶ 22, 26. As this Court has explained, the exception derives from the concept that while legal acts of state officers are regarded as acts of the State itself, illegal acts (ones in violation of statutory or constitutional law) performed by state officers are not. *Leetaru*, 2015 IL 117485, ¶45-46.

This Court has long held that the exception applies only to claims for injunctive or declaratory relief that compel a state official to comply with the law. *See Ellis v. Bd. of Governors of State Colls. & Univs.*, 102 Ill. 2d 387, 395 (1984) (exception applies to claims "to enjoin a State officer from taking future actions in excess of his delegated authority") (citing *Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 548 (1977)); *accord In re Lawrence M.*, 172 Ill. 2d 250, 267 (1996) (sovereign immunity does not apply to action "to compel [state

officials] to perform their [statutory] duty"); *Noyola v. Bd. of Educ. of the City of Chi.*, 179 Ill. 2d 121, 135 (1997) (same, citing *Lawrence M.*); *Senn Park Nursing Ctr. v. Miller*, 104 Ill. 2d 169, 188-89 (1984) (action for order directing state official to perform statutory duty was not barred by sovereign immunity); *Smith v. Jones*, 113 Ill. 2d 126, 133 (1986) (same, quoting *Senn Park*); *Allphin*, 74 Ill. 2d at 124-26 (action for declaratory and injunctive relief was not barred by sovereign immunity); *Bd. of Trs. of Cmty. Coll. Dist. No. 508 v. Burris*, 118 Ill. 2d 465, 472-73 (1987) (same, citing *Allphin*).

Consistent with that principle, this Court in *Leetaru* applied the officer suit exception to a graduate student's request to enjoin an ongoing investigation of research misconduct, holding that the student's claim could proceed because it alleged a constitutional violation and sought an injunction requiring the defendants, who were state officers, to proceed in compliance with due process requirements. 2015 IL 117485, ¶¶ 46-51. Explaining that sovereign immunity did not bar an "action to enjoin" a state officer from taking unlawful action, *id*. at ¶ 48, the Court concluded that the plaintiff's claim could proceed because it sought "only to prohibit future conduct," rather than seeking "redress for some past wrong," *id*. at ¶ 51.

This Court revisited the issue in *Parmar* and reaffirmed that the officer suit exception applies only to claims for prospective injunctive relief. In *Parmar*, the plaintiff brought a class action against the Illinois Attorney General and Treasurer alleging that an amendment to the estate tax statute

violated the Illinois Constitution. 2018 IL 122265, ¶¶ 1, 8. For relief, the plaintiff sought a declaration that the estate tax was unconstitutional and requested a "full refund" of the taxes paid, as well as interest and loss of use. *Id*. at ¶ 8. The appellate court held that the officer suit exception applied, finding that it covered all claims alleging "'that the State's agent acted in violation of . . . constitutional law or in excess of his authority.'" *Parmar v. Madigan*, 2017 IL App (2d) 160286, ¶ 21 (quoting *Leetaru*, 2015 IL 117485, ¶ 45), *rev'd* 2018 IL 122265.

This Court reversed, holding that the plaintiff's action "seeking damages for a past wrong [did] not fall within the officer suit exception to sovereign immunity." *Parmar*, 2018 IL 122265, ¶ 26. In so deciding, this Court stated that the appellate court misread *Leetaru* when it interpreted that decision as holding that all claims alleging a statutory or constitutional violation fell within the exception. *Parmar*, 2018 IL 122265, ¶¶ 18-27; *see also Parmar*, 2017 IL App (2d) 160286, ¶ 22. The Court noted that although the plaintiff alleged that the defendants acted pursuant to an unconstitutional statute, he only sought monetary compensation "for a past wrong," not an order "to enjoin future conduct." 2018 IL 122265, ¶ 26. Under the exception, the Court explained, allegations of a constitutional violation would allow the circuit court "to prospectively enjoin" unlawful future conduct, but not order "a refund of all moneys paid" under the statute. *Id*. And *Leetaru*, the Court continued, was consistent with that principle, as it merely reiterated that the

exception applied to claims seeking to prospectively enjoin a state officer from engaging in allegedly unconstitutional conduct. *Id*. at ¶¶ 22-24. Unlike *Leetaru*, where the plaintiff "sought 'only to prohibit future conduct'" and "did 'not seek redress for some past wrong,'" *id*. at ¶ 24 (quoting 2015 IL 117485, ¶ 51), *Parmar*'s plaintiff sought only a monetary refund for the taxes he paid to remedy a past wrong, *id*. at ¶ 26. Therefore, consistent with *Leetaru* and other precedent, this Court held that sovereign immunity barred the tax refund claim. *Id*. at ¶ 27.

Plaintiffs' refund claim here is materially identical to that in *Parmar*: as in *Parmar*, plaintiffs claimed that state officials imposed an unconstitutional tax on them and sought a monetary refund of the amount paid. *See Walker*, 2021 IL 126086, ¶ 43 (characterizing filing fee as "a tax on litigation"). The appellate court's decision that the officer suit exception applied here thus runs directly contrary to *Leetaru* and *Parmar*. Having already obtained permanent prospective relief, *see id*. at ¶¶ 10, 49-50, plaintiffs' singular remaining claim in this case was their request for a monetary refund of the paid filing fee, C3017 V2 ("issues of damages sought in the complaint" remained unresolved); A6 ("The only issue remaining from the plaintiffs' action is their request for restitution — namely refunds of the fees they paid."). Thus, like in *Parmar*, and unlike in *Leetaru*, plaintiffs seek a monetary refund to remedy "a past wrong." *Parmar*, 2018 IL 122265, ¶ 26.

That claim is foreclosed by *Parmar*, which held that the officer suit exception does not apply in these circumstances.

Before the appellate court, plaintiffs principally argued that their refund claim, which they framed as restitution, was not prohibited by sovereign immunity because they raised a constitutional challenge to the filing fee, which this Court ultimately found to be unconstitutional. That argument misses the key point: although the officer suit exception applies to actions alleging that state officers violated statutory or constitutional law, it applies only to those claims seeking to prospectively enjoin the official from taking further unlawful action, not those seeking relief for a past wrong. *See Parmar*, 2018 IL 122265, ¶ 26. Plaintiffs' only remaining claim sought relief for a past wrong — "[a]n order to return all fees collected . . . to [p]laintiffs" — as the unconstitutional fees had already been collected and deposited with the Treasurer. C973. That claim for monetary relief to remedy a past wrong is not covered by the exception.

And although the appellate court addressed *Parmar*, it misread the case as holding that the officer suit exception "does not apply when the complaint seeks only *damages* for a past wrong." A8 (emphasis added). Based on that misreading, the court incorrectly concluded that the exception applied here because plaintiffs sought restitution rather than damages, as well as injunctive relief, in the complaint. A8-9.

But *Parmar* did not hold that only claims seeking "damages" are outside the scope of the officer suit exception. This Court instead expressly stated that the exception, referring to it as the "prospective injunctive relief exception," applies only to claims that seek "to prospectively enjoin" unlawful conduct. *Parmar*, 2018 IL 122265, ¶ 22. Contrary to the appellate court's decision, *Parmar* never intimated that its holding applied only to damages claims; such a limitation would be inconsistent with its reasoning, which focused on the plaintiff's general request for relief to remedy a past wrong. *See id*. at ¶ 26. Instead, this Court confirmed, consistent with its prior precedent, that the exception reaches only to claims for prospective injunctive relief. *See id*. at ¶¶ 24, 26. Thus, the appellate court erred when it read *Parmar* to *exclude* from the exception only claims seeking "damages for a past wrong"; in actuality, *Parmar* held that the exception *includes* only claims that seek to enjoin future unlawful conduct. *See id*.

And by holding that the exception applies only to claims seeking prospective injunctive relief, the Court maintained consistency between the officer suit exception to state sovereign immunity and the *Ex parte Young* exception to sovereign immunity that applies in the context of the Eleventh Amendment to the United States Constitution. *See* U.S. Const. amend. XI; *Ex parte Young*, 209 U.S. 123 (1908) (Eleventh Amendment did not bar action in federal court to enjoin state official from enforcing statute claimed to violate federal constitution). This is appropriate because this Court has recognized

that the officer suit exception is derived from the *Ex parte Young* exception. *See PHL, Inc. v. Pullman Bank & Tr. Co.*, 216 Ill. 2d 250, 261 (2005) ("The officer suit exception has a long and complex history, with its origination in the federal courts."); *Schwing v. Miles*, 367 Ill. 436, 441 (1937) (citing *Fitts v. McGhee*, 172 U.S. 516 (1899), and *U.S. v. Lee*, 106 U.S. 196 (1882), for proposition that state officer who violates constitutional or state law "may be restrained by proper action instituted by a citizen").

The *Ex parte Young* exception is limited to claims for prospective injunctive relief, and it does not apply to claims for retrospective relief, including both damages and restitution. In *Edelman v. Jordan*, 415 U.S. 651, 662-78 (1974), for example, the United States Supreme Court held that a federal court could order an Illinois state official to prospectively administer a federally funded state aid program in compliance with federal regulations without running afoul of the Eleventh Amendment, but it could not award retroactive payments of the statutory benefits found to have been wrongfully withheld, even when the monetary award request was framed as "equitable restitution." 415 U.S. at 662-78; *accord Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 (2011) (prospective injunctive relief exception to the Eleventh Amendment "cannot be used to obtain an injunction requiring the payment of funds from the State's treasury") (citing *Edelman*, 415 U.S. at 666).

In sum, *Parmar* held that the officer suit exception covers only claims for prospective injunctive relief. That conclusion is apparent from the purpose of the exception, and it is consistent with prior precedent from this Court, as well as analogous federal law. The appellate court therefore erred by focusing on whether plaintiffs' refund claim was for damages when the proper inquiry was whether plaintiffs sought prospective injunctive relief. Because plaintiffs are not seeking prospective injunctive relief, this Court should hold that the officer suit exception does not apply and that plaintiffs' remaining claim is barred by sovereign immunity.

### C. Plaintiffs cannot draw a material distinction between restitution and damages because both are retrospective relief and therefore are barred by sovereign immunity.

Proceeding from its erroneous interpretation of *Parmar*, the appellate court wrongly decided that plaintiffs' refund claim was within the officer suit exception to sovereign immunity because plaintiffs sought restitution rather than damages. *See* A8-9. But any differences between restitution and damages, *see Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248, 256-57 (2004) (discussing those differences), are immaterial for purposes of sovereign immunity because both are forms of retrospective relief.

To begin, plaintiffs did not request restitution in the operative complaint. *See* C971-73. Instead, they sought monetary relief nearly identical to that sought in *Parmar*. *Compare id.* (seeking "return [of] all fees collected") *with Parmar*, 2018 IL 122265, ¶ 26 (seeking "refund of all moneys paid"); *see*

*also* C3016 V2 (circuit court noting that plaintiffs sought "damages . . . in the complaint"). And even if plaintiffs had labeled their requested monetary relief as restitution, "artful pleading . . . designed to cloak the cause in the attire of equity" cannot insulate their refund claim from sovereign immunity. *See Joseph Constr. Co v. Bd. of Tr. of Governors State Univ.*, 2012 IL App (3d) 110379, ¶ 48 (cleaned up); *see also People v. Davis*, 2021 IL App (1st) 191959, ¶ 41 ("substance must take precedence over form when determining whether sovereign immunity applies"); *Brucato v. Edgar*, 128 Ill App. 3d 260, 267 (1st Dist. 1984) (despite prayer for relief being "framed in equitable terms," action was "substantively a claim for monetary damages from the State . . . the exclusive jurisdiction of the Court of Claims").

In the below proceedings, plaintiffs attempted to distinguish restitution from damages for purposes of sovereign immunity on the basis that restitution is an equitable claim, not a claim at law. C2867-70; A153-56. The relevant inquiry under *Parmar* and prior precedent, however, is not whether plaintiffs sought damages (relief at law) or restitution (relief ostensibly in equity), but whether plaintiffs sought prospective injunctive relief prohibiting "future conduct" or retrospective relief seeking to remedy "a past wrong." *See Parmar*, 2018 IL 122265, ¶ 26; *see also supra* pp. 18-19. As in *Parmar*, plaintiffs sought an award of money, drawn from the Treasury, to remedy a past inequity that occurred when the filing fees were collected under a statute that was later held unconstitutional. *See* R255, 257 (plaintiffs' request for "all

fees that had been taken," including those held by "the Treasurer"). Moreover, the refund claim did not seek prospective relief prohibiting the collection of fees or the transmission of fees to the Treasury; nor could it, as this Court has already granted that relief, *see infra* § II(D); *Walker*, 2021 IL 126086, ¶¶ 46-49. Because restitution, like damages, provides retrospective relief, it does not matter whether plaintiffs' refund claim is framed as one or the other.

The Restatement (Third) of Restitution describes restitution as an order to "restore" a benefit that was lost or pay money to "eliminate [an] unjust enrichment" that has occurred. Restatement (Third) of Restitution § 1 cmt. A (Am. L. Inst., 2011). In other words, restitution deals "with the consequences of transactions," measuring liability by the amount of benefit received for the past transaction. *Id*. at § 1 cmt. D. It also describes restitution as a "reversal of a transfer," referencing restitution's backward-looking nature as an act to reverse what has already happened. *Id*. at § 1 cmt. A. Whether restitution is an act to "restore[ ] something to someone, or restore[ ] someone to a previous position," each formulation in the Restatement presupposes a past event for which a party must be compensated through restitution. *Id*. at § 1 cmt. E.

Consistent with that understanding, this Court has repeatedly recognized restitution as retrospective relief intended to redress a party for a past inequity. *See*, *e.g.*, *Bd. of Comm'rs of Wood Dale Pub. Libr. Dist. v. Du Page Cnty.*, 103 Ill. 2d 422, 430-32 (1984) (equating "restitutionary relief" with

"retroactive relief"); *see also Watkins v. Dunbar*, 318 Ill. 174, 178 (1925) (purpose of restitution is to "restore, so far as possible, the parties to their former position"); *Indep. Voters of Ill. v. Ill. Com. Comm'n*, 117 Ill. 2d 90, 98 (1987) ("Restitution is compelled against one who has obtained money or property without authority and usually where an adequate legal remedy does not exist for the aggrieved party."). And the appellate court has followed suit, treating restitution as a backward-looking means to restore a party to a previous position. *See*, *e.g.*, *In re Marriage of Lehr*, 317 Ill. App. 3d 853, 859 (1st Dist. 2000) (equating restitution and retroactive maintenance); *Ryan v. City of Chi.*, 148 Ill. App. 3d 638, 644-46 (1st Dist. 1986) (treating restitution as form of retroactive relief); *W. Suburban Bank v. Latteman*, 285 Ill. App. 3d 313, 316 (2d Dist. 1996) (citing *Watkins*, 318 Ill. at 178, and ordering restitution for a previous erroneous order).

Consistent with the Restatement, and like Illinois courts, federal courts have also interpreted restitution as a retrospective, restorative remedy. *See*, *e.g.*, *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 593 U.S. 67, 75 (2021) (differentiating injunction, which is "prospective relief," from restitution, which "offers retrospective relief"); *Edelman*, 415 U.S. at 666-71 ("retroactive award of monetary relief," referred to as "equitable restitution," was practically "indistinguishable in many aspects from an award of damages against the State"); *Goodwin v. C.N.J., Inc.*, 436 F.3d 44, 51 (1st Cir. 2006) ("restitution is a retrospective remedy"); *Fla. Ass'n of Rehab. Facilities, Inc. v.*

*State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1220 (11th Cir. 2000) (Eleventh Amendment "bars suits seeking retrospective relief such as restitution or damages"); *Hengle v. Asner*, 433 F. Supp. 3d 825, 879 (E.D. Va. 2020) ("restitution provides for only retrospective relief by returning to the plaintiff what the defendant rightfully owes her").

Thus, plaintiffs' characterization of their claim as restitution, rather than damages, makes no difference because restitution remains a remedy predicated on "a past wrong," a form of relief strictly prohibited by sovereign immunity. *See Parmar*, 2018 IL 122265, ¶ 26. In fact, plaintiffs' attempt to draw a distinction between restitution and damages would be inconsistent with *Parmar*. Had this Court intended for restitution to be an acceptable form of relief under the officer suit exception, it would have allowed the plaintiff in *Parmar* to recover the refund for the taxes he already paid under the estate tax (as restitution), but disallowed his request for interest and loss of use (as damages). But this Court categorically rejected all three forms of relief as barred by sovereign immunity. *Parmar*, 2018 IL 122265, ¶ 26.

In the end, and despite their protestations that they sought equitable relief through restitution, plaintiffs' refund claim sought a monetary payment compensating them for filing fees they previously paid, which is retrospective relief. Thus, whether framed as a claim for restitution or damages, plaintiffs' refund claim is not within the officer suit exception to sovereign immunity.

### D. Plaintiffs' request for injunctive relief prohibiting the collection of the fees is distinct from their refund claim and has no impact on the sovereign immunity analysis because that relief has already been granted.

The appellate court further erred when it held that the officer suit exception applied because plaintiffs sought injunctive relief in their complaint. A8-9. But plaintiffs' request for injunctive relief to enjoin the collection of the filing fee had been resolved by the time the circuit court entered a permanent injunction barring defendants from collecting the fee moving forward, *see* C2113-14 V2, and this Court affirmed that decision, invalidating the fee provision as unconstitutional, *see Walker*, 2021 IL 126086, ¶ 48. Indeed, the appellate court acknowledged earlier in its decision that the only remaining issue in the case was plaintiffs' "request for restitution — namely, refunds of the fees they paid." A6. In the below proceedings, plaintiffs did not argue that the officer suit exception applied because they were previously awarded injunctive relief, *see* A41-60, 152-63, and the appellate court gave no explanation for why a previously resolved claim was relevant to whether the instant claim to recoup the filing fees was barred by sovereign immunity, *see* A6-9.

### E. The appellate court's consideration of the Court of Claims' jurisdiction was unnecessary and incorrect.

The appellate court began its decision by questioning "whether jurisdiction over the remainder of the plaintiffs' case lies with the circuit court

or the [C]ourt of [C]laims." A6. The appellate court, however, need not have engaged in such analysis because the only question before the appellate court was whether the circuit court had jurisdiction over plaintiffs' refund claim, and that question is governed by the Immunity Act, not the Court of Claims Act.

As explained, *see supra* pp. 13-14, the General Assembly "reinstated the doctrine [of sovereign immunity] through enactment of the [ ] Immunity Act," *Leetaru*, 2015 IL 117485, ¶ 42 (citing 745 ILCS 5/0.01 *et seq.* (2022)), which provides that "the State of Illinois shall not be made a defendant or party in any court," except under explicit circumstances detailed in the Immunity Act itself, 745 ILCS 5/1, 1.5 (2022). Because the Immunity Act alone governs whether a claim is barred by sovereign immunity, the appellate court erred by basing its decision on its assessment of the scope of the jurisdiction of the Court of Claims.

Regardless, the appellate court was incorrect when it determined that the Court of Claims would lack jurisdiction over plaintiffs' refund claim because it cannot decide constitutional issues or grant equitable relief. First, whether the Court of Claims may decide constitutional issues is immaterial because this Court has already resolved the constitutional issue by holding that the filing fee was unconstitutional. *See Walker*, 2021 IL 126086, ¶ 48; *see also supra* § II(D). And plaintiffs have not identified any constitutional issues

that the Court of Claims could be asked to decide while resolving their refund request. *See* A46-61, 152-63.

Second, the appellate court incorrectly concluded that the Court of Claims "does not possess the authority to grant equitable remedies." A7. To the contrary, that court has held that "[t]he Court of Claims is not without authority to grant equitable relief." *Mgmt. Ass'n of Ill., Inc. v. Bd. of Regents of N. Ill. Univ.*, 248 Ill. App. 3d 599, 610 (1st Dist. 1993) (claim seeking injunctive relief, in addition to money damages, against the State must be brought in the Court of Claims) (citing *Ellis*, 102 Ill. 2d at 395). Although the appellate court relied on *Lowery v. State* to support its conclusion, A7 (citing 72 Ill. Ct. Cl. 102, 104 (2020)), *Lowery* did not address whether the Court of Claims could review an equitable claim seeking a monetary payment from state coffers. Instead, *Lowery* held that the Court of Claims could equitably toll a statute of limitations and, in doing so, discussed the scope of its equitable powers. 72 Ill. Ct. Cl. at 104. The appellate court, therefore, placed too much reliance on that discussion from *Lowery*, which did not involve a claim for equitable relief, when deciding that the Court of Claims lacks jurisdiction over restitution claims.

Indeed, the Court of Claims has elsewhere recognized its authority to adjudicate equitable claims, like restitution, insofar as they give rise to relief within its statutory authority to grant. *Garimella v. Bd. of Tr. of Univ. of Ill.*, 50 Ill. Ct. Cl. 350, 360 (1996) (Epstein, J., concurring) (observing that three

statutory incarnations of the Court of Claims Act over the course of a century allowed it jurisdiction over equitable claims). In other words, the Court of Claims could hear an equitable claim for restitution if the relief sought resulted in a monetary judgment against the State. *See id*. Therefore, because plaintiffs' refund claim, even if framed as restitution, seeks a monetary award against the State, the Court of Claims would likely have authority to hear it. And if it did not have such authority, this Court has rejected the argument that, just because a claim cannot be pursued in the Court of Claims, it must be allowed to proceed in the circuit court. *See Parmar*, 2018 IL 122265, ¶¶ 50-52 (limiting available remedies to injunctive relief is constitutionally permissible).

In sum, the appellate court should not have considered the jurisdiction of the Court of Claims when addressing whether sovereign immunity barred plaintiffs' refund claim in the circuit court and, regardless, the appellate court's analysis was incorrect, as the Court of Claims would likely have jurisdiction over the claim.

## CONCLUSION

For these reasons, Defendants-Appellants 18 Clerks ask this Court to vacate the appellate court's decision and affirm the circuit court judgment.

Respectfully submitted,

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July 10, 2024

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this brief, excluding the pages contained in the Ill. Sup. Ct. R. 341(d) cover, the Ill. Sup. Ct. R. 341(h)(1) table of contents and statement of points and authorities, the Ill. Sup. Ct. R. 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Ill. Sup. Ct. R. 342(a), is 32 pages.

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# APPENDIX

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2023 IL App (3d) 220387

Opinion filed November 15, 2023

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

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| REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>ANDREA LYNN CHASTEEN, in Her Official Capacity as the Clerk of the Circuit Court of Will County and as a Representative of All Clerks of the Circuit Courts of All Counties Within the State of Illinois; CANDICE ADAMS, Clerk of the Circuit Court of Du Page County; ERIN CARTWRIGHT WEINSTEIN, Clerk of the Circuit Court of Lake County; THOMAS A. KLEIN, Clerk of the Circuit Court of Winnebago County; MATTHEW PROCHASKA, Clerk of the Circuit Court of Kendall County; THERESA E. BARREIRO, Clerk of the Circuit Court of Kane County; LORI GESCHWANDNER, Clerk of the Circuit Court of Adams County; PATTY HIHER, Clerk of the Circuit Court of Carroll County; SUSAN W. McGRATH, Clerk of the Circuit Court of Champaign County, AMI L. SHAW, Clerk of the Circuit Court of Clark County; ANGELA REINOEHL, Clerk of the Circuit Court of Crawford County; JOHN NIEMERG, Clerk of the Circuit Court of | Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.<br><br>Appeal No. 3-22-0387<br>Circuit No. 12-CH-5275 |

| | | |
|---|---|---|
| Effingham County; KAMALEN JOHNSON ANDERSON, Clerk of the Circuit Court of Ford County; LEANN DIXON, Clerk of the Circuit Court of Livingston County; KELLY ELIAS, Clerk of the Circuit Court of Logan County; LISA FALLON, Clerk of the Circuit Court of Monroe County; CHRISTA S. HELMUTH, Clerk of the Circuit Court of Livingston County; KIMBERLY A. STAHL, Clerk of the Circuit Court of Ogle County; and SETH E. FLOYD, Clerk of the Circuit Court of Piatt County, | ) | |
| Defendants-Appellees. | ) | The Honorable John C. Anderson, Judge, presiding. |

JUSTICE McDADE delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justice Peterson concurred in the judgment and opinion.

## OPINION

¶ 1 The plaintiffs in this case comprise a class of individuals who, in connection with the filing of their mortgage foreclosure complaints in the circuit courts, paid filing fees mandated by section 15-1504.1 of the Code of Civil Procedure (Code) (735 ILCS 5/15-1504.1 (West 2012)). The defendants are a class of all the Illinois circuit court clerks. The class action alleged, among other things, that section 15-1504.1 of the Code was facially unconstitutional. The supreme court agreed, thereby striking down section 15-1504.1, as well as two additional statutes that created programs funded by the filing fees (20 ILCS 3805/7.30, 7.31 (West 2012)). *Walker v. Chasteen*, 2021 IL 126086, ¶ 47 (*Walker II*).

¶ 2 On remand from the supreme court, the circuit court dismissed the remainder of the plaintiffs' action, which sought refunds of the filing fees paid by the plaintiffs. The circuit court ruled that it lacked jurisdiction to grant the plaintiffs' requested relief, as the claim was against

the State and therefore had to be brought in the Illinois Court of Claims. On appeal, the plaintiffs alleged that the circuit court erred when it dismissed the remainder of their action. We reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The facts of this case have been set out in previous appeals; most recently, in *Walker II*, 2021 IL 126086. We include only those facts necessary for the disposition of this appeal.

¶ 5 The original plaintiff in this action, Reuben D. Walker, filed a mortgage foreclosure complaint in the Will County Circuit Court in April 2012. At the time he filed his complaint, Walker paid a $50 filing fee mandated by section 15-1504.1 of the Code. Pursuant to sections 7.30 and 7.31 of the Illinois Housing Development Act (Act) (20 ILCS 3805/7.30, 7.31 (West 2012)), the fees collected in connection with the filing of mortgage foreclosure complaints were earmarked to fund a social welfare program.

¶ 6 In October 2012, Walker filed a putative class action complaint against the Will County Circuit Court, which, in part, alleged that section 15-1504.1 was unconstitutional. The circuit court certified the class, which included all individuals who paid the $50 filing fee up to and including Walker. The court also certified a class of defendants, which consisted of all the Illinois circuit court clerks in their official capacities. The State was later allowed to intervene.

¶ 7 In November 2013, the circuit court granted partial summary judgment in favor of the plaintiffs and denied the State's motion to dismiss. More specifically, the court ruled that (1) the circuit court clerks fell within the "fee officer" prohibition in article VI, section 14, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 14), and (2) the provision in section 15-1504.1 authorizing circuit court clerks to retain 2% of the $50 filing fees for administrative expenses

created an unconstitutional fee office. Accordingly, the court struck down section 15-1504.1 as facially unconstitutional.

¶ 8 An appeal was taken to our supreme court. In *Walker v. McGuire*, 2015 IL 117138, ¶ 30 (*Walker I*), our supreme court disagreed with both of the circuit court's rulings. The case was remanded for further proceedings. *Id.* ¶ 44.

¶ 9 In April 2018, the plaintiffs filed an amended complaint containing four counts. Count I alleged that section 15-1504.1 of the Code and sections 7.30 and 7.31 of the Act violated separation-of-powers principles. Count II alleged that the statutes violated equal protection, due process, and uniformity-of-burden principles. Count III alleged that the statutes unconstitutionally provided for the imposition of a filing fee for a noncourt related purpose. Count IV requested the creation of a protest fund to contain all fees collected or to be collected pursuant to section 15-1504.1 until the conclusion of the plaintiffs' case. Counts I, II, and III requested the same relief: (1) a declaratory judgment that the statutes were unconstitutional, (2) "[a] declaratory judgment that any expenditures of State funds collected pursuant to this statute must be returned to Plaintiffs," (3) temporary, preliminary, and permanent injunctions "enjoining Defendants from disbursing fees collected pursuant to [section 15-1504.1], and (4) "[a]n order to return all fees collected pursuant to [section 15-1504.1] to Plaintiffs."

¶ 10 The circuit court granted partial summary judgment in favor of the plaintiffs, striking down all three statutes as violative of the equal protection, due process, and uniformity clauses of the Illinois Constitution (Ill. Const. 1970, art. I, § 2; Ill. Const. 1970, art. IX, § 2). The court also found the statutes violated the free access clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 12). The court stayed its permanent injunction, which prohibited the collection of the fees and the funding the social welfare program, so our supreme court could review the case.

¶ 11 In June 2021, our supreme court addressed the appeal in *Walker II*. First, the court held that the filing fees were paid by the plaintiffs under duress such that the voluntary payment doctrine did not invalidate the plaintiffs' cause of action. *Walker II*, 2021 IL 126086, ¶ 28. Second, the court held that section 15-1504.1 of the Code and sections 7.30 and 7.31 of the Act violated the free access clause of the Illinois Constitution. *Id.* ¶¶ 47-48. The court then remanded the case for further proceedings. *Id.* ¶ 49.

¶ 12 After remand, discovery proceeded on the issue of restitution. During that time, numerous motions were filed, including a motion and supplemental motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)) filed by Will County Circuit Court Clerk Andrea Lynn Chasteen.

¶ 13 In August 2022, the circuit court issued a written order dismissing the case. The court ruled that it lacked jurisdiction over the plaintiffs' restitution claims, as those claims had to be brought in the court of claims because they were directed at recovering money from the State. The plaintiffs appealed.

¶ 14 II. ANALYSIS

¶ 15 While the plaintiffs claim there are five issues on appeal, there is only one—whether the circuit court erred when it granted Chasteen's motion to dismiss.

¶ 16 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(9) permits a motion to dismiss that alleges "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2020). When ruling on a section 2-619 motion, a court must construe all pleadings and supporting documents in the light most favorable

to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367-68. We review the granting of a motion to dismiss *de novo*. *Parmar v. Madigan*, 2018 IL 122265, ¶ 17.

¶ 17 The primary question we must answer on appeal is whether jurisdiction over the remainder of the plaintiffs' case lies with the circuit court or the court of claims. Here, the plaintiffs filed a declaratory judgment action seeking a ruling that section 15-1504.1 of the Code and sections 7.30 and 7.31 of the Act were unconstitutional. "Actions under the declaratory judgments statute [citation] are neither legal nor equitable in nature. Rather, they are *sui generis* and the judgment, decree or order takes its character from the nature of the relief declared." *Continental Casualty Co. v. Commonwealth Edison Co.*, 286 Ill. App. 3d 572, 578 (1997).

¶ 18 The only issue remaining from the plaintiffs' action is their request for restitution—namely, refunds of the fees they paid. Our supreme court has noted that restitution "may be available in both cases at law and in equity." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257 (2004). Notably, "[t]he law of restitution is not easily characterized as legal or equitable, because it acquired its modern contours as the result of an explicit amalgamation of rights and remedies drawn from both systems." Restatement (Third) of Restitution and Unjust Enrichment § 4 cmt. b (2011); see *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 212-15 (2002) (discussing the distinction between restitution as a legal remedy and restitution as an equitable remedy). The complex analysis[1] needed to determine whether the plaintiffs' restitution request in this case is legal or equitable is not necessary, however. Either way, the court of claims would not have jurisdiction over the plaintiffs' restitution request.

[1]The Restatement (Third) of Restitution and Unjust Enrichment § 4 (2011), contains an excellent, thorough discussion of why it is so difficult to determine whether a request for restitution is legal or equitable.

¶ 19 While the State possesses immunity from being sued (745 ILCS 5/1 (West 2020)), the legislature has authorized certain claims to be brought against the State in the court of claims (705 ILCS 505/8 (West 2020)). In relevant part, the court of claims has jurisdiction over "[a]ll claims against the State founded upon any law of the State of Illinois." *Id.* § 8(a). Constitutional questions, which present legal questions (*Hooker v. Illinois State Board of Elections*, 2016 IL 121077, ¶ 21), cannot be heard by the court of claims. See, *e.g.*, *Bennett v. State*, 72 Ill. Ct. Cl. 141, 142 (2019). Additionally, the court of claims does not possess the authority to grant equitable remedies. *Lowery v. State*, 72 Ill. Ct. Cl. 102, 104 (2020). Thus, no matter whether the plaintiffs' restitution request is legal or equitable, the court of claims was—and is—not the proper venue for any part of the plaintiffs' action. Therefore, the circuit court erred when it so held.

¶ 20 We note that an issue was raised below regarding whether sovereign immunity prohibited the plaintiffs from maintaining this action in the circuit court. The issue was addressed by both parties but not decided by the circuit court. Because that issue will arise again on remand and is a question of law that both parties have briefed on appeal, we choose to address the issue now. *Village of Spring Grove v. Doss*, 202 Ill. App. 3d 858, 862 (1990); see *Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 142 (1985).

¶ 21 "Sovereign immunity is a common-law doctrine that bars lawsuits against the government unless the government consents to be sued." *Jackson v. Alverez*, 358 Ill. App. 3d 555, 559 (2005). Article XIII, section 4, of the Illinois Constitution (Ill. Const. 1970, art. XIII, § 4) abolished sovereign immunity but authorized the legislature to reinstate it by law. It did so, with limited exceptions that include the court of claims, in section 1 of the State Lawsuit Immunity Act (745 ILCS 5/1 (2020)).

¶ 22 "A suit against a State official in his or her official capacity is a suit against the official's office and is therefore no different than a suit against the State." *Parmar*, 2018 IL 122265, ¶ 21. In this case, the plaintiffs sued the defendant circuit court clerks in their official capacities and do not dispute that they are State officers. Presumably, then, sovereign immunity would apply in this case.

¶ 23 However, under the "officer suit exception," sovereign immunity will not apply if "the State officer's conduct violates statutory or constitutional law or is in excess of his or her authority, [because] such conduct is not regarded as the conduct of the State." *Id.* ¶ 22; see *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 261 (2005) (holding that "when an action of a state officer is undertaken without legal authority, such an action strips a State officer of his official status *** [and] his conduct is not then regarded as the conduct of the State, nor is the action against him considered an action against the State" (internal quotation marks omitted)).

¶ 24 "When a statute is found to be facially unconstitutional in Illinois, it is said to be void *ab initio*; that is, it is as if the law had never been passed ***." *In re N.G.*, 2018 IL 121939, ¶ 50. Here, our supreme court held that the relevant statutes were facially unconstitutional. *Walker II*, 2021 IL 126086, ¶¶ 47-48. Thus, the defendant circuit court clerks collected the filing fees from the plaintiffs in violation of the constitution and absent legal authority to do so; accordingly, their actions were not considered as actions by the State. See *Parmar*, 2018 IL 122265, ¶ 22; *PHL*, 216 Ill. 2d at 261.

¶ 25 Importantly, this exception to sovereign immunity does not apply when the complaint seeks only damages for a past wrong. *Parmar*, 2018 IL 122265, ¶ 26. However, the plaintiffs' complaint not only sought restitution rather than damages (see *Raintree*, 209 Ill. 2d at 257-58 (discussing the difference between damages and restitution)), but also sought injunctive relief to

prohibit certain future conduct. Under these circumstances, we hold that the officer suit exception applies and sovereign immunity neither protects the defendants in this case nor robs the circuit court of jurisdiction to resolve the restitution issue.

¶ 26 III. CONCLUSION

¶ 27 The judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings on the plaintiffs' complaint.

¶ 28 Reversed and remanded.

*Walker v. Adams*, 2023 IL App (3d) 220387

| | |
|---|---|
| **Decision Under Review:** | Appeal from the Circuit Court of Will County, No. 12-CH-5275; the Hon. John C. Anderson, Judge, presiding. |
| **Attorneys for Appellant:** | Daniel K. Cray and Melissa H. Dakich, of Cray Huber Horstman Heil & VanAusdal LLC, of Chicago, Laird M. Ozmon, of Law Offices of Laird M. Ozmon, Ltd., of Joliet, and Michael T. Reagan, of Ottawa, for appellants. |
| **Attorneys for Appellee:** | Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Frank H. Bieszczat, Assistant Attorney General, of counsel), for appellees Candice Adams, Erin Cartwright Weinstein, Thomas A. Klein, Matthew Prochaska, Theresa E. Barreiro, Lori Geschwandner, Patty Hiher, Susan W. McGrath, Ami L. Shaw, Angela Reinoehl, John Niemerg, Kamalen Johnson Anderson, LeAnn Dixon, Kelly Elias, Lisa Fallon, Christa S. Helmuth, Kimberly A. Stahl, and Seth E. Floyd.<br><br>Carrie L. Haas, of Dunn Law Firm, LLP, of Bloomington, for appellee Don Everhart Jr.<br><br>Kimberly M. Foxx, State's Attorney, of Chicago (Cathy McNeil Stein, Jessica Scheller, Jonathon D. Byrer, Paul Fangman, and Patrick E. Dwyer III, Assistant State's Attorneys, of counsel), for appellee Iris Martinez.<br><br>James W. Glasgow, State's Attorney, of Joliet (Scott Pyles, Assistant State's Attorney, of counsel), for appellee Andrea Lynn Chasteen. |

# SUPREME COURT OF ILLINOIS

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March 27, 2024

In re: Reuben D. Walker et al., etc., Appellees, v. Andrea Lynn Chasteen, etc., Appellant. Appeal, Appellate Court, Third District. 130288

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Neville, J., took no part.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

130288

IN THE

SUPREME COURT OF ILLINOIS

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| Reuben D. Walker and M. Steven Diamond, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,<br><br>Appellees<br><br>v.<br><br>Andrea Lynn Chasteen, in Her Official Capacity as the Clerk of the Circuit Court of Will County and as a Representative of All Clerks of the Circuit Courts of All Counties Within the State of Illinois, Candice Adams, Clerk of the Circuit Court of DuPage County, Erin Cartwright Weinstein, Clerk of the Circuit Court of Lake County, Thomas A. Klein, Clerk of the Circuit Court of Winnebago County, Matthew Prochaska, Clerk of the Circuit Court of Kendall County, Theresa E. Barreiro, Clerk of the Circuit Court of Kane County, Lori Geschwandner, Clerk of the Circuit Court of Adams County, Patty Hiher, Clerk of the Circuit Court of Carroll County, Susan W. McGrath, Clerk of the Circuit Court of Champaign County, Ami L. Shaw, Clerk of the Circuit Court of Clark County, Angela Reinoehl, Clerk of the Circuit Court of Crawford County, John Niemerg, Clerk of the Circuit Court of Effingham County, Kamalen Johnson Anderson, Clerk of the Circuit Court of Ford County, LeAnn Dixon, Clerk of the Circuit Court of Livingston County, Kelly Elias, Clerk of the Circuit Court of Logan County, Lisa Fallon, Clerk of the Circuit Court of Monroe County, Christa S. | ) | Petition for Leave to Appeal from Appellate Court Third District 3-22-0387 12CH5275 |

Helmuth, Clerk of the Circuit Court of Moultrie County, Kimberly A. Stahl, Clerk of the Circuit Court of Ogle County, and Seth E. Floyd, Clerk of the Circuit Court of Piatt County

# # # # #

Andrea Lynn Chasteen, in Her Official Capacity as the Clerk of the Circuit Court of Will County and as a Representative of All Clerks of the Circuit Courts of All Counties Within the State of Illinois,

Appellant

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O R D E R

This cause coming to be heard on the motion of Candice Adams, Clerk of the Circuit Court of DuPage County, Erin Weinstein, Clerk of the Circuit Court of Lake County, Thomas Klein, Clerk of the Circuit Court of Winnebago County, Matthew Prochaska, Clerk of the Circuit Court of Kendall County, Theresa Barreiro, Clerk of the Circuit Court of Kane County, Lori Geschwandner, Clerk of the Circuit Court of Adams County, Patty Hiher, Clerk of the Circuit Court of Carroll County, Susan McGrath, Clerk of the Circuit Court of Champaign County, Ami Shaw, Clerk of the Circuit Court of Clark County, Angela Reinoehl, Clerk of the Circuit Court of Crawford County, John Niemerg, Clerk of the Circuit Court of Effingham County, Kamalen Anderson, Clerk of the Circuit Court of Ford County, LeAnn Dixon, Clerk of the Circuit Court of Livingston County, Kelly Elias, Clerk of the Circuit Court of Logan County, Lisa Fallon, Clerk of the Circuit Court of Monroe County, Christa Helmuth, Clerk of the Circuit Court of Moultrie County, Kimberly Stahl, Clerk of the Circuit Court of Ogle County, and Seth Floyd, Clerk of the Circuit Court of Piatt County, proper notice having been served, and the Court being fully advised in the premises:

IT IS ORDERED: Motion by Candice Adams, Clerk of the Circuit Court of DuPage County, Erin Weinstein, Clerk of the Circuit Court of Lake County, Thomas Klein, Clerk of the Circuit Court of Winnebago County, Matthew Prochaska, Clerk of the Circuit Court of Kendall County, Theresa Barreiro, Clerk of the Circuit Court of Kane County, Lori Geschwandner, Clerk of the Circuit Court of Adams County, Patty Hiher, Clerk of the Circuit Court of Carroll County, Susan McGrath, Clerk of the Circuit Court of Champaign County, Ami Shaw, Clerk of the Circuit Court of Clark County, Angela Reinoehl, Clerk of the Circuit Court of Crawford County, John Niemerg, Clerk of the Circuit Court of Effingham County, Kamalen Anderson, Clerk of the Circuit Court of Ford County, LeAnn Dixon, Clerk of the Circuit Court of Livingston County, Kelly Elias, Clerk of the Circuit Court of Logan County, Lisa Fallon, Clerk of the Circuit Court of Monroe County, Christa Helmuth, Clerk of the Circuit Court of Moultrie County, Kimberly Stahl,

Clerk of the Circuit Court of Ogle County, and Seth Floyd, Clerk of the Circuit Court of Piatt County, for leave to join as Appellants. Allowed.

Order entered by Justice O'Brien.

FILED
May 13, 2024
SUPREME COURT
CLERK

**No. 3-22-0387**

**IN THE APPELLATE COURT OF ILLINOIS**
**THIRD JUDICIAL DISTRICT**

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| REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,<br><br>Plaintiffs-Appellants,<br>v.<br><br>ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois,<br><br>Defendant-Appellee,<br><br>and<br><br>PEOPLE OF THE STATE OF ILLINOIS *Ex rel.* KWAME RAOUL, Attorney General of the State of Illinois, and DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County,<br><br>Intervenors-Defendants-Appellees. | On Appeal from Final Judgment Pursuant to Illinois Supreme Court Rules 301 and 303<br><br>From the 12th Judicial Circuit of Will County, Illinois<br><br>No. 12 CH 5275<br><br>The Honorable JOHN C. ANDERSON Judge Presiding. |

(Cover Continued on Next Page)

# BRIEF OF PLAINTIFFS - APPELLANTS

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**ORAL ARGUMENT REQUESTED**

APPENDIX SEPARATE

# POINTS AND AUTHORITIES

## NATURE OF THE CASE

Mortgage foreclosure litigants brought a class action complaint challenging the constitutionality of three statutes that imposed an additional fee on litigants filing residential mortgage foreclosure complaints. The Circuit Court certified a plaintiff class of the litigants who paid the add-on fees, and further certified a defendant class of the 102 circuit court clerks who collected those fees from the plaintiff class members. Plaintiffs' class action complaint sought, among other injunctive relief, a declaratory judgment that the challenged legislation violated the Illinois Constitution and a refund of the fees the circuit court clerks imposed pursuant to the unconstitutional statutes.

The Circuit Court granted partial summary judgment in favor of the class plaintiffs, finding that the challenged fee statutes were not related to the operation of the courts and instead were "tantamount to a litigation-tax funded neighborhood beautification plan." The Circuit Court ruled that the statutes violated the free access, due process, equal protection, and uniformity clause protections guaranteed by the Illinois Constitution. On direct appeal, the Illinois Supreme Court affirmed the Circuit Court's ruling, finding that the statutes facially violated the right to free access to the courts under the Illinois Constitution. The Illinois Supreme Court remanded the matter to the Circuit Court to conclude this litigation consistent with its opinion.

Approximately 14 months after remand, and after extensive restitution discovery to tabulate the total fees collected under the unconstitutional fee statues, the Circuit Court dismissed class plaintiffs' claim for restitution. The Circuit Court's order stated that the Circuit Court lacked subject matter jurisdiction to proceed because the last remaining issue involved a monetary claim against the State. To reach this conclusion, the Circuit

Court apparently relied on the Court of Claims Act and the Illinois Supreme Court's ruling in *Parmar v. Madigan*, 2018 IL 122265. Class plaintiffs timely appealed the Circuit Court's dismissal order.

## ISSUES PRESENTED FOR REVIEW

1. Whether the Circuit Court misapplied the law and thus erred in dismissing Class Plaintiffs' complaint where the Circuit Court reasoned that it had subject matter jurisdiction to order injunctive relief, but no subject matter jurisdiction to order equitable restitution.
2. Whether the Circuit Court erred in dismissing Class Plaintiffs' complaint based on its reasoning that "Class plaintiffs may pursue their request for restitution in the Court of Claims."
3. Whether the doctrine of sovereign immunity applies to Class Plaintiffs' complaint, seeking a refund of add-on fees imposed by the circuit court clerks pursuant to statutes that the Illinois Supreme Court has found to be facially unconstitutional and void *ab initio*.
4. Whether the Illinois Supreme Court's ruling in *Parmar v. Madigan* bars Class Plaintiffs' claim for restitution.
5. Whether the State may justifiably keep the fees collected at the expense of the plaintiff class members where those fees were collected illegally pursuant to statutes that the Illinois Supreme Court has held to be facially unconstitutional.

## JURISDICTIONAL STATEMENT

The Circuit Court granted the defendant class representative's motion to dismiss and entered an order on August 30, 2022, stating that its order resolves all matters pending before the Court. (C3016-18.) Class plaintiffs filed a timely notice of appeal on September 28, 2022. (C3019-27.) This Court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303.

## STATEMENT OF FACTS

### A. Proceedings Beginning in 2012 and Leading to the Illinois Supreme Court's Opinion in 2021, Holding the Statutes Facially Unconstitutional.

In April 2012, Reuben D. Walker filed a mortgage foreclosure action in the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, seeking a foreclosure regarding property located within Will County. (C18.) At the time of this mortgage foreclosure filing, Walker paid the court filing fee assessed by the circuit court clerk.[1] (C19.) Walker later learned that the circuit court clerk had charged him an additional fee that had no relation to the expenses of his litigation or to the judicial services rendered. (C1753-56, C2725-2726.) Rather, the circuit court clerk charged Walker an additional fee to raise revenue for the Foreclosure Prevention Fund and Abandoned Residential Property Fund, as a result of a new law enacted by the legislature to fund social programs. (C19-20.)

Subsequently, Reuben Walker filed his original class action complaint on October 2, 2012, challenging the constitutionality of the legislation that imposed on Illinois

[1] The Illinois Supreme Court opined that Walker paid the fee under duress, finding that when a fee is required for filing a mortgage foreclosure, the fee implicates access to the court system, and litigants like Walker would have lost reasonable access to the judicial process without payment. *Walker v. Chasteen*, 2021 IL 126086, ¶ 28.

litigants add-on fees to fund neighborhood beautification projects, 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. (C18-36.) Section 15-1504.1 required mortgage foreclosure plaintiffs to pay to the circuit court clerks an additional fee which funded these social programs. 735 ILCS 5/15-1504.1. (C21.)

Walker's complaint sought among other injunctive relief: (i) a declaratory judgment that the challenged social programming legislation violated the Illinois Constitution, (ii) a temporary, preliminary, and later a permanent injunction enjoining defendants from disbursing the fees collected under the statutes, and (iii) a declaratory judgment that the State funds collected pursuant to this statute must be returned to the plaintiffs. (C213-18.) Walker's complaint also sought the creation of a protest fund and/or that the fees collected under the statutes be placed in a separate fund under the direction and control of the Circuit Court. (C218-19.) On November 9, 2012, the Circuit Court certified two classes: (1) a plaintiff class as "all plaintiffs who paid the 735 ILCS 5/15-1504.1 fee" and (2) a defendant class of the 102 clerks of the circuit courts of Illinois. (C651, C2434.)

On February 8, 2013, the Illinois Attorney General on behalf of the people of Illinois moved to intervene in the Walker class action lawsuit and also moved to dismiss Walker's class action complaint under 735 ILCS 5/2-615 for failure to state a claim. (C177, C185.) Although the Attorney General argued that the circuit court clerks are state officers, the Attorney General did not raise sovereign immunity as a defense to the class action lawsuit. (C198-99.)

On November 8, 2013, the Circuit Court entered an order denying the motions to dismiss filed by the class defendants and granting partial summary judgment in favor of

class plaintiff Walker on the basis that the two percent payment to the clerks of the circuit courts created an impermissible fee office. (C608-15.) Class defendant and intervenor-defendants sought direct review in the Illinois Supreme Court. (C623, C636.) At no time did the class defendants and intervenors seek appellate review on the grounds that sovereign immunity barred class plaintiff's claims. On September 24, 2015, the Illinois Supreme Court reversed the decision of the Court, finding that the legislation did not create a fee office. See *Walker v. McGuire*, 2015 IL 117138. (C687.) The Court declined to consider at that time several alternative bases class plaintiffs had raised as challenges to the constitutionality of the legislation and instead remanded this matter for further proceedings to resolve those alternative challenges. (*Id*.)

Upon remand, class plaintiff Walker filed an amended complaint adding M. Steven Diamond as an additional class plaintiff. (C727-40.) Class plaintiffs subsequently filed a second amended complaint. (C960-75.) The second amended complaint alleges class plaintiff Diamond filed a mortgage foreclosure action in the Circuit Court of Cook County, Illinois seeking to foreclose upon property located within Cook County. (C961.) Diamond had also paid the court filing fee that included an additional fee assessed to fund the Foreclosure Prevention Program Fund and the Abandoned Residential Property Fund. (*Id*.)

Class plaintiffs again argued that the at-issue statutes violated separations of powers (Ill. Const. 1970, art. II, sec. I), the equal protection, dues process and uniformity clauses (Ill. Const. 1970, art I, sec. 2; art. IX, sec. 2) and the free access clause (Ill. Const. 1970, art. I, sec.12) and as interpreted in *Crocker v. Finley*, 99 Ill. 2d 444 (1984). (C970-73.) Class plaintiffs again sought among other injunctive relief a declaratory judgment

that the statutes violated the Illinois Constitution and that the fees collected under the unconstitutional statute be returned to the class plaintiffs who were required to pay the fees in order to access the courts and file their mortgage foreclosure actions. (*Id*.) The second amended complaint also sought the creation of a protest fund to segregate the fees collected pursuant to the statutes. (C974.)

Class plaintiffs, along with class defendant, the Circuit Court Clerk of Will County and the intervenor-defendants, the Circuit Court Clerk of Cook County and the State of Illinois, filed cross motions for summary judgment. (C1030-44, C1065-88, C1140-58, C1162-79.) The class defendant and intervenor-defendants argued that the statutes were facially constitutional, and the Circuit Court Clerk of Cook County additionally argued that plaintiffs' constitutional claims failed under the voluntary payment doctrine; but again, neither the class defendant nor the intervenor-defendants argued that the Circuit Court lacked subject matter jurisdiction, or that sovereign immunity barred the relief sought by the class plaintiffs.

On March 2, 2020, the Circuit Court issued a Memorandum Opinion and Order declaring the three statutes unconstitutional and enjoining their enforcement. (C1726-44.) The Circuit Court held that the statutes violated the free access, due process and equal protection clauses of the Illinois Constitution. (*Id*.)

On May 14, 2020, the Circuit Court entered a second order addressing class plaintiffs' standing to attack the various iterations of the statutes that existed after plaintiffs Walker and Diamond incurred their filing fees. (C1930-35.) The Circuit Court reasoned, "[t]o be sure, Plaintiffs have standing to attack the versions of the statutes (i.e. those Public Acts) that existed at the time they filed their underlying foreclosure actions.

Further, the Court finds Plaintiffs may seek a refund of the fees collected under those versions." (C1930.) The Circuit Court questioned whether the class plaintiffs had standing to seek relief in the form of a return of the fees from subsequent version of the statutes. (C1931.)

The Circuit Court ultimately ruled: "…[T]he Court finds that the named plaintiff have standing to seek injunctive relief as to the current version of the statutes, and restitution as to all versions of the statutes that existed from the time they filed their underlying claims through the present versions." (C1935.) The Circuit Court found that the State and state actors waived any challenges to the class plaintiffs' standing to seek restitution under all iterations of the statutes. (C1931.) "Quite simply, the State has not seriously contended, before this Court, that plaintiffs lack standing to challenge, or seek relief in connection with, the subsequent iterations of the statute." (*Id.*) Finally, the Circuit Court Order indicated that the Circuit Court expressly asked the State whether it wished to submit briefs on the issue of standing and the State declined. (*Id.*)

The Circuit Court Clerk of Will County and intervenor defendants the Circuit Court Clerk of Cook County and the Attorney General, on behalf of the people of Illinois, separately appealed directly to the Illinois Supreme Court the Circuit Court's Orders of March 2, 2020 and May 14, 2020. (C2011, C1983, C1955.) The appeals were consolidated. *Walker v. Chasteen*, 2021 IL 126086, ¶ 11. The Circuit Court Clerk of Cook County and the Attorney General filed appellant briefs. The Circuit Court Clerk of Will County joined the State's brief. *Id*. The State and the Circuit Court Clerk of Cook County argued that the statutes were constitutional, and the Circuit Court Clerk of Cook County additionally argued that the voluntary payment doctrine precluded plaintiffs'

claims. *Id*., ¶¶ 14, 20, 28. The appeals did not challenge the Circuit Court's finding that class plaintiffs had standing to seek restitution as to all versions of the statutes.

On June 17, 2021, the Illinois Supreme Court affirmed the circuit court's rulings. First, the *Walker* Court found that the voluntary payment doctrine did not apply, reasoning "when a mandatory filing fee is required to access the judicial process, duress may be implied." *Id*, ¶ 28. The *Walker* Court held that the statutes facially violated the right to freely access to the courts under the Illinois Constitution. *Id*., ¶¶ 47, 48. The Court remanded the matter to the Circuit Court to conclude this litigation consistent with its opinion. *Id*., ¶ 51.

**B. The Proceedings in this Matter Following the Illinois Supreme Court's Affirmance that the Statutes Facially Violated the Free Access Clause of the Illinois Constitution.**

Upon remand, the class plaintiffs conducted restitution-related discovery to determine the amount of unconstitutional fees paid by the plaintiff class members. Class plaintiffs' work in this regard included multiple motions to compel restitution discovery and a motion for sanctions against certain recalcitrant class defendants who refused to provide information as to the amount of illegal fees obtained from the facially unconstitutional add-on fee statutes and the identities of the individual plaintiffs from whom the fees were collected. (C2586-98, C2776-86, C2799-2810, C2933-41.) Additionally, the class defendant and intervenor-defendants engaged in extensive motion practice, including the following motions:

- On September 28, 2021, defendant class representative Andrea Lynn Chasteen, in her official capacity as the Circuit Court Clerk of Will County, filed a motion for summary judgment on the issue of damages in

which she argued: (1) the circuit court clerks were immune from damages under the Local Governmental and Governmental Tort Immunity Act and (2) summary judgment should be entered on the entire case as some of the class plaintiffs may have recovered the fees they paid under the unconstitutional statutes from other sources. (C2116-31, C2632-52.)

- On October 8, 2021, class defendant Katherine Phillips in her official capacity as Jo Daviess County Circuit Court Clerk, joined in the Will County Circuit Court Clerk's motion for summary judgment. (C2143-45.)
- On October 12, 2021, Defendant class representative Will County Circuit Court Clerk filed a motion to dismiss wherein she argued that the circuit court lacked personal jurisdiction over 101 of the 102 defendant class members because, even though the class plaintiffs served the class representative, the class plaintiffs did not personally serve each of the other 101 circuit court clerks class members with summons and complaint. (C2163-66.)
- On October 29, 2021, defendant class representative Will County Circuit Court Clerk filed a supplemental motion to dismiss wherein she again argued: (1) each of the remaining 101 circuit court clerks who comprised the defendant class should be dismissed as they needed to be personally served; and (2) the circuit court clerks are state officers and sovereign immunity thus applied. (C2266-77, C2375-2581.)
- On November 4, 2021, Intervenor-defendant Iris Martinez in her official capacity as Cook County Circuit Court Clerk filed a motion for summary

judgment in which she argued: (1) the plaintiffs' claims are barred by the State's sovereign immunity to the extent those fees were remitted to the State, (2) the plaintiff class members were not entitled to double recovery, and (3) the Tort Immunity Act (745 ILCS 10/2-201) barred plaintiffs from seeking a refund from the circuit court clerks. (C2313-17, C2653-74.)

- On December 2, 2021, the Cook County Circuit Court Clerk filed a two-page citation of additional authority in support of the motion to dismiss and for summary judgment, in which she quotes a portion of a sentence from the *Parmar* decision. (C2611-12, C2815-30, C2858-71.)
- On December 10, 2021, the Circuit Court Clerks of DuPage, Kane, Kendall, Lake and Winnebago Counties filed a petition to intervene for the purpose of filing their own motion for judgment on the pleadings in which they argued sovereign immunity applied based on the holding in *Parmar v. Madigan*, 2018 IL 122265, regardless of whether the circuit court clerks acted pursuant to statutes that were later held to be unconstitutional. (C2700-20, 2957-70, C2753-65.)
- On December 27, 2021, the Circuit Court Clerks of Adams, Carroll, Champaign, Clark, Crawford, Effingham, Ford, Livingston, Logan, Monroe, Moultrie, Ogle, and Piatt counties filed a petition to intervene wherein they stated they would be joining the proposed motion for judgment on the pleadings. (C2746-52, C2753-65.)
- On January 3, 2022, class plaintiffs filed a motion to strike the class defendants and intervenor-defendants' filings seeking dismissal, judgment

on the pleadings or summary judgment based on the law of the case doctrine. (C2787-2794.)

- On March 23, 2022, the Circuit Court Clerks of DuPage, Kane, Kendall, Lake, and Winnebago counties filed a memorandum of law in support of a motion for judgment on the pleadings based on the holding in *Parmar v. Madigan*. (C2957-70.)
- On April 8, 2022, the 18 intervening circuit court clerks filed a memorandum of law on the application of the law of the case doctrine. (C2994-97.)
- On April 8, 2022, the Circuit Court Clerk of Cook County filed a response to the class plaintiff's motion to strike the 18 intervening circuit court clerks' memorandum of law on the application of the law of the case doctrine (C2998-99.)

The Circuit Court entered a partial ruling on the motions on July 19, 2022. (C3007-14.) First, the Circuit Court ruled against class plaintiffs' argument that the Illinois Supreme Court's determination that the statutes were facially unconstitutional implicitly upheld the class plaintiffs' right for a return of fees under the law of the case doctrine,. (C3007-08.) Second, the Circuit Court ruled that in a class action lawsuit, service of summons on each class defendant is not necessary and, given the fact that the case had twice been before the Illinois Supreme Court, it would be absurd to suggest that the defendant class members, the circuit court clerks, did not have adequate notice of the case. (C3008-11.)

Third, the Circuit Court denied the class defendant's request for summary

judgment on the basis that some plaintiff class members may have recouped some or all of money they were forced to pay to initiate their mortgage foreclosure proceedings. (C3011-12.) The Circuit Court reasoned the plaintiff class had been certified based on a finding that common questions predominated over individual questions, and one of the common questions concerned restitution, a form of equitable relief. (*Id*.) The fact that one or more plaintiff class members may have recovered all or a portion of the illegal add-on fees from other sources could not serve as a basis for summary judgment. ( *Id*.) As the Circuit Court observed, restitution is an "equitable remedy." (C3012) "In a case like this one, a restitution award is generally measured by the defendant class members' unjust gains rather that the plaintiff class members' losses." (C3012.)

The Circuit Court made quick work of the class defendants' Tort Immunity Act challenge finding the Tort Immunity Act has no application to the constitutional issues at the heart of this case. (C3012.) As the Circuit Court observed, "[t]his is not in form or substance a tort case." (*Id*.) According to the Circuit Court, the collection of the unlawful fees was a ministerial act, which does not implicate tort immunity concerns, and class plaintiffs' action to recover moneys paid under an unconstitutional statute more nearly resembled the common law action for money had and received rather than a tort proceeding for damages. (C3012-13.)

The Circuit Court did not rule on the issue of sovereign immunity and instead set the matter for additional argument. (C3013.) According to the Circuit Court, the cases cited in support of the class defendant's and intervenor-defendants' sovereign immunity argument fell into one of three categories:

> "First, there are cases that assert a claim solely for monetary damages. Second, there are cases that seek declaratory relief, an injunction, a request

> to compel future action, or the like. Third, there are cases that fall into both categories. This case began as a category three case. Arguably, it is now a category one case. The Court would benefit from further discussion from the parties regarding whether it is still a third category case or, alternatively, a category one case." (C3013.)

The Circuit Court heard oral argument on July 21, 2022. (R245.) Counsel for the class plaintiffs argued: (1) sovereign immunity did not apply and the Circuit Court has jurisdiction to award restitution, (2) the Court of Claims has no jurisdiction to hear this this matter, and (3) the plaintiff class has consistently sought the same relief, including a return of the fees paid, since the lawsuit's inception, and the finding that the statutes are unconstitutional neither turned the matter into a new case nor divested the circuit court of jurisdiction. (R249-58.)

The Circuit Court responded, "I don't think anybody is saying that you [Plaintiffs] cannot have a remedy. The question is whether you have a remedy here [in the circuit court]." (R258.) Counsel for the class defendant likewise argued, "[n]ow it is relatively clear that beyond the State Immunity Lawsuit Act, there is a route for [counsel for class plaintiffs] to get his money, and that is the Court of Claims Act." (R263.) According to counsel for the class defendants:

> "If people want to stay out of claims [the Court of Claims], everybody would make up a way to file class actions and claim some sort of equitable relief at the beginning of the case, and then everybody can keep all their cases out of the Court of Claims if that was, in fact, the way to do it in these type of cases." (R265.)

On August 30, 2022, the Circuit Court entered a three-page order stating that although the permanent injunction the Circuit Court previously entered remained enforceable, the Circuit Court lacked jurisdiction to order a refund of the fees collected under the unconstitutional statutes, and that the class plaintiffs should pursue their request

for restitution in the Court of Claims. (C3016-18.) Class plaintiffs timely appealed the Circuit Court's order on September 28, 2022. (C3019-27.)

## ARGUMENT

### I. STANDARD OF REVIEW.

The Circuit Court granted the class defendant's supplemental motion to dismiss "to the extent it seeks dismissal for lack of jurisdiction over plaintiff's [sic] restitution claims." According to the Circuit Court:

> "This order does not impact the permanent injunction previously entered by the Court; that order was entered with jurisdiction and remains enforceable. However, the Court lacks jurisdiction to provide any relief to plaintiffs relative to their claim for restitution. Accordingly, the prayers for restitution are stricken. Class plaintiffs may pursue their request for restitution in the Court of Claims. Cook County's motion for summary judgment and the Illinois Attorney General's motion for judgment on the pleadings are denied as moot. The order resolves all matters pending before this Court. Clerk to notify." (C3018.)

The Circuit Court granted the Circuit Court Clerk of Will County's motion to dismiss plaintiffs' class action complaint pursuant to section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-619. A section 2-619 motion to dismiss raises certain defects or defenses and questions whether a defendant is entitled to judgment as a matter of law. *Tyler v. Gibbons,* 368 Ill. App. 3d 126, 128 (3d Dist. 2006). Since the resolution of the motion involves a question of law, the standard of review is *de novo*. *Tyler*, 368 Ill. App. 3d at 128. Additionally, because the question of a circuit court's subject matter jurisdiction presents an issue of law, appellate review is *de novo*. *Leetaru v. Board of Trustees of University of Illinois,* 2015 IL 117485, ¶ 41.

## II. THE ILLINOIS SUPREME COURT HAS RECOGNIZED THE BURDEN EXCESSIVE FILING FEES PLACE ON LITIGANTS; PARTICULARLY WHERE THE LEGISLATURE HAS FINANCED GENERAL WELFARE PROGRAMS ON THE BACKS OF COURT USERS.

### A. The Creation of the Statutory Fee Task Force to Review Fees Imposed on Illinois Litigants.

The Illinois Supreme Court has recognized both the importance of allowing litigants access to the courts and the corresponding need to restrict the growing burden of add-on fees imposed on litigants. On August 15, 2013, the legislature adopted and codified the Court's initiative as the Access to Justice Act. 505 ILCS 95/25. (C817, C821.) The Access to Justice Act created a Statutory Court Fee Task Force to review the various filing fees and fines imposed on criminal and civil litigants. (C817.) The Task Force recognized in its 2016 Report that court fees imposed on Illinois litigants were constantly increasing and outpacing inflation. (C817-18.) The Task Force found the problem with ever increasing court fees was "exacerbated by the ability of various special interest groups to finance aspects of their operations on the backs of court users. Today it is all too common for litigants to pay for services through additional assessments that are wholly unrelated to the court system." (C817.)

In response, the Task Force recommended that (1) any court fees imposed must be directly related to the operation of the court system, (2) assessments imposed for a particular purpose should be limited to the types of court proceedings that are elated to that purpose, and (3) funds raised by assessments intended for a specific purpose should be used only for that purpose. (C818.) The Task Force also recommended that the General Assembly should review all assessments to determine if they should be adjusted or repealed. (*Id*.)

On January 11, 2021, the Illinois Supreme Court created a new Illinois Supreme Court Statutory Court Fee Task Force to continue the work of the original Task Force created under the Access to Justice Act.[2] (A19.) The stated purpose of the new Task Force was to conduct a thorough review of the various statutory fees imposed on Illinois litigants and to further improve the manner in which assessments are imposed in Illinois courts. (A19.) One of the issues the new Task Force identified was the need to review court fees that may violate the free access clause of the Illinois Constitution. (A38.) The new initiative is in direct response the litigation now before this Court. According to the 2022 Task Force Report:

> "In *Walker v. Chasteen*, 2021 IL 126086, the Supreme Court held that the add-on filing fee on mortgage foreclosure complaints contained in Section 15-1504.1 of the Code of Civil Procedure (735 ILCS 5/15-1504.1) violated the free access clause of the Illinois constitution, Ill. Const. 1970 art. I, § 12. Enacted as part of the "Save Our Neighborhoods Act" in response to the mortgage foreclosure crisis, the legislation authorizing that the fee directed that those funds be used to support the Foreclosure Program Prevention Fund and the Abandoned Residential Property Fund, including by subsidizing grants to housing counseling agencies, foreclosure prevention services and municipalities for such things as cutting grass, removing garbage and graffiti, and erecting fencing at abandoned properties.
>
> In striking down the mortgage foreclosure fee, the Supreme Court reaffirmed its holding in *Crocker v. Finley*, 99 Ill. 2d 444, 451 (1984), which recognized that the central issue in a claim that a filing fee violates the free access and due process clauses of the Illinois Constitution is that whether the legislature may impose a fee on a limited group of plaintiffs, when the funds are emitted to the state treasury to fund a general welfare program. In *Crocker*, the Court held that charges imposed on a litigant are fees if assessed to defray the expenses of litigation, whereas a charge having no relation to the services rendered is properly considered a tax. A

[2] The Committee heard public comments on the 2022 Illinois Statutory Court Fee Task Force Report in August 2022 and was set to finalize the report the week of January 30, 2023. According to the Director of Communications for the Illinois Supreme Court, as of February 3, 2023, the Committee intends to include in their report the new initiative to review all court fees that may violate the free access clause of the Illinois Constitution.

> litigation tax may only be imposed for purposes related to the operation and maintenance of the courts.
>
> Like in *Crocker*, the Supreme Court concluded that the mortgage filing fee in Walker was actually a litigation tax as it bore no direct relation to the expenses of the litigation or to the services rendered. The Court further held that the fee unreasonably interfered with the foreclosure litigants' access to the courts in violation of the free access clause of the Illinois Constitution. The fee was a revenue-raising measure designed to fund a statewide social program, which had no direct relation to the administration of the court system." (A38-39.)

The Task Force recommended that the General Assembly convene a legislative working group to review statutory add-on fees to ensure consistency with the standard set out by the Illinois Supreme Court in *Crocke*r and affirmed in *Walker*. (A39.) The Task Force counseled that add-on fees that are merely designated to raise revenue to fund non-court-related social welfare programs should be repealed and alternate funding sources should be identified. (*Id*.) According to the Task Force, "any fees which do not defray the expenses of litigation should be properly considered litigation taxes, which may run afoul of the free access clause of the Illinois Constitution unless they have a direct relationship to the administration of the court systems." (*Id.*)

### B. The Illinois Supreme Court's Ruling and Rational in *Walker,* and the Circuit Court's Failure to Grant Relief Upon Remand.

As reflected in the 2022 Statutory Court Fee Task Force Report, the Illinois Supreme Court held that the legislation that imposed add-on fees on the class plaintiffs was facially unconstitutional and violative of the plaintiff class members' right to freely access the courts. *Walker v. Chasteen,* 2021 IL 126086. Article I, section 12, of the Illinois Constitution provides:

> "Every person shall find a certain remedy in the law for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, **freely**, **completely**, and **promptly**." (emphasis added)

As the *Walker* Court observed, "[s]uccessfully making a facial challenge to a statute's constitutionality is extremely difficult, requiring a showing that the statute would be invalid under any imaginable set of circumstances." *Walker,* 2021 IL 126086, ¶ 31. Accordingly, a successful challenge to a statute's constitutionality voids the statute for all parties in all contexts." *Id*., ¶ 31. When a court determines that a statute is unconstitutional, the statute is void *ab initio*. *People v. Gersch*, 135 Ill. 2d 384, 390 (1990). The legal effect of declaring a statute unconstitutional is to relegate the parties to such rights as obtained prior to the enactment of the unconstitutional statute. *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 564-65 (2d Dist. 2003).

Simply finding the statute unconstitutional and enjoining the statutes' prospective enforcement provides no relief to the plaintiff class members who paid the unconstitutional fees. The only way to return the plaintiff class members to the status they held before the circuit court clerks imposed the illegal filing fees and excessively charged them, is to return to the plaintiff class members the money that they should not have been forced to pay in the first place. The Illinois Supreme Court has already opined that there was no rational basis for imposing the filing fee on the mortgage foreclosure litigants and requiring them to bear the cost of maintaining a social welfare program, while excluding other taxpayers from this burden. *Walker v. Chasteen*, 2021 IL 126086, ¶ 48. Anything less than the return of those fees would embolden the legislative branch to continue funding social programs on the backs of Illinois citizens who use their courts.

Upon remand from the Illinois Supreme Court, the remaining proceedings should have been the tabulation of the illegal fees paid by the plaintiff class members under the void statutes and restitution of those fees to the plaintiff class. Instead, fourteen months after remand, the Circuit Court dismissed the class plaintiffs' complaint, stating it lacked subject matter jurisdiction to order restitution of the fees. The Circuit Court instructed class plaintiffs to file a new action in the Court of Claims to recover the add-on fees that the circuit court clerks had collected under facially unconstitutional statutes.

The Circuit Court did not fully explain in its three-page dismissal order why it had authority to find the statutes unconstitutional but no authority to grant class plaintiffs the complete equitable relief they had sought since the beginning of this litigation. According to the Circuit Court, "the Court agrees that the Court of Claims Act, and the Illinois Supreme Court's ruling in *Parmar v Madigan*, and the fact that the last remaining issue involves a monetary claim against the State, the Court must agree that it lacks jurisdiction to proceed." (C3018.)

Contrary to the suggestion of the Circuit Court, the Court of Claims has no jurisdiction to either determine the merits of constitutionally based claims, or to adjudicate class actions. Additionally, Illinois cases are clear and consistent that a sovereign-immunity defense to the jurisdiction of the Circuit Court to hear a case fails where the plaintiff claims a constitutional violation against a state actor. The Circuit Court's August 30, 2022, order fails to explain why *Parmar v. Madigan*, 2018 IL 122265 (2018), mandates a different outcome, particularly where class plaintiffs have never sought compensatory damages and are merely seeking a return of the original thing to which the plaintiff class members are entitled: the fees they paid to the class

defendants under statutes that are *void ab initio*, i.e., void from the beginning. *Perlstein v. Wolk*, 218 Ill. 2d 448, 454-55 (2006).

The plaintiff class members were forced to pay the challenged filing fees in order to access the courts to proceed with their residential mortgage foreclosure actions. The class plaintiffs had to pay a second fee to file their class action lawsuit in the Circuit Court, and twice paid additional filing fees on appeal. After the Illinois Supreme Court ruled that the at-issue statutes were unconstitutional and violative of the plaintiff class members' rights, the Circuit Court ended this litigation by denying class plaintiffs both free access to the courts and the return of the original fees. The Circuit Court's order effectively requires each plaintiff class member to pay individually yet another fee in the Court of Claims, all for the return of the original add-on fees, some as little as $50, that the plaintiff class members should never have been required to pay in the first place. It is too late for plaintiffs to obtain justice **freely** or **promptly** under the free access clause of the Illinois Constitution, but this Court's reversal of the Circuit Court's order will at least allow plaintiffs to obtain justice **completely**.

## III. THE COURT OF CLAIMS LACKS JURISDICTION TO HEAR THIS CLASS ACTION LAWSUIT.

### A. The Court of Claims Has No Jurisdiction to Hear Class Actions or Constitutional Issues.

The Circuit Court impermissibly ceded its authority to provide complete relief to the class plaintiffs. The Circuit Court's order of August 30, 2022 sends the plaintiff class members down a dead-end road due to its mistaken belief that the class plaintiffs can seek a return of the fees paid in the Court of Claims. However, the Court of Claims has determined that it has no authority to hear class actions. *Radke v. State of Illinois*, 72 Ill.

Ct. Cl. 82, 85 (2016). Further, the Court of Claims has no authority to hear constitutionally-related issues. See *Bennett v. State of Illinois*, 72 Ill. Ct. Cl. 141, 142 (2019) (Federal and state constitutional issues are outside the jurisdiction of the Court of Claims.) As noted above, this case involved at its outset a violation of the Illinois Constitution and still involves issues concerning the equitable remedies available for the constitutional violation.

In *Radke*, Timothy Radke filed a putative class action complaint in the Court of Claims seeking damages on behalf of himself and a putative class of individuals who had applied to the University of Illinois but were not offered admission because the university "rewarded political clout, money, and power over prior academic achievement." *Radke*, 72 Ill. Ct. Cl. at 82. The Court of Claims concluded: (1) it did not have authority under the Court of Claims Act to preside over class actions and it could only hear claims brought by individuals, (2) because the Court of Claims Act permits the court of claims to direct the appearance of any claimant to appear and be examined under oath, a claimant cannot file a single petition on behalf of thousands of individuals, and (3) consideration of issues regarding class certification would be too burdensome on the Court of Claims. *Id*. at 84-85.

Radke filed a petition for writ of certiorari and mandamus in the Circuit Court following the Court of Claims' dismissal of his class action against the university. *Radke v. Illinois Court of Claims*, 2019 IL App (1st) 180370-U, ¶ 16 (unpublished order under Illinois Supreme Court Rule 23). The Appellate Court reasoned that it lacked authority to review whether the Court of Claims erred in its determination of its own authority and the Illinois Supreme Court denied Radke's petition for leave to appeal. *Id*., ¶ 16, pet. for

leave to appeal denied, 132 N.E. 3d 302 (Table) (2019). The Appellate Court clarified that the Court of Claims is not a "court" within the meaning of the judicial article of the Illinois Constitution and is instead a part of the legislative branch of the state government. *Id*., ¶ 16. As such, proceedings in the Court of Claims are not the equivalent of those in the Circuit Court, and the Court of Claims may determine how it will apply the provisions of the civil practice law. *Id*., ¶ 25.

The Court of Claims' sole statutory authority is derived from Section 8 of the Court of Claims Act. 705 ILCS 505/8. Therefore, any jurisdictional analysis of a claim brought in the court of claims depends on whether that claim falls within the jurisdictional grants in Section 8. *Bennett*, 72 Ct. Cl. at 142. "The Court of Claims jurisdictional grant does not encompass claims based upon either federal or state constitutional issues." *Id.* As constitutional claims are outside the jurisdiction of the Court of Claims, the *Walker* class plaintiffs could not have filed their complaints in the Court of Claims even if they had done so solely in their individual capacities.

Although presented with the above-noted precedents, the Circuit Court nevertheless reasoned that the class plaintiffs could obtain full relief in the Court of Claims because the Court of Claims has authority to grant equitable relief under *Management Ass'n of Illinois v. Board of Regents of Northern University of Illinois*, 248 Ill. App. 3d 599 (1st Dist. 1993). The Circuit Court's reliance on *Management Ass'n of Illinois* is misplaced for several reasons. First, the case was not a class action, and it did not involve a constitutional challenge. *Management Ass'n of Illinois*, 248 Ill. App. 3d at 601. Moreover, the appellate court opined that the Court of Claims had exclusive jurisdiction because "[t]he conduct for which the constructive trust is sought in the

present case was tortious conduct regulated by common law rather than statute and involved no ministerial acts, but discretionary acts on the part of a State agency." *Id*. at 611. No similar tortious conduct or discretionary acts are alleged in *Walker*. To the contrary, certification of the defendant class as all 102 circuit court clerks was appropriate in this matter because the circuit court clerks had no discretion regarding whether or how to implement the statutes that the Illinois Supreme Court has found to be unconstitutional.

Contrary to the Circuit Court's reasoning, any chance for relief for the plaintiff class members in the Court of Claims is remote at best. Clearly, the Court of Claims will not exercise jurisdiction over this class action lawsuit; and it is doubtful that the Court of Claims will exercise its jurisdiction even if each plaintiff class member seeks reimbursement of fees paid under an unconstitutional statute individually. The Circuit Court has no oversight over the Court of Claims, and the plaintiff class members will be left with no recourse in the likely event the Court of Claims rejects the filing of their claims.

**B. This Matter Remains a Class Action for Good Reason.**

Assuming, *arguendo*, the Court of Claims has authority to adjudicate the return of the fees collected pursuant to an unconstitutional statute, the Court of Claims would be overwhelmed by the sheer number of individual claims. According to the financial data provided by the defendant class members during the course of discovery, the circuit court clerks collected $102,377,136.10 in unlawful fees from the plaintiff class members. The amount of the unconstitutional add-on fees ranged from $50, $250, and $500. Even if each plaintiff class member paid the highest fee of $500 (which is not the case as the

original version of the statute had a $50 fee only), the Court of Clams would be flooded with over 200,000 individual claims. Tellingly, the Court of Claims adjudicated fewer than 7000 claims in the fiscal year 2019.[3]

The Circuit Court never decertified the plaintiff or defendant classes. This matter was and remains a class action for an important reason. Not only would it be impractical for each plaintiff class member to bring his or her own cause of action in the Court of Claims, but it would also be financially unfeasible. First, no plaintiff class member could file a refund claim in the Court of Claims until the judicial branch held that the statutes were unconstitutional. It is highly unlikely that an individual plaintiff would bear the cost to litigate for a decade the constitutionality of these fee statutes. Moreover, even assuming the Court of Claims exercised authority to grant restitution to each plaintiff class member on an individual basis, the illegal fees taken by the Circuit Court Clerks were in many cases as little as $50. The well-established policy objective behind class action lawsuits is to encourage individuals, who may otherwise lack incentive to file individual actions because their damages are limited, to join with others to vindicate their rights in a single action. The slight loss to the individual, when aggregated, results in recovery that is worthy of an attorney's time and costs of litigation and provides restitution to the injured party and deterrence to the wrongdoer.

Barring restitution of the fees collected under the facially unconstitutional statutory scheme to the plaintiff class members would be far more than simply inequitable. It would have the practical effect of emasculating judicial review of the constitutionality of state statutes. No citizen or group of citizens would challenge even

[3] See Reports of Cases Argued and Determined in the Court of Claims of the State of Illinois, Volume 71, https://www.ilsos.gov/departments/court_of_claims/volumes/volume71.pdf

the most egregious statutory schemes if the state actors do not have to refund the fees regardless of whether the judiciary finds the statutes to be unconstitutional and violative of the rights of the citizens of the State.

## IV. THE JUDICIAL BRANCH HAS AUTHORITY TO ORDER THE DISBURSEMENT OF MONEY WITHOUT ANY SPECIFIC APPROPRIATION WHEN SUCH ACTION IS COMPELLED BY THE CONSTITUTION.

The Illinois Supreme Court has held that it is the duty of the judiciary to construe the constitution to determine whether its provisions have been violated by either of the other branches of government. *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 310-311 (2004). "If officials of the executive branch have exceeded their lawful authority, the courts have not hesitated and must not hesitate to say so." *Jorgensen*, 211 Ill. 2d at 310-311. *Id*. at 311. While the decision in *Jorgenson* was based on this Court's inherent right to order the payment of judicial salaries, the Court's analysis of its constitutional authority may be more broadly applied. The Court held it had authority to order the disbursement of state money without any explicit appropriation when such action is compelled by a constitutional violation. *Id*. at 314. As the *Jorgensen* Court observed, "the controller is not being asked to draw warrants without authorization. We hereby give him authorization by court order." *Id*. at 315.

While the State Comptroller Act provides that an obligation or expenditure must be pursuant to law and authorized, such authority may be furnished by a court order. *Illinois County Treasurers' Ass'n v. Hamer*, 2014 IL App (4th) 130286, ¶ 25. According to the *Hamer* Court:

> "[L]imitations written into the Constitution are restrictions on legislative power and are enforceable by the courts. *Client Follow-Up v. Hynes*, 75 Ill. 2d 208, 215 (1979). 'It is the duty of the judiciary to construe the

> Constitution and determine whether its provisions have been disregarded by the action of any of the branches of government.' *Rock v. Thompson*, 85 Ill. 2d 410, 418 (1981). '[T]he doctrine of separation of powers does not prevent the court from ascertaining compliance with or mandating performance of constitutional duties.' *Rock*, 85 Ill. 2d at 417." *Id*. at ¶ 27.

Here, the circuit court clerks violated the free access clause of the Illinois Constitution. It is therefore within the power of the judicial branch to not only find a constitutional violation (as it did here) but to also compel restitution of the fees that the Illinois Supreme Court has determined were collected illegally. *Jorgenson*, 2011 Ill. 2d at 315. Anything less than complete relief provides a glaring disincentive to private citizens to file future suits against facially unconstitutional legislative statutes.

## V. SOVEREIGN IMMUNITY AFFORDS NO PROTECTION WHERE THE STATE'S AGENT ACTS IN VIOLATION OF THE CONSTITUTION.[4]

### A. Class Defendants Halfheartedly Raised Sovereign Immunity After a Decade of Litigation.

In May 2020, the Circuit Court ruled that the class plaintiffs had standing to seek restitution. (C1930-35.) As the Circuit Court observed, the State had not seriously challenged the class plaintiffs' standing to seek restitution of the fees paid under the statutes in effect at the time Walker and Diamond paid the add-on fees as well as under later versions of the statutes, which continued to assess add-on fees. (C1934.) According to the Circuit Court, when asked whether it wished to submit a brief on the issue plaintiffs' right to seek restitution under every version of the fee statutes, the State declined. (*Id*.) Reasoning that the State and the class defendants had expressly waived

[4] Although it is unclear from the Circuit Court's order of August 20, 2022, whether the Circuit Court believes sovereign immunity applies, the Circuit Court nevertheless stated that it lacked jurisdiction because the remaining issues of the cased involved money damages and state actors. Therefore, this Section discusses why sovereign immunity is inapplicable.

any argument regarding lack of standing, the Circuit Court ordered that the class plaintiffs had standing to seek restitution as to all versions of the statutes that existed at the time they filed their underlying claims through the present versions. (C1935.)

The state actors neither challenged the Circuit Court's Order of May 14, 2020, nor raised the issue of restitution on appeal in *Walker v. Chasteen*. Only upon remand from the Illinois Supreme Court did the defendants first raise the defense of sovereign immunity; and only after the defendants raised other clearly inapplicable defenses, including lack of service on all defendant circuit court clerks in the class action; the class plaintiffs' claims were barred by the Tort Immunity Act; and summary judgment should end the entire case where some of the plaintiff class members may have already received a return of the unconstitutional fees.

These defendants have not only wasted judicial resources; their conduct has also reduced to advisory status the Circuit Court's decision of May 14, 2020. While the defense of sovereign immunity is typically brought by motion to dismiss, such motions are not generally filed nearly a decade into the litigation. If the defendants seriously thought sovereign immunity insulated them from the class plaintiffs' constitutional challenge (and the remedies plaintiffs sought therein), the defendants presumably would have raised this defense in a timely manner.

However, whether the State is entitled to assert a defense of sovereign immunity at any stage of the litigation is an issue this Court need not consider. From its inception, this class action has been governed by an important exception to sovereign immunity in suits against state officials or employees. Sovereign immunity affords the State no protection where, as here, a plaintiff alleges that state officials violated the Illinois

Constitution. The Circuit Court erred by dismissing class plaintiffs' complaint because "it lacked jurisdiction to proceed" (C3018) because: (1) the Court of Claims does not have jurisdiction over this class action, and (2) the class defendants are not entitled to sovereign immunity.

### B. Sovereign Immunity Does Not Apply Where a State Actor Violates the Constitution.

Under the Illinois Constitution of 1870, the State of Illinois enjoyed immunity for lawsuits of any kind. *Parmar v. Madigan*, 2018 IL 122265, ¶ 19. The doctrine of sovereign immunity was abolished in Illinois by the 1970 Constitution "[e]xcept as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, § 4. The General Assembly subsequently reinstated the doctrine through the enactment of the State Lawsuit Immunity Act. See Pub. Act 77-1776 (eff. Jan. 1, 1972.) The statute provides that except as provided in the Court of Claims Act and several other specified statutes, "the State of Illinois shall not be made a defendant or party in any court." *Leetaru v. Board of Trustees of University of Illinois*, 2015 IL 117485, ¶ 42.

The formal identification of the parties as they appear in the complaint is not dispositive of whether the State is a party to the lawsuit. *Leetaru*, 2015 IL 117485, ¶ 44. However, the fact that the named defendant is an agent of the State does not mean that the bar of sovereign immunity applies. *Id*. In appropriate circumstances, plaintiffs may obtain relief in the circuit court even where the defendants are servants or agents of the State. *Healey v. Vaupel*, 133 Ill. 2d 295, 308 (1990). Whether an action is against the State, which must be brought in the Court of Claims, depends on the issues involved and the relief sought. *Healey*, 133 Ill. 2d at 308. Importantly, the doctrine of sovereign

immunity affords no protection when it is alleged that the State's agent acted in violation of the Illinois Constitution. *Leetaru*, 2015 IL 117485, ¶ 44; *Healey*, 133 Ill. 2d at 308.

When it is alleged that the state agent acted unconstitutionally, the State agent's conduct is not considered to be that of the State for purposes of sovereign immunity. *Leetauru*, 2015, IL 117485, ¶ 46. According to the *Leetaru* Court, "[t]he doctrine of sovereign immunity "affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court." *Id.* As the *Leetaru* Court reasoned:

> "This exception [to sovereign immunity] is premised on the principle that while legal official acts of state officers are regarded as acts of the State itself, illegal acts performed by the officers are not. In effect, actions of a state officer undertaken without legal authority strip the officer of his official status. Accordingly, when a state officer performs illegally or purports to act under an unconstitutional act or under authority which he does not have, the officer's conduct is not regarded as the conduct of the State. *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill.2d 250, 261, 296 Ill.Dec. 828, 836 N.E.2d 351 (2005). A suit may therefore be maintained against the officer without running afoul of sovereign immunity principles. *Sass v. Kramer*, 72 Ill.2d at 492, 21 Ill.Dec. 528, 381 N.E.2d 975; *Senn Park Nursing Center*, 104 Ill.2d at 188, 83 Ill.Dec. 609, 470 N.E.2d 1029." *Id.*, ¶ 46.

This exception to sovereign immunity is aimed at situations where the state official is performing the work empowered to the official in a way the law forbids. *Id*. at ¶ 47. The *Leetaru* Court reasoned that the purpose of the doctrine of sovereign immunity is "to protect the State from interference in its performance of the functions of government and to preserve its control over State coffers." *Id*. (citation omitted). However, "[t]he State cannot justifiably claim interference with its functions when the act complained of is unauthorized and illegal." *Id.*

As the Illinois Supreme Court reasoned in *City of Springfield v. Allphin,* there is a presumption that the State does not violate the constitution or laws of the State, but that such a violation, if it occurs, is by a State actor and may thus be restrained by a proper action instituted by a citizen. 74 Ill. 2d 117, 124 (1978). Where a State actor acts in violation of the constitution or the laws of Illinois, the rights of the plaintiffs to be free from the consequences of those actions outweigh the interest of the State that is served by the sovereign immunity doctrine. *Senn Park Nursing Center v. Miller,* 104 Ill. 2d 169, 188 (1984); see *Illinois Collaboration on Youth v. Dimas,* 2017 IL App (1st) 162471, ¶ 35 (Where the plaintiff seeks to enjoin the state actor from taking actions in violation of the plaintiff's protectable legal interests, the suit does not contravene the immunity prohibition.). The exception to sovereign immunity is aimed at situations where "the official is not doing the business which the sovereign has empowered him to do or is doing it in a way in which the law forbids." *Dimas,* 2017 IL App (1st) 162471, ¶ 36, citing *Leetaru,* 2015 IL 117485, ¶ 47.

Here, the 102 circuit court clerks are state officers within the judicial branch of state government and are not county officers. *Drury v. McLean County*, 89 Ill. 2d 417, 424 (1982). These class defendants were not performing their duties negligently, but the Illinois Supreme Court found that their actions were unconstitutional. Illinois law provides no sovereign immunity defense for the actions of these state actors.

**C. Mandating Restitution Would Neither Control the Actions of the State Nor Expose the State to Direct Liability.**

The rationale for sovereign immunity is not present under the facts of this case because ordering the return of the add-on fees to the class plaintiffs who were forced to pay those fees would neither operate to control the actions of the State nor subject the

State to direct liability. *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 42. This is so because the unconstitutional acts of a state agent "cannot be properly characterized as action on behalf of the State." *Loman v. Freeman*, 229 Ill. 2d 104, 123 (2008); see *Jinkins v. Lee*, 209 Ill. 2d 320, 337 (2004) (A judgment against health professionals employed at state mental healthcare facility would not operate to control the actions of the State as consequent state policy decisions would remain dependent on the goal of meeting the standard of care already directed by existing state law.). A judgment in favor of a plaintiff finding that a state actor has been found to have acted illegally could not serve to restrain the state actor's performance of his or her lawful duties. *Bianchi*, 2016 IL App (2d) 150646, ¶ 42. To the contrary, a Circuit Court judgment that would tend to *curb* such unconstitutional actions does not violate sovereign immunity. *Loman*, 229 Ill. 2d at 123.

Additionally, any duty the State may have to indemnify its state actors, is not the same as "liability," which is a legal obligation enforced against the state itself. *Loman*, 229 Ill. 2d at 121. "The State's obligation to indemnify its employees for liability incurred by them does not constitute the State's assumption of direct liability." *Loman*, 229 Ill. 2d at 121. The State's decision to indemnify its employees should not be equated with the State's direct liability for its employee's conduct, and a State's decision to indemnify its employees does not deprive the Circuit Court of subject matter jurisdiction. *Id.*

As the *Loman* Court observed, the State Employee Indemnification Act provides that unless the court *or a jury* finds the conduct or inaction which gave rise to the cause of action was intentional, willful, or wanton and was not intended to serve the interests of the State, the State shall indemnify the State employee for any damages as long as certain

conditions are met. *Id*. at 122. Jury trials are not available in the Court of Claims. *Id*. According to the *Loman* Court, "[i]f the availability of indemnification was sufficient to confer exclusive jurisdiction in the Court of Claims, there would be no role for a jury. *Id.* The State Employee Indemnification Act anticipates actions against state agents in the Circuit Courts and Circuit Courts' authority to render monetary judgments.

## VI. THE *PARMAR* DECISION SHOULD NOT BE READ TO LIMIT EQUITABLE CLAIMS FOR RESTITUTION.

### A. *Parmar,* a Tax Refund Case, Presented the Court with Different Facts and Issues.

*Parmar v. Madigan*, 2018 IL 122265, is inapplicable as the *Parmar* Court had no occasion to consider the remedy when statutes that imposed additional fees on mortgage foreclosure litigants have been found to be facially unconstitutional and violative of the free access clause. Additionally, *Parmar* does not hold the circuit courts lack jurisdiction where the monetary relief requested is equitable restitution and no further monetary recovery is sought.

*Parmar,* a tax refund case, involved both a different procedural application and different requested relief. The plaintiff in *Parmar* was the executor of a taxpayer's estate and the son of the decedent. 2018 IL 122265, ¶ 4. Parmar filed a complaint in the circuit court against the Attorney General and the Treasurer of the State of Illinois challenging their authority to enforce the Estate Tax Act, which, according to Parmar, caused him to overpay taxes purportedly owed on his mother's estate. *Id*., ¶ 1. Parmar alleged that retroactive application of an amendment to the Estate Tax Act violated his due process rights, and that the amendment was also adopted in violation of the three readings clause of the Illinois Constitution. *Id*., ¶ 8. Parmar's complaint sought a full tax refund of all the

moneys he paid to the Treasurer along with interest damages and loss of use damages**.** *Id*. at ¶ 8.

The Illinois Supreme Court observed that Parmar could have litigated his claims in the circuit court had he followed the procedures for paying taxes under protest pursuant to the Protest Moneys Act (30 ILCS 230/1 et seq. (West 2014)). *Id*., ¶¶ 47-48. As the *Parmar* Court observed:

> "This statutory procedure has been utilized to challenge the retroactive application and constitutionality of an amendment to the Estate Tax Act (*McGinley v. Madigan*, 366 Ill. App. 3d 974, 303 Ill.Dec. 522, 851 N.E.2d 709 (2006)) and to challenge the construction of an amendment to the Estate Tax Act (*Brooker v. Madigan*, 388 Ill. App. 3d 410, 327 Ill.Dec. 860, 902 N.E.2d 1246 (2009)). Plaintiff could have availed himself of this statutory procedure and pursued his constitutional claims in the circuit court, but he failed to do so." *Id*., ¶ 49.

The *Parmar* Court likewise reasoned that Parmar failed to avail himself of the procedures for obtaining a tax refund under the Estate Tax Refund Fund, a special fund created under section 13(c) of the Estate Tax Act that requires the Illinois Treasurer to deposit 6% of taxes collected into the Estate Tax Refund Fund, for purpose of paying refunds from overpayment of tax liability under the Estate Tax Act. 35 ILCS 405/13(c). *Id*., ¶¶ 38-42.

Parmar neither predicated his complaint on an overpayment of taxes under the Estate Tax Act, nor filed an application for a refund with the State Treasurer. *Id*., ¶ 43. He instead filed a complaint arguing that the Estate Tax Act should not have applied at all and seeking a return of all the money paid plus interest and loss of use. *Id*. Critically, Parmar conceded at oral argument that he was not seeking to limit his requested relief to the amount available under the Estate Tax Refund Fund (which would be a refund

[restitution] of the improper taxes), and Parmar expressly requested in his complaint interest and loss of use on the money he paid to the treasurer. *Id*., ¶ 44.

The *Parmar* Court discussed the exception to sovereign immunity, where, as here, a plaintiff alleges that the State officer's conduct violates constitutional law or is in excess of his authority. *Id*., ¶ 22. However, the *Parmar* Court never addressed whether any provisions of the Estate Tax Code were unconstitutional. Instead, the *Parmar* Court held that the officer suit exception to sovereign immunity did *not* apply because Parmar's lawsuit did not seek to enjoin future conduct by the defendants but instead sought damages which included a full tax refund together with interest and loss of use as a remedy for a past wrong. *Id*., ¶¶ 23, 26. The *Parmar* Court reasoned that such compensatory damages, which are intended to indemnify the injured plaintiff for a past loss, do not fall within the officer suit exception to sovereign immunity. *Id*., ¶ 26.

*Parmar* is distinguishable on its facts as the *Parmar* Court took pains to explain that Parmar had multiple procedural vehicles available for seeking a tax refund. The Court explained that the Protest Moneys Act has been utilized to challenge both the retroactive application and constitutionality of amendments to the Estate Tax Act. *Id*., ¶¶ 48, 49. In contrast to Parmar, who had multiple procedural options to seek a tax refund, class plaintiffs could only bring their constitutional challenge in the Circuit Court.

The present matter is instead factually similar to *Crocker v. Finley*, 99 Ill. 2d 444 (1984), a case upon which the *Walker* Court relied in reaching its decision that the statutes are facially unconstitutional. *Walker*, 2021 IL 126086, ¶¶ 36-41, 47. In *Crocker*, the plaintiff brought a class action suit against a state actor, the Cook County Circuit Court Clerk, and several Cook County officers, to challenge the validity of state statutes

that required all Illinois circuit court clerks to collect a special $5 filing fee from petitioners seeking dissolution of marriage. 99 Ill. 2d at 447.

The $5 fee, which was paid in addition to the regular filing fees, was collected to fund shelters and other services for victims of domestic violence. *Id*. at 447-448. Under the Domestic Violence Act, Illinois circuit court clerks were to collect the $5 fee and deposit the fee with the county treasurer who would then remit the fees to the State treasurer who would, in turn, deposit the money into the Domestic Violence Shelter and Service Fund. *Id*. at 451. The trial court ruled in favor of the plaintiff on all issues and held that the fee statute contravened the due process and equal protection guarantees in the United States and Illinois constitutions. Accordingly, the trial court appointed a trustee to present a plan of refund to the class. *Id*. at 449.

It is clear from the *Crocker* Opinion that the Court was aware of the procedural posture of the underlying litigation. *Id*. at 448. Critically, the *Crocker* Court did not find that the money taken under an unconstitutional statute could be kept, and likewise did not find that the case must be litigated in the Court of Claims. The Illinois Supreme Court affirmed the judgment of the trial court and remanded the case for further proceedings. *Id*. at 457. Like the class plaintiff in *Crocker*, Walker requested the Circuit Court to create a protest fund or to otherwise segregate the fees the class defendants collected from the litigants who paid the fees in order to file their mortgage foreclosure actions. (C974.) This matter is much more similar to *Crocker* than it is to *Parmar*, and sovereign immunity does not preclude the Circuit Court from granting complete relief to the class plaintiffs upon remand.

**B. Class Plaintiffs Seek Restitution, Not Compensatory Damages.**

Moreover, *Parmar v. Madigan* does not hold the circuit courts lack jurisdiction where the monetary relief requested is restitution, and no further monetary recovery is sought. The Illinois Supreme Court has previously defined compensatory damages as damages sufficient in amount to indemnify the injured person for the loss suffered. *In re Consolidated Objections to Tax Levies of School Dist. No. 205*, 193 Ill. 2d 490, 497 (2000). The plain meaning of the term "compensatory damages" limits its application to the payment of monetary awards in tort judgments or settlements as opposed to injunctive remedies, which seek a court order commanding or preventing an action. 193 Ill. 2d at 498. "Compensatory damages clearly differ from an injunction such that injunctive remedies do not constitute compensatory damages." *Id.*

The distinction between compensatory damages and other forms of relief within the context of federal sovereign immunity has been further explained by the Seventh Circuit:

> "A party seeks 'money damages' if he or she is seeking 'substitute' relief, rather than 'specific' relief. In other words, money damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled. Whether the relief sought is 'substitute' or 'specific' is the touchstone of this inquiry. Therefore, the fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as money damages, if that sum of money constitutes the very thing to which the plaintiff claims he is entitled."

*Veluchamy v. F.D.I.C.*, 706 F.3d 810, 815 (7th Cir. 2013) (citations omitted).

Here, class plaintiffs did not allege statutory violations by the class defendants as a predicate for imposing liability in tort or contract; nor did they allege they suffered injuries to their persons or property that requires indemnification from the State. Since

the inception of this class action, the class plaintiffs have sought the restitution of the add-on fees they were forced to pay under the unconstitutional statutes. The class plaintiffs are seeking specific relief and the return of the very thing to which they are entitled—the return of their own money.

### C. Class Plaintiffs are Not Seeking to Hold State Actors Liable in Tort for Past Injuries.

According to *Parmar*, a complaint seeking compensatory damages for a past wrong does not fall within the officer suit exception to sovereign immunity. 2018 IL 122275, ¶ 26. A party seeks money damages for a past wrong if he or she is seeking substitute relief rather than specific relief. *Dept. of Army v. Blue Fox, Inc*., 525 U.S. 255, 262 (1999). In other words, compensatory damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies such as restitution are not substitute remedies but are instead an attempt to give the plaintiff the very thing to which the plaintiff is entitled–her money back. *Blue Fox*, 525 U.S. at 262. Therefore, the fact that a judicial remedy may require one party to reimburse another is not a sufficient reason to characterize the relief as compensatory damages to remedy a past wrong if that sum of money constitutes the return of the plaintiffs' rightfully property that was wrongfully taken. *Veluchamy*, 706 F.3d at 815.

The Illinois Supreme Court has addressed this issue in *Raintree Homes, Inc. v. Village of Long Grove,* 209 Ill. 2d 248 (2004). In *Raintree Homes*, real estate developers filed a complaint against the Village of Long Grove seeking a declaratory judgment as to the validity of a Village ordinance requiring the payment of "impact fees" to the Village to obtain building permits and a refund of those fees paid by the plaintiffs. *Raintree Homes*, 209 Ill. 2d at 252-53. The Village argued the action was time-barred under the

Tort Immunity Act and the plaintiffs argued in response that their complaint did not seek damages and therefore the Tort Immunity Act did not apply. Id. at 255. The Illinois Supreme Court agreed with the plaintiffs. According to the *Raintree* Court, the plaintiffs were not seeking "relief as compensation for a wrong done, or 'damages' due from a duty, breach and causation." *Id*. at 256. "Rather, the relief sought is correctly viewed as a refund, the return of money to a person who overpaid because the original payment was in violation of the law." *Id*. According to the *Raintree* Court:

> "Stated another way, plaintiffs' requested relief of a refund may be properly designated as seeking an award of restitution. While restitution may be available in both cases at law and in equity [citations omitted], the concepts of restitution and damages are quite distinct, but sometimes courts use the term damages when they mean restitution. *** The damages award is not the only money award courts make. Court may also award restitution in money; they may also order money payments in the exercise of equity powers. Damages differs from restitution in that damages is measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain." *Id*. at 257.

Following in the footsteps or *Raintree Homes,* the First District Appellate Court determined that a suit related to unlawful fees in which restitution was sought against the Cook County Circuit Court Clerk (a state actor) was not a suit which sought damages. *Midwest Medical Records Association v. Brown*, 2018 IL App (1st) 163230. According to the *Midwest Medical* Records Court:

> "To the extent that plaintiffs here are requesting a declaration that imposition of the filing fees is unlawful and seek a return of the fees collected pursuant to section 27.2a(g), plaintiffs' claim can be construed as one for restitution, and not attempting to impose tort liability or damages on the [Circuit Court] Clerk.
>
> As our supreme court has explained, restitution is available in both cases of law and equity and " '[t]he concepts of restitution and damages are quite distinct, but sometimes courts use the term damages when they mean restitution.' " *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257, 282 Ill.Dec. 815, 807 N.E.2d 439 (2004) (quoting 1 Dan B.

> Dobbs, Law of Remedies § 3.1, at 280 (2d ed. 1993)). " 'Damages differs from restitution in that damages is measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain.'" *Id.* (quoting Dobbs, *supra*, at 278)." *Midwest Medical Records Association,* 2018 IL App (1st) 163230, ¶¶ 50-51.

Class plaintiffs are not seeking compensatory damages to remedy some past injury. They are seeking the return of their own money that State actors took from them under a facially unconstitutional statute. At issue is whether the State can justifiably retain funds that originally and rightfully belonged to the class plaintiffs. The class plaintiffs are not seeking compensation for economic losses suffered by the State's alleged wrongdoing; class plaintiffs simply want the return of the money that lawfully belongs to them.

## VII. THE CIRCUIT COURT'S APPARENT RULING THAT ONLY PROSPECTIVE RELIEF IS AVAILABLE MEANS CLASS PLAINTIFFS LACKED STANDING TO BRING THIS LAWSUIT, AND TO LITIGATE FOR OVER A DECADE THE CONSTITUTIONALITY OF THE ADD-ON FEES.

Finally, the Circuit Court's ruling that it never had jurisdiction to award restitution in this class action calls into question whether class plaintiffs ever had standing to bring this claim seeking vindication for the violation of their constitutional rights. A plaintiff has standing only where there has been some injury in fact to a legally cognizable interest. *Illinois Road and Transportation Builders Association v. County of Cook,* 2022 IL 127126, ¶ 13. The claimed injury must be: (1) distinct and palpable, (2) fairly traceable to the defendant's actions, and (3) *substantially likely to be redressed by the grant of the requested relief. Id.*, ¶ 13. Under a traditional standing analysis, a court is limited to deciding actual, specific controversies and not abstract questions. *In re M.I.*, 2013 IL 113776, ¶ 32. Here, if the only redress available to the class plaintiffs is

prospective injunctive relief (and not restitution), the class plaintiffs would thus be in a position no different than that of members of the general public.

For the class plaintiffs to have had standing to bring this class action lawsuit, their claimed injury, i.e., the forced payment of the unconstitutional add-on fee, had to be an injury that could be redressed by the courts. Under the Circuit Court's ruling, the class plaintiffs, who have spent over a decade challenging the validity of these fee statutes, are not entitled to such redress. Under the Circuit Court's analysis, class plaintiffs were entitled to a declaratory judgment that the add-on fee statutes were unconstitutional and an injunction to bar the circuit court clerks from collecting unconstitutional add-on fees going forward, but they were not entitled to ask for their money back.

## CONCLUSION

The Circuit Court's August 30, 2022, order, if allowed to stand, would upend the role of the judiciary system as the protector of the constitutional rights of citizens. The class plaintiffs cannot seek redress in the Court of Claims as the Court of Claims has no jurisdiction to hear class actions or constitutional claims. Conversely, although the Circuit Court has jurisdiction to hear class actions and constitutional claims, the Circuit Court has ruled that it has no jurisdiction to grant restitution. The Circuit Court's ruling effectively declared that the courts have no power to provide restitution to correct the impact of unconstitutional fee statutes on the citizens of the State who paid the fees. It is unjust to allow the State to retain the plaintiff class members' money, to which it is not entitled. Moreover, this ruling ignores the obligation of the courts to provide oversight of and relief from unconstitutional legislative acts.

WHEREFORE, petitioners Reuben Walker and M. Steven Diamond, individually, and on behalf of themselves and on behalf of all other individuals or institutions who paid residential mortgage foreclosure fees, respectfully request this Court to reverse the judgment of the Circuit Court and to remand this matter with instructions that the Circuit Court has jurisdiction over this matter and the authority to approve a plan of refund to the plaintiff class members.

Respectfully submitted,

REUBEN D. WALKER and M. STEVEN DIAMOND, Class Plaintiffs /Appellants.

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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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 41 pages.

By: /s/ Daniel K. Cray
Daniel K. Cray
*One of the Attorneys for Class Plaintiffs-Appellants Reuben D. Walker and M. Stephen Diamond.*

No. 3-22-0387

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

| | |
|---|---|
| REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,<br><br>Defendants-Appellees. | Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois<br><br>No. 2012 CH 5275<br><br>The Honorable JOHN C. ANDERSON, Judge Presiding. |

**BRIEF OF DEFENDANTS-APPELLEES-CLASS MEMBERS 18 CLERKS**

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**ORAL ARGUMENT REQUESTED**

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## NATURE OF THE ACTION

Plaintiffs-Appellants Reuben D. Walker and M. Steven Diamond, individually and as class representatives, initiated this class action claiming that a filing fee on mortgage foreclosure actions violated the Free Access Clause of the Illinois Constitution, Ill. Const., art. I, § 12. Plaintiffs sought declaratory and injunctive relief, as well as the return of all filing fees that they and the class plaintiffs had paid. The circuit court concluded that the filing fee violated the Free Access Clause and entered a permanent injunction prohibiting the collection of the fee going forward, which was affirmed in *Walker v. Chasteen*, 2021 IL 126086. The circuit court, however, did not rule on plaintiffs' claims for monetary relief.

On remand, plaintiffs pursued their remaining claims for monetary relief against the 102 circuit court clerks of Illinois, including Defendants-Appellees-Class Members Candice Adams, Clerk of the Circuit Court of DuPage County; Erin Weinstein, Clerk of the Circuit Court of Lake County; Thomas Klein, Clerk of the Circuit Court of Winnebago County; Matthew Prochaska, Clerk of the Circuit Court of Kendall County; Theresa Barreiro, Clerk of the Circuit Court of Kane County; Lori Geschwandner, Clerk of the Circuit Court of Adams County; Patty Hiher, Clerk of the Circuit Court of Carroll County; Susan McGrath, Clerk of the Circuit Court of Champaign County; Ami Shaw, Clerk of the Circuit Court of Clark County; Angela Reinoehl, Clerk of the Circuit Court of Crawford County; John Niemerg, Clerk

of the Circuit Court of Effingham County; Kamalen Anderson, Clerk of the Circuit Court of Ford County; LeAnn Dixon, Clerk of the Circuit Court of Livingston County; Kelly Elias, Clerk of the Circuit Court of Logan County; Lisa Fallon, Clerk of the Circuit Court of Monroe County; Christa Helmuth, Clerk of the Circuit Court of Moultrie County; Kimberly Stahl, Clerk of the Circuit Court of Ogle County; and Seth Floyd, Clerk of the Circuit Court of Piatt County (collectively, "18 Clerks").

Each asserting that the circuit court lacked subject matter jurisdiction over plaintiffs' remaining claims for monetary relief under the State Lawsuit Immunity Act ("Immunity Act"), 745 ILCS 5/0.01 *et seq.* (2020), the 18 Clerks filed a motion for judgment on the pleadings; Defendant-Appellee Andrea Lynn Chasteen, Clerk of the Circuit Court of Will County ("Will County Clerk"), filed a motion to dismiss; and Defendant-Appellee-Class Member Iris Martinez, Clerk of the Circuit Court of Cook County ("Cook County Clerk"), filed a motion for summary judgment. The circuit court concluded that the Immunity Act deprived it of subject matter jurisdiction and dismissed this action. Plaintiffs appealed. The circuit court's final judgment is not based on a jury verdict and questions are raised on the pleadings.

## ISSUE PRESENTED FOR REVIEW

Whether the Immunity Act deprived the circuit court of subject matter jurisdiction over plaintiffs' claims seeking monetary relief from state officials for previously paid filing fees.

## JURISDICTION

On March 2, 2020, the circuit court entered a final judgment on plaintiffs' claims for declaratory and injunctive relief, C1726-44, and found that there was no just reason for delaying an appeal of that judgment under Ill. Sup. Ct. R. ("Rule") 304(a), C1930, C1935.[1] On June 17, 2021, the Illinois Supreme Court, on direct appeal, affirmed the circuit court's judgment as to those claims. C2076-2100.

On August 30, 2022, the circuit court entered a final judgment dismissing plaintiffs' remaining claims for lack of subject matter jurisdiction and disposing of "all matters pending before [it]." C3018. On September 28, 2022, plaintiffs filed a notice of appeal, which was timely because it was filed within 30 days of the circuit court's final judgment. C3023; Ill. Sup. Ct. R. 303(a)(1). This court, therefore, has jurisdiction over this appeal from the circuit court's final judgment under Rule 301.

[1] This brief cites the two-volume common law record as "C__," the one-volume report of proceedings as "R__," and plaintiffs' opening brief as "AT Br. __."

## STATEMENT OF FACTS

In 2012, Walker initiated this class action claiming that a $50 filing fee on mortgage foreclosure actions imposed by section 15-1504.1 of the Code of Civil Procedure, 735 ILCS 5/15-1504.1 (2012), violated various provisions of the Illinois Constitution. C18-19, C29-35. Later that year, the circuit court certified a class of plaintiffs defined as "all individuals or entities that paid the $50.00 fee at the time that [Walker] filed an action seeking to foreclose on property located in Illinois" and a class of defendants defined as "all Clerks of Court who reviewed [sic] these fees." C136. After several years of litigation, including a direct appeal to and remand from the Illinois Supreme Court, *see Walker v. McGuire*, 2015 IL 117138, plaintiffs amended their complaint to add Diamond, who paid the $50 fee in Cook County in 2015, as a named plaintiff and class representative. C727-28.

Plaintiffs' second amended complaint, the operative one for purposes of this appeal, claimed that the foreclosure fee violated several provisions of the Illinois Constitution, including the Free Access Clause, Ill. Const., art. I, § 12. C970-73. Plaintiffs sought declaratory and injunctive relief, as well as "[a]n order to return all fees collected . . . to [p]laintiffs." C973.

After the State intervened, C985, plaintiffs, the State, and the Cook County Clerk filed cross-motions for summary judgment as to the fee's constitutionality, C1030, C1065, C1140. In March 2020, the circuit court entered an order on the parties' cross-motions for summary judgment, holding

that the foreclosure fee violated the Illinois Constitution's Free Access Clause and permanently enjoining the clerks of the circuit courts from collecting it. C1726, C1743-44. In the same order, the circuit court also noted that plaintiffs' "request for the return of collected fees" remained pending. C1744.

Two months later, the circuit court entered an order stating that there was "no just reason for delaying either enforcement or appeal" of its March 2020 order under Rule 304(a). C1930, C1935. In the same order, the circuit court noted that it had "grappled with" the named plaintiffs' standing to challenge the constitutionality of amendments to section 15-1504.1 that were enacted after they had paid the fee. C1930. But, it reasoned, the State had not raised, and thus forfeited, any objection to plaintiffs' standing. C1934-35. The court also noted that there were "remaining issues of monetary damages and remedies," so it scheduled further court dates "for discussion of all remaining issues . . . such as [the] return of filing fees collected." C1935.

The State, the Cook County Clerk, and the Will County Clerk each appealed the circuit court's March 2020 order directly to the Illinois Supreme Court, C1955-56, C1983-84, C2011-12, which held that the fee violated the Free Access Clause and affirmed the circuit court's permanent injunction, *Walker*, 2021 IL 126086, ¶¶ 46-49. The Court remanded the action "for further proceedings consistent with [its] opinion." *Id.* at ¶ 51.

On remand, the Will County Clerk filed a motion to dismiss under section 2-619 of the Code of Civil Procedure, 735 ILCS 5/2-619 (2020), the

Cook County Clerk filed a motion for summary judgment under 2-1005 of the Code of Civil Procedure, *id.* § 2-1005, and the 18 Clerks filed a motion for judgment on the pleadings under section 2-615(e) of the Code of Civil Procedure, *id.* § 2-615(e), as to plaintiffs' remaining claims for monetary relief. C2266, C2313, C2746-47, C2957. Each motion asserted that the Immunity Act deprived the circuit court of subject matter jurisdiction over plaintiffs' remaining claims and that such claims had to be brought, if anywhere, in the Illinois Court of Claims. C2274-76, C2313-14, C2955-58, C2963-69. They argued that the doctrine of sovereign immunity applied because circuit court clerks were state officers, the clerks collected the filing fees as part of their official duties, and plaintiffs sought monetary relief from the clerks for the exercise of those official duties. C2274-76, C2313-14, C2963-69. And the officer-suit exception to sovereign immunity, which allows a party to seek prospective, injunctive relief in court for violations of the Illinois Constitution, was inapplicable because plaintiffs' remaining claims sought only backward-looking monetary relief for a past wrong. C2314, C2683, C2965-69.

In response, plaintiffs conceded that circuit court clerks were state officers and that they sought the return of previously collected fees from the State. C2391, R255-57. But, plaintiffs argued, they could avoid sovereign immunity because the filing fee was unconstitutional, C2390-92, C2655-57, C2819-26, C2860-67, and they sought restitution rather than damages, C2393-95, C2654, C2826-30, C2867-70.

On August 30, 2022, the circuit court entered an order holding that the Immunity Act barred plaintiffs' remaining claims. C3016-18. The court first explained that its "prior orders did not resolve issues of damages sought in the complaint." C3016. And because "the remaining aspects of the case involve[d] a request for money damages" from state officials, these claims "implicat[ed] sovereign immunity." C3017. As to the view that plaintiffs sought restitution, not damages, the court acknowledged that restitution is an equitable remedy, but decided that the Court of Claims' exclusive jurisdiction was not limited to "damages at law claims." *Id.* (cleaned up). The court thus held that it lacked subject matter jurisdiction to award plaintiffs monetary relief, granted the Will County Clerk's motion to dismiss their remaining claims, denied the 18 Clerks' and Cook County Clerk's pending motions as moot, noted that its permanent injunction remained in effect, and entered final judgment. C3018.

Plaintiffs appealed. C3023-24.

## ARGUMENT

**The Immunity Act deprived the circuit court of subject matter jurisdiction over plaintiffs' claims seeking monetary relief for the circuit court clerks' past collection of filing fees.**

### A. Standard of review.

Section 2-619(a)(1) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(1) (2020), allows a party to seek the dismissal of an action on the basis that the circuit court "does not have jurisdiction of the subject matter of the action." Because sovereign immunity affects the circuit court's subject matter jurisdiction, *Kucinsky v. Pfister*, 2020 IL App (3d) 170719, ¶ 42, it is an appropriate subject for a section 2-619 motion, *Joseph Constr. Co. v. Bd. of Trs. of Governors State Univ.*, 2012 IL App (3d) 110379, ¶ 17.

This court should review the circuit court's grant of the Will County Clerk's section 2-619 motion to dismiss *de novo*. *See Leetaru v. Bd. of Trs. of Univ. of Ill.*, 2015 IL 117485, ¶ 41. And this appeal raises issues regarding the circuit court's subject matter jurisdiction and the interpretation of the Immunity Act, which are issues of law that this court also reviews *de novo*. *Parmar v. Madigan*, 2018 IL 122265, ¶ 17.

### B. Plaintiffs' claims, which sought monetary relief from state officials in their official capacity for the exercise of their official duties, implicated sovereign immunity.

The Illinois Constitution abolished sovereign immunity "[e]xcept as the General Assembly may provide by law." Ill. Const., art. XIII, § 4. The Illinois General Assembly later codified sovereign immunity in the Immunity Act, which provides in relevant part that, "[e]xcept as provided in . . . the Court of

Claims Act, . . . the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2020). "With some limited exceptions, the Illinois Court of Claims [has] exclusive jurisdiction to hear and determine . . . [a]ll claims against the State founded upon any law of the State of Illinois." *Parmar*, 2018 IL 122265, ¶ 20 (cleaned up). In turn, the Court of Claims Act, 705 ILCS 505/1 *et seq.* (2020), gives the Court of Claims "exclusive jurisdiction to hear and determine . . . [a]ll claims against the State founded upon any law of the State of Illinois," subject to limited exceptions, *id.* § 8.

When, as here, a plaintiff sues a state official in their official capacity, the action is generally considered to be brought against the State. *Parmar*, 2018 IL 122265, ¶ 21; *see also* C960 (naming circuit court clerks, in their "Official Capacit[ies]," as defendants); AT Br. at 30 (conceding that clerks are "state officers within the judicial branch of state government"); *Drury v. McLean Cnty.*, 89 Ill. 2d 417, 424-27 (1982) (clerks of circuit courts are State, not county, officials). That said, the formal designation of a party's capacity is not dispositive and the court should consider "the issues involved and the relief sought." *Parmar*, 2018 IL 122265, ¶ 22.

The issues involved and relief sought implicate sovereign immunity when a plaintiff seeks monetary relief from a state official based on an alleged breach of a duty placed on them by virtue of their office. *See*, *e.g.*, *id.* at ¶¶ 8, 25-26 (sovereign immunity barred claim seeking "a full refund" of taxes paid to state officials where those officials were "responsible for administering and

enforcing" that statute); *Kay v. Frerichs*, 2021 IL App (1st) 192271, ¶ 21 (sovereign immunity barred claim that Treasurer improperly administered state "finances, which [was] within his statutory duty and to be performed pursuant to his official capacity"); *Brandon v. Bonell*, 368 Ill. App. 3d 492, 508 (2d Dist. 2006) (sovereign immunity barred claim that Illinois Department of Corrections' employees breached a statutory duty that arose "solely by virtue of their [state] employment"). That is so even when a plaintiff alleges that the state officer acted in violation of the Illinois Constitution. *See*, *e.g.*, *Parmar*, 2018 IL 122265, ¶ 26 (sovereign immunity barred claim even though plaintiff claimed "that defendants' conduct was unlawful because [they] acted pursuant to an unconstitutional statute"); *Brucato v. Edgar*, 128 Ill. App. 3d 260, 262, 269 (1st Dist. 1984) (sovereign immunity barred claim that Illinois Secretary of State violated plaintiff's "right[s] to due process and equal protection" even if "Secretary acted outside the scope of his authority" or took actions that were "unconstitutional").

Those are exactly the types of issues involved and relief sought here — the "return of . . . money" that the circuit court clerks collected as part of their official duties. AT Br. 39; *see* 735 ILCS 5/15-1504.1(a) (2020) (requiring filing fee to be paid to "clerk of the court in which the foreclosure complaint [was] filed" and clerk to "remit the fee collected . . to the State Treasurer"). Any violation of plaintiffs' rights committed by the clerks arose solely by virtue of their state offices, not some independent duty. And the relief that plaintiffs

sought would have been drawn from state funds, as the clerks were required to deposit 98% of the fees collected with the Illinois Treasurer, while retaining 2% to cover their expenses in collecting the fee. 735 ILCS 5/15-1504.1(a) (2020). Any relief, therefore, would come from either the State Treasury or the clerks' own funds, which are the funds of state officers. Indeed, in the circuit court, plaintiffs recognized that any award would come from the State because, in effect, "the State of Illinois took 100[%]" of the fees. R256.

And in this court, plaintiffs do not dispute that the 18 Clerks were carrying out their official duties in collecting the mortgage foreclosure filing fee or that any monetary award would be satisfied by state funds. *See* AT Br. 14-40. Accordingly, the circuit court correctly held that plaintiffs' remaining claims for monetary relief "implicat[ed] sovereign immunity." C3017.

### C. Plaintiffs' attempt to invoke the officer-suit exception to sovereign immunity is foreclosed by Illinois Supreme Court precedent.

In their opening brief in this appeal, plaintiffs principally argue that sovereign immunity did not apply to their claims for monetary relief because they raised a constitutional challenge to the mortgage foreclosure filing fee. AT Br. 26-30. According to plaintiffs, the Immunity Act does not apply if "'it is alleged that the State's agent acted in violation of . . . constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court.'" *Id.* at 29 (quoting *Leetaru*, 2015 IL 117485, ¶ 45). This

exception to sovereign immunity is known as the "officer suit exception." *PHL, Inc. v. Pullman Bank & Tr. Co.*, 216 Ill. 2d 250, 261 (2005).

But in *Parmar*, 2018 IL 122265, the Illinois Supreme Court held that this exception did not apply to an action that was materially identical to this action. There, a taxpayer initiated a putative class action against the Illinois Attorney General and Treasurer, claiming that an amendment to a tax statute violated the Illinois Constitution. *Id.* at ¶¶ 1, 8. As relief, the taxpayer sought a declaration that the tax was unconstitutional and "a full refund" of the taxes that he had paid. *Id.* at ¶ 8. The circuit court dismissed the action under the Immunity Act, but the appellate court reversed, stating that sovereign immunity did not apply "'when it is alleged that the State's agent acted in violation of . . . constitutional law or in excess of his authority.'" *Parmar v. Madigan*, 2017 IL App (2d) 160286, ¶ 21 (quoting *Leetaru*, 2015 IL 117485, ¶ 45). According to the appellate court, plaintiffs' constitutional claims could invoke the "officer-suit exception" to sovereign immunity. *Id.* at ¶ 27.

The Illinois Supreme Court reversed the appellate court's judgment, clarifying that the taxpayer's action "seeking damages for a past wrong [did] not fall within the officer suit exception to sovereign immunity." *Parmar*, 2018 IL 122265, ¶ 26. The Court explained that this exception permits the circuit court only to "prospectively enjoin" the unconstitutional acts of state officers, *id.* at ¶ 22, not award a money judgment to compensate for "a past wrong," *id.* at ¶ 26. Recognizing that the taxpayer alleged that the Attorney

General and Treasurer "acted pursuant to an unconstitutional statute," the Court held that such allegations merely would allow the circuit court "to enjoin [their] future conduct," not order "a refund of all moneys paid" under the statute. *Id.* And because the Attorney General and Treasurer collected and enforced the allegedly unconstitutional statute as part of their official duties, sovereign immunity applied. *Id.* at ¶ 25.

*Parmar* is directly on point. Just as in *Parmar*, plaintiffs claimed that state officials imposed an unconstitutional tax on them. *See Walker*, 2021 IL 126086, ¶ 43 (characterizing filing fee as "a tax on litigation"). Having already obtained prospective, injunctive relief, plaintiffs' remaining claims in this case were directed at the past collection of the filing fees. *See* C971-73 (seeking "return [of] all fees collected"). And like the appellate court in *Parmar*, plaintiffs attempt to invoke the officer-suit exception to seek monetary relief for that past wrong. *See* AT Br. 28-29. But *Parmar* foreclosed the application of that exception in these very circumstances, and so the circuit court here correctly concluded that it lacked subject matter jurisdiction over this action. *See* C3017-18.

Plaintiffs attempt to distinguish *Parmar* on two grounds, *see* AT Br. 32-39, but neither is persuasive. First, plaintiffs contend that *Parmar* only held that sovereign immunity applied because the taxpayer there could have sought a refund in the circuit court under the State Officers and Employees Money Disposition Act ("Protest Moneys Act"), 30 ILCS 230/1 *et seq.* (2020). AT Br.

32-34 (citing *Parmar*, 2018 IL 122265, ¶¶ 47-49). According to plaintiffs, sovereign immunity should not apply because they had no similar, "procedural options" for seeking a refund of their filing fees. *Id*. at 34.

But in *Parmar*, the Illinois Supreme Court never suggested that the Immunity Act's application was dependent on the taxpayer being able to initiate proceedings under the Protest Moneys Act — or any other statute — in the circuit court. To the contrary, the Court made no mention of the Protest Moneys Act in its sovereign immunity analysis. *Parmar*, 2018 IL 122265, ¶¶ 18-35. The Court only addressed the Protest Moneys Act in response to the taxpayer's argument that applying sovereign immunity would violate his alleged due process right to litigate his claims in the circuit court. *See id.* at ¶¶ 47, 49 (no authority stood for "the proposition that due process requires that his complaint proceed in the circuit court notwithstanding the bar of sovereign immunity," and, regardless, the taxpayer could not "complain that due process requires that his complaint proceed in the circuit court" when he could have used Protest Moneys Act). Thus, the Protest Moneys Act had no bearing on the Court's conclusion that sovereign immunity applied.

And plaintiffs' suggestion that sovereign immunity should apply only when a party has some other means, like the Protest Moneys Act, to seek monetary relief in the circuit court would defy the plain text and purpose of the Immunity Act and Court of Claims Act. *See O'Connell v. Cnty. of Cook*, 2022 IL 127527, ¶¶ 21-22 (statutes should be interpreted in accord with their

"plain language" and "essential purposes") (cleaned up). As discussed, the Immunity Act provides that, "[e]xcept as provided in . . . the Court of Claims Act . . . , the State of Illinois shall not be made a defendant or party in any court," 745 ILCS 5/1 (2020), and the Court of Claims Act gives the Court of Claims "*exclusive* jurisdiction to hear and determine . . . [a]ll claims against the State founded upon any law of the State of Illinois," 705 ILCS 505/8(a) (2020) (emphasis added). If, as plaintiffs contend, sovereign immunity applied only when a party could proceed in the circuit court under the Protest Moneys Act, the Court of Claims would never have exclusive jurisdiction over claims against the State. Such an outcome would undermine the General Assembly's intent to establish the Court of Claims as the primary "forum for actions against the State." *Parmar*, 2018 IL 122265, ¶ 20; *see also Healy v. Vaupel*, 133 Ill. 2d 295, 316 (1990) ("[T]he legislature has established the Court of Claims[ ] to serve as the forum for hearing and determining claims against the State."). This court should not adopt a reading of the Immunity Act that would contravene both its plain text and purpose.

Second, plaintiffs contend that *Parmar* is distinguishable because, unlike the taxpayer in that case, they sought restitution — an equitable remedy — rather than damages. AT Br. 36-39. But their operative complaint did not mention restitution as a form of relief sought. Instead, they sought substantively identical monetary relief as that sought in *Parmar*. *Compare* C971-73 (seeking "return [of] all fees collected") *with Parmar*, 2018 IL 122265,

¶ 26 (seeking "refund of all moneys paid"); *see also* C3016 (circuit court noted that plaintiffs sought "damages . . . in the complaint"). And even if plaintiffs had labeled their requested monetary relief as restitution, they could not avoid sovereign immunity simply through "artful pleading . . . designed to cloak the cause in the attire of equity." *Joseph Constr.*, 2012 IL App (3d) 110379, ¶ 48 (cleaned up); *see also People v. Davis*, 2021 IL App (1st) 191959, ¶ 41 ("[S]ubstance must take precedence over form when determining whether sovereign immunity applies."); *Brucato*, 128 Ill. App. 3d at 267 (despite prayer for relief being "framed in equitable terms," action was "substantively a claim for monetary damages from the State . . . within the exclusive jurisdiction of the Court of Claims").

Regardless, the relevant inquiry was not whether plaintiffs sought relief at law or equity — it was whether they sought prospective, injunctive relief prohibiting "future conduct" or retrospective, monetary relief seeking to remedy "a past wrong." *Parmar*, 2018 IL 122265, ¶ 26. Plaintiffs clearly sought the latter, which was prohibited by the Immunity Act.

Indeed, plaintiffs cite *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248 (2004), to support their contention that they could avoid sovereign immunity by seeking restitution, AT Br. 37-38, but that case only confirms that there is no exception for restitution in the Immunity Act. In *Raintree Homes*, the Court held that the plaintiff could seek restitution from a municipality because section 2-101 of the Local Governmental and

Governmental Employees Tort Immunity Act, 745 ILCS 10/2-101 (2002), provided that nothing in that statute "affects the right to obtain relief other than damages against a local public entity," 209 Ill. 2d at 259 (cleaned up). But no similar language appears in the Immunity Act. *See* 745 ILCS 5/1, 1.5 (2020). If the General Assembly had intended to create a similar exception for remedies other than damages in the Immunity Act, it could have used language similar to that found in section 2-101. It did not, and this court should not read into the Immunity Act "exceptions, limitations, or conditions that the legislature did not express." *In re Jarquan B.*, 2017 IL 121483, ¶ 33 (cleaned up).

And as the circuit court here recognized, *see* C3017-18, "[t]he Court of Claims is not without authority to grant equitable relief" such as restitution, *Mgmt. Ass'n of Ill., Inc. v. Bd. of Regents of N. Ill. Univ.*, 248 Ill. App. 3d 599, 610 (1st Dist. 1993). Plaintiffs, therefore, could seek the same remedy in the Court of Claims. Nor did plaintiffs explain why, if they had proceeded in the Court of Claims, they could not have recharacterized their requested relief as compensatory damages, which the Court of Claims also would have had jurisdiction to award. *See Midwest Sanitary Serv. v. Sandberg*, 2022 IL 127327, ¶ 27 ("Compensatory damages are defined as such damages as will compensate the injured party for the injury sustained . . . ; such as will simply make good or replace the loss caused by the injury or wrong."); *Clay v. State*, 69 Ill. Ct. Cl. 181, 186 (2017) (awarding claimant compensatory damages).

Unable to distinguish this case from *Parmar*, plaintiffs next contend that *Crocker v. Finley*, 99 Ill. 2d 444 (1984), and *Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004), support their requested relief, but neither case included any mention of sovereign immunity. AT Br. 25-26, 34-35; *see Crocker*, 99 Ill. 2d at 451-57; *Jorgensen*, 211 Ill. 2d at 298-317. Nor can, as plaintiffs argue, *Crocker* be read as an endorsement of the circuit court's appointment of "a trustee to present a plan of refund to the class" plaintiffs in that case, AT Br. 35, because the Court's opinion addressed only the constitutional issues before it, not the circuit court's orders appointing a trustee, *Crocker*, 99 Ill. 2d at 451-57. Neither case, therefore, supports plaintiffs' arguments. *See*, *e.g.*, *Gonzalez v. Union Health Serv., Inc.*, 2018 IL 123025, ¶ 15 (party could not cite opinion as to "issue of jurisdiction" that was "completely overlooked" by Illinois Supreme Court because "[a]n oversight is not a holding" and "[a] judicial opinion is authority only for what is actually decided in the case"); *In re N.G.*, 2018 IL 121939, ¶ 67 (prior opinion containing "no analysis" of an issue "cannot be read as expressing any view by this court" on that issue).

And neither *Crocker* nor *Jorgensen* addressed sovereign immunity for good reason, as the issues before the Court did not implicate that doctrine. In *Crocker*, the plaintiff sought only prospective, injunctive relief — a declaratory judgment that the fee was invalid, an injunction prohibiting the "collection of the fee," and an injunction "to restrain the clerk [of the circuit court] from transferring [fees] to the county treasurer." 99 Ill. 2d at 448. Likewise, in

*Jorgensen*, the plaintiffs — judges who brought an action for declaratory judgment to enforce the constitutional prohibition on the diminishment of judicial salaries — sought prospective relief in the form of an order compelling the future payment of cost of living adjustments. 211 Ill. 2d at 293-94. And the Court held that it had authority to order such adjustments under its supervisory authority over the judicial branch in Ill. Const., art. VI, § 16. *Jorgensen*, 211 Ill. 2d at 312; *see id.* (supervisory authority included the "corresponding authority" to require that "judicial salaries provided by law" would be paid). So, even if ordering the payment of cost-of-living adjustments could have been construed as implicating sovereign immunity, the Court's constitutional authority would have superseded the Immunity Act. *See People v. Mayfield*, 2023 IL 128092, ¶ 32 (exercise of Court's supervisory authority "prevails over a conflicting statute").

Here, by contrast, plaintiffs' remaining claims did not seek prospective relief prohibiting the collection of the fees or the transmission of fees to the Treasury — they already obtained that relief, *see Walker*, 2021 IL 126086, ¶¶ 46-49. Instead, they sought an award of money, drawn from the Treasury, as compensation for a past injury. *See* R255, R257 (conceding that plaintiffs were seeking "all fees that had been taken," even those held by "the Treasurer," even though those funds already "ha[d] been used" by the State). Nor did plaintiffs' requested monetary relief implicate the exercise of the Illinois Supreme Court's supervisory authority, which this court could not exercise in

any event. *See* Ill. Const., art. VI, § 16 (supervisory authority "vested in the Supreme Court" alone); *Mitchell v. Fiat-Allis, Inc.*, 158 Ill. 2d 143, 150 (1994) (only Illinois Supreme Court, not circuit or appellate courts, exercises "general supervisory authority . . . in the statewide system of courts"); *Jam Prods., Ltd. v. Dominick's Finer Foods, Inc.*, 120 Ill. App. 3d 8, 13-14 (2d Dist. 1983) (appellate court could not exercise supervisory authority over circuit court).

### D. Plaintiffs have forfeited any argument that sovereign immunity was waived and their arguments are wrong on their merits in any event.

Next, plaintiffs contend that: the State Employees Indemnification Act ("Indemnification Act"), 5 ILCS 350/0.01 *et seq.* (2020), allows for "actions against state agents in the Circuit Courts," AT Br. 32; the application of sovereign immunity "call[ed] into question" plaintiffs' standing to challenge the foreclosure fee after "a decade" of litigation, *id.* at 39-40; and defendants "[h]alfheartedly" raised sovereign immunity late in these proceedings, *id.* at 26. Although not clearly articulated, these arguments suggest that sovereign immunity has been waived, either by statute or the clerks' litigation conduct.

But plaintiffs do not actually assert that sovereign immunity has been waived, cite the relevant authority on the waiver of sovereign immunity, or explain how those standards were met here. AT Br. 14-40; *see Parmar*, 2018 IL 122265, ¶ 31 (discussing standards for determining whether sovereign immunity was waived). They have, therefore, forfeited any such argument. *See* Ill. Sup. Ct. R. 341(h)(7) (brief must contain "[a]rgument, which shall

contain the contentions of the appellant and the reasons therefor, with citation of the authorities . . . relied on" and "[p]oints not argued are forfeited"); *Ramos v. Kewanee Hosp.*, 2013 IL App (3d) 120001, ¶ 37 ("[F]ailure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument.").

Forfeiture aside, the General Assembly did not waive sovereign immunity as to plaintiffs' claims. The General Assembly may, by statute, waive sovereign immunity, but such a waiver "must be clear and unequivocal" and "explicitly indicate, in affirmative language, that the State waives sovereign immunity." *Parmar*, 2018 IL 122265, ¶ 31. For example, the Illinois Educational Labor Relations Act states that, "[f]or purposes of this Act, the State of Illinois waives sovereign immunity," 115 ILCS 5/19 (2020), and the Immunity Act lists several exceptions to its broad grant of immunity, 745 ILCS 5/1, 1.5 (2020).

But there is no similar language in the Immunity Act or any other statute stating that the General Assembly intended to waive sovereign immunity as to claims like plaintiffs'. In fact, when the General Assembly has intended to waive sovereign immunity as to certain constitutional claims, it has done so expressly. For example, the Illinois Civil Rights Act of 2003 ("Civil Rights Act"), 740 ILCS 23/1 *et seq.* (2020), allows parties to bring claims seeking "actual damages" for discrimination based on "race, color, national origin, or gender" in a "civil lawsuit, in a federal district court or State circuit

court, against the offending unit of government," *id.* § 5(a)-(c). This statute has been interpreted as a waiver of sovereign immunity, *see Grey v. Hasbrouck*, 2015 IL App (1st) 130267, ¶¶ 13-21, but only for claims of discrimination under the Equal Protection Clause of the Illinois Constitution, not any other constitutional provision, *see Johnson v. Mun. Emps. Annuity & Benefit Fund*, 2018 IL App (1st) 170732, ¶¶ 7, 14-23 (claim under Illinois Constitution's Pension Protection Clause not covered by Civil Rights Act); *Thomann v. Dep't of State Police*, 2016 IL App (4th) 150936, ¶ 29 (rejecting "expansive reading" of Civil Rights Act that would apply to "any claim arising under the Illinois Constitution"). If the General Assembly had intended for any constitutional claim seeking damages, like plaintiffs', to proceed in the circuit court, it would have enacted a broader waiver of sovereign immunity.

For their part, plaintiffs cite no statutory language waiving sovereign immunity as to their claims. Instead, they argue that the Indemnification Act allows for "actions against state agents in the Circuit Courts" because it refers to jury trials. AT Br. 32. But the Illinois Supreme Court rejected this same argument in *Healy*, 133 Ill. 2d at 315-16, holding that the predecessor statute to the Indemnification Act did not waive sovereign immunity. In so holding, the Court noted that a provision of that statute stated that "'[n]othing contained or implied in this Section shall operate, or be construed or applied, to deprive the state or any employee thereof, of any defense heretofore available,'" including the defense of sovereign immunity. *Id.* (quoting Ill. Rev.

Stat. 1988 Supp., ch. 127, par. 1302(f)). And the Indemnification Act still contains that provision, so *Healy*'s reasoning applies here. *See* 5 ILCS 350/2(f) (2020) ("Nothing contained or implied in this Section shall operate, or be construed or applied, to deprive the State, or any employee thereof, of any defense heretofore available.").

Moreover, the case that plaintiffs cite to support their Indemnification Act argument — *Loman v. Freeman*, 229 Ill. 2d 104 (2008), AT Br. 31-32 — is inapposite. That case involved claims of negligence against a state-employed veterinarian regarding his treatment of the plaintiffs' horse. *Loman*, 229 Ill. 2d at 107. The Illinois Supreme Court held that those claims did not implicate sovereign immunity because they arose from the veterinarian's independent, professional duties to the plaintiffs, not any duty imposed by virtue of his state employment. *Id.* at 112-19. And, the Court concluded, even if the State later indemnified the veterinarian under the Indemnification Act, it would change nothing because the veterinarian, rather than the State, would remain the liable party. *Id.* at 121-22. Thus, *Loman* did not hold that the Indemnification Act allows claims otherwise barred by sovereign immunity to proceed in the circuit court.

Plaintiffs next argue that, if sovereign immunity barred their claims for monetary relief, then their standing to bring this action should have been "call[ed] into question," but they were permitted to litigate the filing fee's constitutionality for "over a decade." AT Br. 39-40. Similarly, they argue that

the 18 Clerks "[h]alfheartedly" raised sovereign immunity after the circuit court found that they had standing to challenge the statute imposing the filing fee. *Id.* at 26-27. For several reasons, these arguments do not allow plaintiffs to avoid the bar of sovereign immunity.

First, only the General Assembly — not the clerks of the circuit courts or their counsel — may waive sovereign immunity. *See Twp. of Jubilee v. State*, 2011 IL 111447, ¶ 25 ("[E]fforts by legal counsel for the State to defend itself against [an] action will not result in a waiver or forfeiture of the State's statutory immunity. That is so because only the legislature itself can determine where and when claims against the State will be allowed."). Second, sovereign immunity restricts a circuit court's subject matter jurisdiction and thus may be raised at any time in a case, even for the first time on appeal. *See Giovenco-Pappas v. Berauer*, 2020 IL App (1st) 190904, ¶¶ 44, 46 (sovereign immunity "can never be forfeited and may be raised at any time" because it "speaks . . . to the court's jurisdiction"). Third, there was no reason for defendants to raise sovereign immunity before the Illinois Supreme Court remanded this action in 2021; until that point, the litigation focused on the constitutionality of the filing fee and plaintiffs' entitlement to prospective, injunctive relief. *See Walker*, 2021 IL 126086, ¶¶ 9-10; C1935, C3016-17. Indeed, the circuit court acknowledged that it elected to resolve the merits of the constitutional issues before plaintiffs' request for monetary relief because it believed that doing so "would streamline the case." R263.

Nor was there any inconsistency between the circuit court's decision that plaintiffs had standing to challenge the filing fee's constitutionality and its conclusion that it lacked subject matter jurisdiction over their claims for monetary relief based on the unconstitutional fee. "To have standing to challenge the constitutionality of a statute, one must have sustained or be in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute." *Piccioli v. Bd. of Trs. of the Teachers' Ret. Sys.*, 2019 IL 122905, ¶ 12 (cleaned up). "Under Illinois law, lack of standing is an affirmative defense, which is the defendant's burden to plead and prove." *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 252 (2010). "While a lack of subject matter jurisdiction cannot be forfeited, a lack of standing will be forfeited if not raised in a timely manner in the trial court." *Id.* at 252-53 (cleaned up).

Here, plaintiffs, who had to pay the filing fee to initiate their foreclosure actions, sustained an injury as a result of its enforcement, and so they had standing to challenge the constitutionality of the statute imposing that fee. And the circuit court concluded that the State had forfeited any objection to plaintiffs' standing to challenge subsequent amendments to that statute by not raising a lack of standing as an affirmative defense. C1934-35. By reaching those conclusions, however, the circuit court did not also conclude that it had subject matter jurisdiction over plaintiffs' claims for monetary relief. To the

contrary, in the same order finding that plaintiffs had standing, it noted that "issues of monetary damages and remedies" remained outstanding. C1935.

### E. Plaintiffs' complaints about the Court of Claims do not warrant disregarding the Immunity Act.

The remainder of plaintiffs' arguments amount to complaints that the Court of Claims would be an improper forum for this action, contending that the Court of Claims cannot decide constitutional issues or entertain class actions, and lacks the resources necessary to handle all of plaintiffs' claims. AT Br. 20-24. But such complaints should override the General Assembly's clear intent that "[a]ll claims against the State founded upon any law of the State of Illinois" be litigated in that forum. 705 ILCS 505/8(a) (2020).

As for plaintiffs' argument that the Court of Claims lacks jurisdiction to decide "federal or state constitutional issues," AT Br. 22 (cleaned up), the Illinois Supreme Court has rejected the argument that a "complaint must be allowed to proceed in the circuit court" because the "Court of Claims does not possess exclusive jurisdiction . . . to rule on the constitutionality of a statute," *Parmar*, 2018 IL 122265, ¶¶ 50, 52. Regardless, no constitutional issues remain in this case. Any constitutional questions were resolved by *Walker*, 2021 IL 126086, which held that the filing fee was unconstitutional. Before the Court of Claims, the only remaining issues would be factual: if and when any party paid the filing fee. Because the Court of Claims would not be called on to decide any constitutional issues in this case, any limitations as to its jurisdiction to resolve such issues are irrelevant.

As for plaintiffs' contention that they could not pursue a class action in the Court of Claims, they cite no authority for the proposition that they have a right to pursue a class action that would supersede the General Assembly's intent that claims against the State be brought in the Court of Claims. AT Br. 20-23. They have thus forfeited any such contention. *See* Ill. Sup. Ct. R. 341(h)(7) (appellant's brief must contain "[a]rgument . . . with citation of the authorities . . . relied on"); *Stein v. Dep't of Emp. Sec.*, 2017 IL App (3d) 160335, ¶ 15 ("Because [plaintiff] provided no authority in support of his first claim, it has been forfeited for appellate review and we do not consider its merits.").

Forfeiture aside, plaintiffs are incorrect that their preference to litigate their claims in a class action allows them to sidestep sovereign immunity. Indeed, courts have repeatedly held that sovereign immunity bars class actions brought in the circuit court. *See*, *e.g.*, *Parmar*, 2018 IL 122265, ¶ 8 (sovereign immunity barred action in which "plaintiff sought certification of a class of all similarly situated persons damaged by" collection of allegedly unconstitutional tax); *Kay*, 2021 IL App (1st) 192271, ¶¶ 1, 23 (doctrine barred "putative class action" seeking "to compel the [Illinois] Treasurer to return illegally collected fees") (cleaned up); *Meyer v. Dep't of Pub. Aid*, 392 Ill. App. 3d 31, 35 (3d Dist. 2009) (because sovereign immunity barred plaintiff's claim for a "monetary judgment against" a state agency, this court lacked jurisdiction to "address the plaintiff's class action arguments on appeal"); *Layfer v. Tucker*, 71 Ill. App. 3d

333, 334, 336 (2d Dist. 1979) (sovereign immunity barred counsel's request for attorney fees in class action seeking return of tax funds from Lake County to the State because fee award would be "satisfied from funds that would otherwise be the property of the State").

And that makes sense because the application of sovereign immunity depended on the "substance" of plaintiffs' claims, *Joseph Constr.*, 2012 IL App (3d) 110379, ¶ 50 (cleaned up), not the procedural mechanism by which they were brought, *see Mashal v. City of Chi.*, 2012 IL 112341, ¶ 41 (class actions are "a procedural device intended to advance judicial economy," they do not alter "substantive prerequisites" for establishing a claim) (cleaned up); *Uchumi Supermarkets, Ltd. v. Diners Club Int'l, Ltd.*, 309 Ill. App. 3d 902, 905 (1st Dist. 1999) ("[T]he designation of an action as a 'class action' merely identifies the procedural device under which the class members' claims will be litigated.").[2]

As for plaintiffs' argument that the Court of Claims "would be flooded with over 200,000 individual claims," they premise this argument on "financial data provided . . . during the course of discovery," but include no citations to the record where this data appears. AT Br. 23-24. They have thus forfeited this argument. *See* Ill. Sup. Ct. R. 341(h)(7) (appellant's brief must include

[2] The Court of Claims also is divided on whether it has the jurisdiction over class actions. *See Radke v. State*, 72 Ill. Ct. Cl. 82, 86 (2015) (Kubasiak, J., dissenting) ("[T]he Court of Claims does have jurisdiction over class action suits . . . .").

argument "with citation of . . . the pages of the record relied on"); *Lopez v. Nw. Mem'l Hosp.*, 375 Ill. App. 3d 637, 651 (1st Dist. 2007) (party who "fail[ed] to provide a record citation" forfeited argument).

Forfeiture aside, plaintiffs' contention that the Court of Claims could not handle numerous claims is speculative and, in any event, irrelevant. Plaintiffs offered no evidence as to the Court of Claims' capacity to handle their straightforward claims, many of which could be consolidated into a single action. *See Radke*, 72 Ill Ct. Cl. 82, 85 (2015) (Kubasiak, J., dissenting) (Court of Claims could "consolidate 10,000 individually filed petitions to hear them as one case"). For example, in Marion County, 740 of the 1,558 foreclosure cases initiated between October 2010 and October 2021 were brought by just five large banks (JP Morgan, Deutsche Bank, Wells Fargo, U.S. Bank, and Bank of America). C2187, C2189-2216. Those banks, as well as other plaintiffs who initiated a large volume of foreclosure actions throughout the State, could seek to have their claims consolidated, significantly streamlining any Court of Claims proceedings.

Also, many of the class members' claims may be time-barred, so it is unlikely that every filing fee paid in the State would give rise to a separate case in the Court of Claims. *See* 705 ILCS 505/22(h) (2020) (generally, "claim[ ] must be filed within [two] years after it first accrues"); *Klopfer v. Ct. of Claims*, 286 Ill. App. 3d 499, 505 (1st Dist. 1997) (compliance with limitations period in Court of Claims Act was "jurisdictional prerequisite to the plaintiff's

right to bring his action before the Court of Claims"). And even if the Court of Claims were overrun by plaintiffs' claims, the lack of sufficient resources to address them would be a problem for the legislature, not this court, to resolve. *See Patzner v. Baise*, 133 Ill. 2d 540, 548 (1990) (any "inequities inherent in the doctrine of sovereign immunity" should be addressed by "the legislature and not this court") (cleaned up).

Plaintiffs also are wrong that, if the Court of Claims refused to hear their claims, the circuit court would have "no oversight over" that decision and they would be "left with no recourse." AT Br. 23. An action for *certiorari* in the circuit court is "available to address alleged deprivations of due process by the Court of Claims." *Reichert v. Ct. of Claims*, 203 Ill. 2d 257, 261 (2003). Such an action, therefore, would ensure that plaintiffs and any class members were afforded an adequate opportunity to be heard on their entitlement to any monetary relief. *See Rosetti Contracting Co. v. Ct. of Claims*, 109 Ill. 2d 72, 78 (1985) (remanding to Court of Claims because it deprived claimant of "an opportunity to be heard").

In sum, plaintiffs' complaints regarding the Court of Claims amount to arguments that it would be unfair to be forced to proceed in that forum. But the Illinois Supreme Court has rejected similar attempts to avoid sovereign immunity based on arguments that proceeding in the Court of Claims would be unfair. *See*, *e.g.*, *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 249 (1998) (applying sovereign immunity even though "fairness seem[ed] to

dictate" that defendant should be able to raise counterclaim against State in an action filed by the State in the circuit court because "only the legislature . . . can determine when and where claims against the state will be allowed"); *Patzner*, 133 Ill. 2d at 547-48 (rejecting plaintiff's argument that "referring his complaint of damages to the Court of Claims [would] deprive him of his right to a jury trial" because any "inequities inherent in the doctrine of sovereign immunity" should be addressed by "the legislature and not this court") (cleaned up); *S.J. Groves & Sons Co. v. State*, 93 Ill. 2d 397, 405 (1982) (declining to "undertak[e] . . . impermissible judicial legislation" by reading exception into Immunity Act because it was not the Court's "province to take action to make [a] remedy more palatable for the aggrieved . . . party") *overruled in part on other grounds Rosetti Contracting*, 109 Ill. 2d 72; *Seifert v. Standard Paving Co.*, 64 Ill. 2d 109, 120 (1976) (rejecting constitutional challenge to cap on Court of Claims' damage awards because "[c]laims against the State have been allowed only when the General Assembly has provided for it" and legislature may "limit the maximum which might be allowable"), *overruled in part on other grounds by Rossetti Contracting*, 109 Ill. 2d 72. Because "[t]he doctrine of sovereign immunity . . . is not about fairness," *Manning*, 184 Ill. 2d at 249, this court should apply the Immunity Act as written and then leave it to the General Assembly — through the Court of Claims — to address plaintiffs' complaints about that forum.

## CONCLUSION

For these reasons, Defendants-Appellees-Class Members 18 Clerks request that this court affirm the circuit court's judgment.

Respectfully submitted,

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April 19, 2023

## 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 contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 33 pages.

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## CERTIFICATE OF FILING AND SERVICE

I certify that on April 19, 2023, I electronically filed the foregoing Brief of Defendants-Appellees-Class Members 18 Clerks with the Clerk of the Court for the Illinois Appellate Court, Third Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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**NO: 3-22-0387**

**IN THE APPELLATE COURT OF ILLINOIS**
**THIRD JUDICIAL DISTRICT**

| | |
|---|---|
| REUBEN D. WALKER, and M. STEVEN DIAMOND, Individually and on behalf of themselves and for the benefit of the taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,<br><br>Plaintiffs-Appellants,<br>v.<br><br>ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all Counties within the State of Illinois,<br><br>Defendant-Appellee,<br>and<br><br>PEOPLE OF THE STATE OF ILLINOIS *Ex rel.* KWAME RAOUL, Attorney General of the State of Illinois, and DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County,<br><br>Intervenors-Defendants-Appellees. | ) On Appeal from Final Judgment<br>) Pursuant to Illinois Supreme Court<br>) Rules 301 and 303<br>)<br>) From the Twelfth Judicial Circuit<br>) of Will County, Illinois<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) No. 12 CH 5275<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) The Honorable John C. Anderson<br>) Judge Presiding |

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**ORAL ARGUMENT REQUESTED**

## POINTS AND AUTHORITIES

## ARGUMENT

The Plaintiffs have brought this appeal to reverse the trial court's dismissal based on jurisdiction as to their class action lawsuit against the State of Illinois (state officers) for a money judgment (reimbursement of an unconstitutional filing fee add-on) for a past wrong. The Plaintiffs have conceded the above facts but argue that: 1) sovereign immunity does not apply; 2) that the Court of Claims does not have jurisdiction for equitable relief; and 3) that *Parmar v. Madigan* does not apply. However, none of these arguments vest the circuit court with jurisdiction of a claim against the state for a past wrong.

### I. REMAINING CLAIMS RAISED BY PLAINTIFFS ARE BARRED BY SOVEREIGN IMMUNITY AND SHOULD BE FILED IN THE COURT OF CLAIMS

The Plaintiffs have filed a complaint seeking a money judgment in the amount of $102,377,000 directed against these state officer Defendants. R257. In essence, the Plaintiffs alleged violations of the right to remedy contained in the Illinois Constitution because of an additional fee charged when filing a mortgage foreclosure case. The trial court found the challenged fee unconstitutional but issued a stay on the ruling pending appellate review. In *Walker v. Chasteen*, the Illinois Supreme Court found the challenged fee to be unconstitutional as the subject fee injuriously and unreasonably interfered with the right to access to the courts. *Walker v. Chasteen*, 2021 IL 126086. The Supreme Court remanded the case to the circuit court following the decision. The Defendants complied with this Court's decision and stopped the collection of the statutory mortgage fee going forward. However, the Plaintiffs seek additional relief apart from the prospective relief given by the Court, in the form of restitution of the prior collected fees.

C2756 V2, R164. Defendants moved to dismiss that claim, as it argued that the circuit court no longer has jurisdiction following resolution of the constitutional claim due to sovereign immunity. Defendant Chasteen argued the claim for restitution should be in the Illinois Court of Claims. The circuit court agreed and dismissed the claims, finding that they did not have jurisdiction to proceed and finding that the Plaintiffs should proceed to the Illinois Court of Claims for their relief in accord with *Parmar v. Madigan,* 2018 IL 122265. C3016-18 V2.

Under section 2–619 of the Code of Civil Procedure, a complaint may be dismissed because it is barred by affirmative matter that avoids the legal effect of the claim. See 735 ILCS 5/2–619(a) (West 2020); see also, *Sibenaller v. Milschewski*, 379 Ill. App. 3d 717 (2nd Dist. 2008). Under the Code of Civil Procedure, a complaint may be dismissed because it is barred by affirmative matter, namely lack of jurisdiction that avoids the legal effect of the claim. See 735 ILCS 5/2–619(a) (West 2020). Here, the matter was dismissed due to an affirmative matter, being that the circuit court did not have jurisdiction. The standard of review is de novo. *Sibenaller v. Milschewski*, 379 Ill. App. 3d 717 (2nd Dist. 2008). Questions of law are reviewed de novo. *Smith v. Joy Marvin, M.D.*, 377 Ill. App. 3d 562 (3rd Dist. 2007).

**A. THE RESTITUTION SOUGHT IS WITH THE STATE OF ILLINOIS**

The Plaintiffs have sued in part for "return of all fees collected pursuant to this statute." Section 15-1504.1 of the Code of Civil Procedure required mortgage foreclosure plaintiffs to pay the clerk of the circuit court an additional fee for the Foreclosure Program Prevention Fund. 735 ILCS 15/15-1504.1 (2012 as amended). Section 15-1504.1(a-5) further required a portion of the fees to be deposited into the Abandoned

Residential Property Municipality Relief Fund (Abandoned Residential Property Fund). *Id.* The money sought by the Plaintiffs is no longer in possession of the Defendant clerks and has been remitted to the state pursuant to the statute. Further, the Plaintiffs have conceded that the circuit clerks are state officers. R103, 255-56. So, in effect, the Plaintiffs are suing state officers for money collected pursuant to their state duties, who then sent the money they collected to the State treasurer. It is noted that the money sent by the circuit clerks has likely been spent pursuant to the statute. R257. As this is a claim against the state, sovereign immunity applies, and the circuit court lacks jurisdiction to consider the monetary claim.

This is in accord with *Parmar v. Madigan*, 2018 IL 122265. In *Parmar,* the plaintiff filed a complaint against the Attorney General and the Treasurer, "challenging the application and constitutionality of an amendment to the Estate Tax Act and seeking a refund of all moneys paid to the Treasurer pursuant to the Estate Tax Act.". *Parmar v. Madigan,* 2018 IL 122265. The Illinois Supreme Court held that sovereign immunity applied and that plaintiff must bring their claim to the Illinois Court of Claims. *Id.* The Plaintiffs argued *inter alia* that the officer suit exception should apply. However, the Supreme Court in *Parmar* determined that the officer suit exception to the sovereign immunity doctrine did not apply because, although the plaintiff alleged the defendants' conduct was unlawful because they acted pursuant to an unconstitutional statute, the plaintiff sought damages, including a refund of money, for a past wrong. The Illinois Supreme Court stated that the officer suit exception applies when a plaintiff seeks to "enjoin future conduct" that is alleged to be contrary to law, not to "a complaint seeking damages for a past wrong." *Id.* In this case, the prospective relief claims have been

resolved and only "restitution" remains in the case, which is barred under the doctrine of sovereign immunity.

**B. PLAINTIFFS CONCEDE THE DEFENDANT CLERKS ARE STATE OFFICIALS AND THUS COVERED BY SOVEREIGN IMMUNITY**

As noted, Plaintiffs have conceded that courts have found that circuit clerks are state officers as a matter of law, *Drury v. McLean Cnty.*, 89 Ill. 2d 417 (1982), as opposed to county or local officials. *Ingemunson v. Hedges*, 133 Ill.2d 364 (1990). R103, 255-56. In *Drury v. McLean Cnty.*, our Supreme Court found that clerks of the circuit court "are nonjudicial members of the judicial branch of State government." *Drury v. McLean Cnty.*, 89 Ill.2d 417 (1982). This view was affirmed in this matter in *Walker v. McGuire,* 2015 IL 117138.

In the Illinois Constitution of 1970, sovereign immunity was abolished in this state "[e]xcept as the General Assembly may provide by law." Ill. Const. 1970, art. XIII, § 4. In accordance with that constitutional grant of authority, the General Assembly adopted the State Lawsuit Immunity Act, reinstituting the doctrine of sovereign immunity. See P.A. 77-1776 (eff. Jan. 1, 1972); *Leetaru v. Bd. of Trustees of Univ. of Illinois,* 2015 IL 117485. This statute provides:

> "Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2012 as amended).

The Illinois State Lawsuit Immunity Act provides that the state cannot be sued unless one of a limited number of exceptions applies. 745 ILCS § 5/1. Moreover, where suit is brought against a state official and the judgment or decree although nominally against the official could operate to control the action of the state or subject it to liability, the cause

in effect is a suit against the state. *Schwing v. Miles*, 367 Ill. 436 (1937); *Struve v. Department of Conservation*, 14 Ill.App.3d 1092 (1973). Such claims against the state brought in the circuit court are barred by operation of law. 745 ILCS § 5/1; See also *Jinkins v. Lee*, 209 Ill.2d 320 (2004). As noted in *Drury* and in *Walker*, the circuit clerk defendants are state officers, and thus the Plaintiffs' action is barred. However, as noted by the trial court, the plaintiffs are not without a remedy.

The Court of Claims Act 705 ILCS 505/1 et seq. (2020), creates a forum for actions against the state. *Healy v. Vaupel*, 133 Ill. 2d 295 (1990). With some limited exceptions, the Illinois Court of Claims "shall have exclusive jurisdiction to hear and determine *** [a]ll claims against the state founded upon any law of the State of Illinois." 705 ILCS 505/8(a) (2012 as amended). A party seeking a monetary judgment against a state agency payable out of state funds must bring its action in the Court of Claims. *Meyer v. Department of Public Aid,* 392 Ill.App.3d 31 (3rd Dist. 2009); *James ex rel. Mims v. Mims*, 316 Ill.App.3d 1179 (1st Dist. 2000). An action naming a state employee as defendant will be found to be a claim against the state, such that exclusive jurisdiction lies in the Court of Claims, where a judgment for the plaintiff could operate to control the actions of the state or subject it to liability. *Loman v. Freeman*, 229 Ill.2d 104 (2008), rehearing denied.

The determination of whether a claim is being brought against the state depends on the "issues raised" and the "relief sought," rather than on the formal designation of the parties. *Fritz v. Johnston*, 209 Ill.2d 302 (2004). Thus, the fact that Plaintiffs are suing the Defendants in their official capacity is not determinative. An action is against the state if the following factors exist: 1) there are no allegations that the defendant acted beyond the

scope of his official authority through wrongful acts; 2) the duty alleged to have been breached was not owed to the public generally independent of the fact of state employment; and 3) the complained-of actions involve matters ordinarily within the defendant's official functions. *Healy v. Vaupel*, 133 Ill.2d 295 (1990). An action will be found to be a claim against the state where a judgment for the plaintiff "could operate to control the actions of the state or subject it to liability." The Plaintiffs allege that the circuit clerks collected the fee as part of their duties mandated by statute that was later ruled unconstitutional and thus meet the above requirements. C1013.

The State Lawsuit Immunity Act provides broad immunity for the state and entitles the state to "not be made a defendant or party in any court" except as provided in the Court of Claims Act. 745 ILCS 5/1 (2012 as amended). Sovereign immunity exists where: 1) the defendant is an arm of the state; 2) the plaintiff's action could subject the state to liability; and 3) no exceptions to the doctrine exist. *Williams v. Davet*, 345 Ill. App. 3d 595 (2003). "If a judgment for plaintiff could operate to control the actions of the state or subject it to liability, the action is effectively against the state and is barred by sovereign immunity." *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill. App. 3d 1048 (1994). "Taxes are raised for certain specific governmental purposes; and, if they could be diverted to the payment of the damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired if not totally destroyed." *Abrams v. Oak Lawn-Hometown Middle Sch.*, 2014 IL App (1st) 132987. All three of the criteria for Defendants' invocation of its sovereign immunity are met in this case. Defendants are an arm of the state, Plaintiffs seek to hold Defendants liable for money judgment, and Plaintiffs have

not cited any exceptions that are applicable in this case.

## II. THE VARIOUS OBJECTIONS RAISED BY PLAINTIFFS DO NOT OBVIATE THE SOVEREIGN IMMUNITY DOCTRINE

Plaintiffs raise several arguments as to why the doctrine of sovereign immunity does not apply in this case. Plaintiffs have in a sense argued that their case falls within the prospective injunctive relief exception (AKA as Officer suit exception) of sovereign immunity. Plaintiffs were correct in seeking a ruling from the circuit court that the foreclosure fee requirement was unconstitutional. The Court of Claims does not have jurisdiction of constitutional questions. Jurisdiction of the matter was proper before the circuit court up to that point. However, as the Illinois Supreme Court has ruled on the constitutional issue and Plaintiffs are now seeking a past money judgment against the state, accordingly Plaintiffs seek relief for a past wrong and the prospective relief exception does not apply.

"A complaint seeking damages for a past wrong does not fall within the officer suit exception to sovereign immunity"; *Ellis v. Board of Governors of State Colleges & Universities,* 102 Ill. 2d 387 (1984) (tenured professor's suit for damages for wrongful discharge was barred by sovereign immunity; court recognized that if plaintiff instead "seeks to enjoin a state officer from taking future actions in excess of his delegated authority, then the immunity prohibition does not pertain"); *Leetaru,* 2015 IL 117485, ¶ 51 (lawsuit not barred by sovereign immunity because "[plaintiff's] action does not seek redress for some past wrong" but, rather, "seeks only to prohibit future conduct * * * undertaken by agents of the state in violation of statutory or constitutional law or in excess of their authority"). *Leetaru v. Bd. of Trustees of Univ. of Illinois*, 2015 IL 117485.

Plaintiffs argue *Parmar v. Madigan* does not apply in this case. The trial court held the money judgment they are seeking is only available in the Illinois Court of Claims. *Parmar v. Madigan*, 2018 IL 122265. R3030-3032. Despite the claims of Plaintiffs to the contrary, the case of *Parmar* is directly on point. In *Parmar*, the court found that Plaintiffs challenging the estate tax must proceed to damages in the Illinois Court of Claims. *Id.* The court noted that part of the relief requested by Plaintiff in that case was a certification of a class. Like the statute in *Parmar*, in this matter, there is no provision waiving sovereign immunity. *Id.* Further, as in *Parmar*, this case involved a "tax" (the $50 additional foreclosure filing charge is a tax on litigation), and now Plaintiffs are seeking a money judgment for past wrongs. *Walker v. Chasteen*, 2021 IL 126086. Since Plaintiffs are seeking a money judgment for sums that were paid in the past and have been since sent to the Illinois State Treasurer, the prospective relief exception does not apply. Plaintiffs seem to want the benefits that the clerks offer as a state officer (indemnification from the state) but do not want to go to the required venue (Illinois Court of Claims) to seek the funds. Analogous to *Parmar*, Plaintiffs allege that Defendants' conduct was unlawful because Defendants acted pursuant to an unconstitutional statute. Given the strikingly similar claims and avenues of relief (unconstitutional tax involved, request for relief by a class of persons harmed by the estate tax statute, requests for refunds of monies paid) that coincide with this case, Plaintiffs attempts to distinguish it fall flat.

The doctrine of sovereign immunity exists in Illinois pursuant to the Immunity Act, which mandates that the state or a department of the state cannot be a defendant in an action brought directly in the circuit court, except where the state has expressly

consented to be sued. *Watkins v. Office of the State Appellate Defender*, 2012 IL App (1st) 111756, ¶ 21. The state's consent to be sued must be "'clear and unequivocal.'" *In re Special Education of Walker*, 131 Ill. 2d 300 (1989). Only the legislature can waive sovereign immunity. *Lynch v. Department of Transportation*, 2012 IL App (4th) 111040, ¶ 23; *Abo-Saif v. Bd. of Trustees of Univ. of Illinois*, 2022 IL App (1st) 211091. Therefore, arguments raised by Plaintiffs in this regard should be disregarded.

Plaintiffs argue the Illinois Supreme Court sent the case back to consider only restitution and by implication allows for jurisdiction in this matter. A review of the decision, as well as *Crocker v. Finley*, do not mention any monetary recovery as suggested by Plaintiffs. *Crocker v. Finley*, 99 Ill.2d 444 (1984). The Court in each case found the fee to be unconstitutional only. *Id.* There is no discussion of restitution or sovereign immunity in either case. *Id.* The Illinois Supreme Court did discuss damages, such as in *Parmar*, the Court found such a claim belonged in the Illinois Court of Claims. *Parmar v. Madigan*, 2018 IL 122265. Plaintiffs' argument is without merit.

Plaintiffs argue that the Court of Claims does not have jurisdiction because this is a class action. Contrary to Plaintiffs' assertions, Illinois courts have referred plaintiff class actions to the Illinois Court of Claims. In *Kay v. Frerichs*, 2021 IL App (1st) 192271, a taxpayer filed a putative class action complaint in the Cook County Circuit Court against Michael Frerichs, in his official capacity as Treasurer of the State of Illinois, alleging that he was administering the Illinois College Savings Pool in an illegal manner, and sought equitable and monetary relief. The court in that case held that plaintiff could pursue her claim in the Court of Claims. *Kay v. Frerichs*, 2021 IL App (1st) 192271; see also, 705 ILCS 505/8(a) (West 2012) (the Illinois Court of Claims

"shall have exclusive jurisdiction to hear and determine *** [a]ll claims against the state").

This case is analogous to the matter in *Kay*. Although Plaintiffs claim that the circuit clerks acted outside of their authority, the allegations concern the circuit clerk's collection of the fee, which is within their statutory duty and to be performed pursuant to their official capacity. See *Brandon v. Bonell*, 368 Ill. App. 3d 492 (2006) (an action resulting from a state employee's breach of a duty imposed solely by a statute pertaining only to state employees protected by sovereign immunity). Indeed, the circuit clerks are the only people with the authority to collect the fee at issue. These are the precise circumstances for which the sovereign immunity doctrine is designed.

Moreover, the monetary relief sought by Plaintiffs further establishes that sovereign immunity applies to this case. As the trial court noted, any damages awarded in this matter would be taken from the state, and, in turn, control the actions of the state. See *Currie v. Lao*, 148 Ill. 2d 151 (1992) (sovereign immunity applies in an action brought nominally against a state employee in his individual capacity where a judgment for the plaintiff could operate to control the actions of the state or subject it to liability).

Another example is *Taylor v. State Universities Ret. Sys.*, 203 Ill. App. 3d 513 (4th Dist. 1990). The court in that case held that in administrative review proceedings, a court may hold that an individual is entitled to payment of sums which a department of state government has improperly withheld. *Id.* A court may not, however, enter a money judgment against the state in such a proceeding. *Id.* The proper forum for obtaining a money judgment against a state agency payable out of state funds is in the Court of Claims. *Taylor v. State Universities Ret. Sys.*, 203 Ill. App. 3d 513 (4th Dist. 1990).

Although this case is not an administrative proceeding, the principle applies here. The court held that although they can determine liability (the fee by plaintiffs was unconstitutional), the court cannot enter a money judgment against the state. Here, the Illinois Supreme Court has ruled that the fees in question were unconstitutional, Plaintiffs may be entitled to the payment, but that the determination on the money judgment goes to the Court of Claims.

Plaintiffs have also argued since they are seeking "restitution" which is an equitable form of relief, the Court of Claims does not have jurisdiction. Contrary to Plaintiffs assertions, the Illinois Court of Claims jurisdiction is not limited to monetary claims, as the Court of Claims has authority to grant equitable relief as well. *Management Ass'n of Illinois, Inc. v. Board of Regents of Northern Illinois University*, 248 Ill. App. 3d 599 (1st Dist. 1993); *Kay v. Frerichs*, 2021 IL App (1st) 192271. Further, the Plaintiffs' attempt to characterize their claim for $102,377,000 as some equitable remedy does not square with the fact that they are seeking a monetary judgment for past wrongs.

Plaintiffs lament the length of time that this case has been pending. However, a significant portion of that time was due to Plaintiffs' unsuccessful attempt to find the Defendants were fee officers. The Supreme Court held that circuit court clerks did not fall within the state constitutional provision prohibiting fee officers in the judicial system. *Walker v. McGuire*, 2015 IL 117138. Furthermore, the issue of whether a court has subject matter jurisdiction may be raised at any time. *Automated Professional Tax Services, Inc. v. Department of Employment Security*, 244 Ill.App.3d 485 (1993). Lack of subject matter jurisdiction cannot be waived by a state officer. *Russell v. Hertz Corp.*, 139

Ill.App.3d 11 (1st Dist. 1985) appeal allowed, affirmed 114 Ill.2d 73. Subject matter jurisdiction either exists or it does not. *Klopfer v. Court of Claims*, 286 Ill.App.3d 499 (1997). It cannot be waived, stipulated to, or consented to by the parties, *Eschbaugh v. Industrial Comm'n*, 286 Ill.App.3d 963 (1996), nor can it be conferred by estoppel. *Jones v. Indus. Comm'n*, 335 Ill. App. 3d 340 (2002).

Even if the Plaintiffs' assertion about the jurisdictional issues regarding the Court of Claims was true, a lack of remedy cannot grant jurisdiction to the circuit court over subject matter, which is specifically barred by statute. *Vill. of Riverwoods v. BG Ltd. P'ship*, 276 Ill. App. 3d 720 (1st Dist. 1995). Even if Plaintiffs had no remedy available in the Court of Claims, codification of public policy is for the legislature, and a lack of a remedy cannot grant jurisdiction to a circuit court over subject matter which is specifically barred by statute. *President Lincoln Hotel Venture v. Bank One, Springfield*, 271 Ill.App.3d at 1058–59 (1994). While reasonable minds can differ as to the fairness of Illinois procedure, "whether a statute is wise and whether it is the best means to achieve the desired result, are matters for the legislature, not the courts." *Snedeker v. Will Cnty. State's Attorney's Off.*, 2022 IL App (3d) 210133, appeal pending (Mar Term 2023).

Additionally, Plaintiffs argue that the Illinois Court of Claims is not suited to handle a large number of claims. This is yet another misdirection by Plaintiffs. In the Court of Claims case *Midwest Pediatric Assocs.*, the Court of Claims handled a case with over 1,000 different patients. *Midwest Pediatric Assocs., Ltd. v. State*, 35 Ill. Ct. Cl. 765 (1983). The claim was for payment of medical services provided to patients under the Department of Public Aid's medical assistance program. *Id.* The claim was originally filed for $51,269.76 for services provided to 1,124 named patients. *Id.* After investigation

by the Department of Public Aid, the claimant and respondent entered into a joint stipulation settling the claim for $10,000. *Midwest Pediatric Assocs., Ltd. v. State*, 35 Ill. Ct. Cl. 765 (1983). Other examples of joint awards entered by the Court of Claims on stipulations are *Peltz v. State* (1981), 34 Ill. Ct. Cl. 284; *Acoff v. State* (1981), 35 Ill. Ct. Cl. 364; and *Coppetelli v. State* (1981), 35 Ill. Ct. Cl. 328, in which significant awards were granted for a large group of claimants (each case involved individual judgments for claimants as opposed to a class action judgment).

Further, as has been pointed out in the trial court, Plaintiffs' counsel is greatly inflating the number of Plaintiffs in the case, as many of the claimants are law firms and banks who filed foreclosure matters during the subject time. Unlike a typical class action case in which the identity of the individual plaintiffs is unknown, these plaintiffs have all been identified through discovery in the case prior to dismissal. R101, 215. Each individual claimant could be consolidated into one case filing. That is to be compared with Plaintiffs' characterization that there will be over 100,000 cases added to the Court of Claims docket. Further, Plaintiffs do not cite to the record for this assertion. See Ill. Sup. Ct. R. 341(h)(7) (appellant's brief must include argument "with citation of . . . the pages of the record relied on"); *Lopez v. Nw. Mem'l Hosp.*, 375 Ill. App. 3d 637 (1st Dist. 2007) (party who "fail[ed] to provide a record citation" forfeited argument). The argument that this matter will overwhelm the Court of Claims should be disregarded. Further, in one example in the record, in Marion County, 740 of the 1,558 foreclosure cases initiated between October 2010 and October 2021 were brought by just five large banks (JP Morgan, Deutsche Bank, Wells Fargo, U.S. Bank, and Bank of America). C2187, C2189-2216. Those banks, as well as other plaintiffs who initiated a large volume

of foreclosure actions throughout the state, could seek to have their claims consolidated into a single action, significantly streamlining any Court of Claims proceedings as demonstrated by the above examples.

The Plaintiffs' complaints regarding the Court of Claims imply that it would be unfair for them to be forced to proceed in that forum. But the Illinois Supreme Court has rejected similar attempts to evade sovereign immunity based on arguments that proceeding in the Court of Claims would be unfair. See, e.g., *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245 (1998) (applying sovereign immunity even though "fairness seem[ed] to dictate" that defendant should be able to raise counterclaim against state in an action filed by the state in the circuit court because "only the legislature . . . can determine when and where claims against the state will be allowed"); Because "[t]he doctrine of sovereign immunity . . . is not about fairness," *Manning*, 184 Ill. 2d at 249, this court should apply the Immunity Act as written and then leave it to the General Assembly, through the Court of Claims, to address Plaintiffs' complaints about that forum. The class representative also adopts the arguments of the Attorney General in its brief as if set forth fully herein.

This matter, as it stands now, is a claim for a significant monetary judgment against the state for a past wrong and the trial court was correct in dismissing the matter. Defendants do not deny the importance of the decision in *Walker v. Chasteen*, however Plaintiffs are required to seek its monetary remedy in the Illinois Court of Claims pursuant to statute.

## CONCLUSION

Defendant-Appellee Andrea Chasteen as class representative respectfully prays that the decision of the circuit court be affirmed.

Respectfully submitted,

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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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief is 15 pages.

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No. 3-22-0387

**IN THE**
**APPELLATE COURT OF ILLINOIS**
**THIRD JUDICIAL DISTRICT**

REUBEN D. WALKER, et al.,

Plaintiffs-Appellants,

v.

ANDREA LYNN CHASTEEN, et al.

Defendants-Appellees.

Appeal from the Circuit Court of Twelfth Judicial Circuit
Will County, Illinois
No. 12-CH-5275
The Honorable John C. Anderson, Judge Presiding

# BRIEF OF DEFENDANT-APPELLEE IRIS MARTINEZ, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

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**POINTS AND AUTHORITIES**

## ARGUMENT[1]

The Illinois Legislature granted sovereign immunity to State employees in order that public officials could perform their jobs without fear that a misstep could entail a damage claim. To balance that interest against the public's need for public officials to comply with the law, the courts have recognized a narrow "officer-suit exception" permitting lawsuits seeking *prospective* relief, but not "present claims" seeking *retroactive* monetary compensation. Because Plaintiffs currently seek only retroactive monetary relief, their claims are barred by sovereign immunity and must be litigated in the Court of Claims. That is true regardless of whether that retroactive relief is labeled as "damages," "restitution," "disbursement," a "return of monies," or a "refund," as those are merely different terms for retrospective relief. Otherwise, the protections of sovereign immunity would be wholly illusory, because they could be evaded by merely recharacterizing a request for retrospective relief as something other than "damages."

### I. Sovereign Immunity Bars Plaintiffs' Refund Claims.

The State Lawsuit Immunity Act, 745 ILCS 5/1 *et seq.*, (2020), protects the State from being sued in circuit court, and Plaintiffs are unable to avoid the protections by filing a lawsuit against the State's agents when it is the State that is the real party in interest. *See Sass v. Kramer,* 72 Ill. 2d 485,

[1] We adopt and incorporate by reference the entirety of the response brief of the "18 Clerks," and offer in this brief only a short supplemental argument.

491 (1978). Vital to the State's interest is the protection of the citizens' monies and the related prevention of drawing State officers into the litigation process in circuit court. *See State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 159 (2010). And when, as here, plaintiffs seek to recover funds previously paid to the State pursuant to a state statute, that claim is barred by sovereign immunity and must be brought in the Court of Claims. *See Parmar v. Madigan*, 2018 IL 122265, ¶26; *see also* 705 ILCS 505/1 *et seq*. (2020).

While Plaintiffs argue that their claims fall within the so-called officer suit exception to sovereign immunity, Walker Br. 27-28, *Parmar* makes clear that this "exception" allows litigants to sue state officials only when they seek to compel *future* compliance with some legal obligation, not to pursue a money judgment for improper past conduct. 2018 IL 122265, ¶¶24, 26; *see also People ex. rel. Manning v. Nickerson,* 185 Ill. 2d 245, 248-50 (1988) (distinguishing claims for damages that are barred by sovereign immunity, with those allowable claims seeking declaratory relief); *Ellis v. Bd. of Governors*, 102 Ill. 2d 387, 395 (1984) (equating prohibited "present claim" with claim for "money damages," and distinguishing claims "to enjoin a State officer from taking future actions in excess of his delegated authority"). And while Plaintiffs attempt to reword their present claim as one for "restitution," *see*, *e.g.*, Walker Br. 30, 32, 34, 36-40, such wordplay does not change the fundamental fact that they are seeking a "refund of all moneys paid" under "an unconstitutional statute," taking their claims outside the officer suit

exception, *Parmar*, 2018 IL 122265, ¶26. Because those funds are protected by sovereign immunity, the only place to request their return is in the Court of Claims, not the circuit court.

Plaintiffs' reliance on *Leetaru v. Board of Trustees,* 2015 IL 117485, Walker Br. 28, is misplaced. In *Leetaru,* the plaintiff attempted to prohibit the Board of Trustees of the University of Illinois from undertaking a future disciplinary process, 2015 IL 117485, ¶¶1, 48, 51 (stating that "Leetaru's action does not seek redress for some past wrong" but "seeks only to prohibit future conduct . . . undertaken by agents of the State in violation of statutory or constitutional law or in excess of their authority"). *Leetaru* thus cannot be read to say anything about the application of the officer suit exception to requests for retrospective relief. He sought the prohibition of a future investigation only; he did not seek monies for past conduct by the State.

Plaintiffs' remaining arguments are equally meritless. Plaintiffs complain at length that the Court of Claims cannot consider class claims or constitutional issues, *see*, *e.g.*, Walker Br. 20-21, but this is beside the point. Most obviously, the Court of Claims does not have to consider any constitutional issues, for the simple reason that those issues have already been conclusively resolved by the Illinois Supreme Court. And the fact that there are no class actions in the Court of Claims means only that the particular procedural device of a class action cannot be used there to consolidate many individual claims for resolution – it does not alter the fact

that the Court of Claims has exclusive jurisdiction to hear the individual claims that would make up such a class action. And to the extent that Plaintiffs think it would be "financially unfeasable" Walker Br. 24, for class members to pursue their claims individually, there is no doctrine of Illinois law allowing the circuit courts to simply seize jurisdiction over claims entrusted to the exclusive authority of the Court of Claims whenever they deem it "financially unfeasable" to do so.

Plaintiffs also make much of the fact that the statute here was unconstitutional, *see*, *e.g.*, Walker Br. 19, but that does not distinguish their claim from those in *Parmar*, which also involved a claim that payments were made pursuant to an unconstitutional statute. And as *Parmar* explained, the constitutionality of a State actor's conduct is relevant to sovereign immunity only when the plaintiff is seeking injunctive relief, not when – as here, specifically on remand – a plaintiff's present claim seeks a refund of monies previously paid under a State statute. 2018 IL 122265, ¶ 26. That is precisely the relief Plaintiffs seek here, regardless of the particular label they attach to that relief.

Plaintiffs also imply that the Illinois Supreme Court, in its decision in the last appeal regarding the statute, *Walker v. Chasteen*, 2021 IL 126086, directed the return of the collected monies on remand, *see*, *e.g.*, Walker Br. 19, 35, but such an instruction is completely absent from the opinion. Nor did the Illinois Supreme Court reference any of its powers under Illinois

Supreme Court Rule 361. Ill. Sup. Ct. R 361. Indeed, the court had no need to address those issues because they were not even before it on appeal, given that the circuit court had explicitly reserved judgment on "Plaintiffs' request for the return of collected fees." C. 1744. Nevertheless, even if the issue had been before it, the Illinois Supreme Court lacked subject matter jurisdiction to make such a remand instruction.

Finally, Plaintiffs claim that they would not have had standing to sue at all if *Parmar* limited them solely to injunctive relief. Walker Br. 39. This completely misunderstands the effect of sovereign immunity here, which did not prohibit the Plaintiffs from *obtaining* any monetary relief, but merely said that such relief, if any, had to be sought in the only tribunal with authority to issue such relief: the Court of Claims. *See* C. 3018 ("Class plaintiffs may pursue their request for restitution in the Court of Claims."). Put another way, the court did not say that Plaintiffs' injuries were not redressable, but that their redress had to be sought in the particular forum established by Illinois law to provide that redress.

In sum, the circuit court properly granted the governmental entities motions concerning sovereign immunity and subject matter jurisdiction. Thus, the circuit court lacked jurisdiction to order the Clerk of the Circuit Court of Cook County to return the filing fees collected pursuant to the now-invalidated statute. Rather, any request for such relief must be addressed to the Court of Claims.

## CONCLUSION

This court should affirm the judgment of the circuit court.

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

*/s/ Patrick E. Dwyer III*
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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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 6 pages.

*/s/ Patrick E. Dwyer III*
Assistant State's Attorney

## CERTIFICATE OF FILING AND SERVICE

I certify that on April 19, 2023 I caused to be electronically filed the foregoing Brief of Intervenor-Defendant-Appellee Clerk of the Circuit Court of Cook County Iris Martinez, with the Clerk of the Court for the Illinois Appellate Court, Third Judicial District, by using the Odyssey eFileIL system. I further certify the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and were caused to be served via Odyssey EfileIL from 500 Richard J. Daley Center, Chicago, Illinois 60602 before 5:00 p.m. on April 19, 2023.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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No. 3-22-0387

In the
Appellate Court of Illinois
Third Judicial District

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| REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois,<br><br>Defendants-Appellees,<br><br>and<br><br>PEOPLE OF THE STATE OF ILLINOIS *Ex rel.* KWAME RAOUL, Attorney General of the State of Illinois, and DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County,<br><br>Intervenors-Defendants-Appellees. | Appeal from the Twelfth Judicial Circuit, Will County, Illinois<br><br>Case No. 12 CH 05275<br><br>The Honorable John D. Anderson Judge Presiding |

# REPLY BRIEF OF PLAINTIFFS - APPELLANTS

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**ORAL ARGUMENT REQUESTED**

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# REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Class Plaintiffs-Appellants REUBEN D. WALKER and M. STEVEN DIAMOND, by and through their attorneys, and for their Reply Brief in support of the Class Plaintiffs' request for the relief outlined in its opening brief, state:

## Background

This cause of action was initiated by Reuben Walker in 2012 as a class action to address the constitutionality of an "add on" filing fee the Legislature imposed on litigants who filed foreclosure actions in the Illinois court system. The Defendant Clerks required Reuben Walker, and those similar to him, to pay the invalid fees before being allowed access to the Circuit Courts to file their foreclosure cases. The action was certified (without objection from Defendants) to proceed as a class action consisting of a class of all those who had paid the add-on filing fee as well as a defendant class action with the Defendants consisting of the individual circuit court clerks in the 102 counties of the State of Illinois. (C122). After a decade of hotly contested litigation, including two separate appeals to the Illinois Supreme Court, that Court held that the statute imposing this add-on fee was facially unconstitutional and remanded the case to the trial court for "further proceedings consistent with the Court's opinion."[1]

The issue in the instant case addressed what was then one of a myriad of "add-on" fees the legislature had imposed on litigants filing or responding to various civil and criminal actions before the Illinois courts. ("Illinois imposes a dizzying array of filing fees

[1] The trial court initially declared the statute unconstitutional as violating the provision against fee offices within the judicial system. On appeal to the Supreme Court, that Court held that the statute did not violate the prohibition on fee offices and, although plaintiff had raised and briefed the issue of whether the statute was facially unconstitutional as violating the free access clause, the Court declined to rule on that basis and remanded the case to the Circuit Court which considered the alternative arguments as initially presented. (C687-C700).

on civil litigants…", Report of 2016 Statutory Court Fee Task Force, pg. 1 (June 1, 2016) (C817). These additional fees had been imposed on litigants not for the purpose of assisting or benefiting the court system but to provide revenue for non-court purposes and thereby violating the free access clause of the Constitution of the State of Illinois as set out in the Illinois Supreme Court decision decades before in *Crocker v. Finley*, 99 Ill.2d 444 (1984).

The concerns regarding the propriety of these add-on statutes and the fees imposed were not limited to Reuben Walker and his counsel. The increasingly burdensome series of add-on fees imposed on litigants were a matter of substantial concern to the branches of government and the Access to Justice Act, 505 ILCS 95/25 (2013), created the Statutory Court Fee Task Force consisting of members of the judiciary, members of the legislature, attorneys, and other officials charged by that Court with examining these add-on fees to determine whether they caused an undue and improper burden on litigants before the Illinois courts (Report of 2016 Statutory Fee Task Force, pgs. 1-5 (June 1, 2016) (C817-821).

More recently, the Illinois Supreme Court by its order of January 11, 2021, convened the Illinois Supreme Court Statutory Court Fee Task Force to build on the 2016 findings and recommendation of the Illinois Statutory Court Fee Task Force. The 2021 Illinois Supreme Court Task Force remained concerned with add-on fees which inhibit free access to Illinois courts and identified specific add-on fees which the Supreme Court Task Force was concerned "are not tied to court-related services and, therefore, may violate the free access clause of the Illinois Constitution." [2] (SA28). The report and recommendations

[2] The opening brief of Plaintiffs-Appellants referenced both the 2016 Report of the Illinois Statutory Court Fee Task Force (C.815-C.903) and the newer 2023 Report of the Illinois Supreme Court Statutory Court Fee Task Force (Appendix (A1-75)). The 2023 Task Force Report contained in the Appendix has now finalized in February of 2023 and for the sake of completeness, the Plaintiffs-Appellants provide the final report of the

of that task force were announced by the Supreme Court on February 21, 2023. (See, Announcement by the Illinois Supreme Court dated February 21, 2023, releasing the final report of its Statutory Court Fee Task Force) (SA76).

One recommendation of this Task Force was: "New Initiative 6: Review of Assessments That May Violate the Free Access Clause of the Illinois Constitution" (SA39-41). This initiative in the Task Force Report references the Supreme Court's opinion in this case as "reaffirming" the Court's earlier decision in *Crocker* and cites the *Walker* decision in support of its determination that these add-on fees posed a substantial threat to the public's access to the court system. (Task Force Report pages 35-37 (SA40-41) (See the 2023 Task Force Report for a more detailed discussion of this issue and its endorsement of the decision in this case as correctly addressing the need to curtail these add-on fees.)

Following the Supreme Court's remand of this case in 2021 to the trial court, Defendants did not challenge the determination by the Supreme Court that the statute was facially unconstitutional nor did they challenge the decisions of that Court that held that facially unconstitutional statutes were void *ab initio* and conferred no lawful authority for the government to collect or retain the benefits of such legislation.[3] Instead, they claimed and continue to claim that once the Supreme Court announced its decision that the statute was facially unconstitutional the court system no longer had subject matter jurisdiction to address the return of the fees Defendants had collected over the last decade while they

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Illinois Supreme Court Statutory Court Fee Task Force in the Supplemental Appendix (SA) to this Reply Brief which is substantively identical to the report previously provided in the Appendix of the opening brief. (SA1-75).

[3] The Report and Recommendations of the 2016 Task Force was available to the parties and was submitted by Plaintiffs to the Circuit Court. (C815-903). As with the decision of the Supreme Court that the statute was facially unconstitutional, Defendants did not challenge the findings of that report nor criticize its reasoning and/or conclusions in any manner. They have failed to do so in their briefs submitted to this Court as well and make no effort to dispute the determination that the continuing existence of these add-on fees is a threat to the public's access to the court system.

attempted to defend the legality of the invalid statute. Defendants asserted the defense of sovereign immunity, which Defendants did not raise before the Supreme Court in either previous appeal, required further proceedings regarding Plaintiffs' recovery of these fees and could ***only*** be considered and resolved by the Court of Claims, therefore imposing the additional obligation on Reuben Walker and the other Plaintiffs to incur additional fees[4] and engage in the delays and additional expenses of still more litigation before that "court."

In other words, Defendants successfully persuaded the trial court that the Illinois Supreme Court decision be construed as resolving that Court's stated concern that these add-on fees impermissibly burdened their right of access to the court system by imposing the requirement to pay additional fees and incur the additional time and expense of filing and prosecuting a new cause of action in a completely different non-judicial forum. Thus, the Defendants and the trial court, after more than a decade of existing and successful litigation, believe that Reuben Walker and any other party seeking to be reimbursed for the fees illegally taken under this unlawful statute were told by the Supreme Court to file yet *another* cause of action, pay *another* fee, and engage in additional potentially lengthy litigation over the return of the illegally obtained fees. Plaintiffs respectfully submit that this argument is not only wrong as was shown in their opening brief, and will be shown, *infra*, but if accepted by this Court would not only effectively vitiate the determination by the Supreme Court that the imposition of these fees unlawfully burdened the public's right to access the courts, but also makes a mockery of the carefully crafted report and recommendations of the task forces that addressed and attempted to stop the existing and potentially future add-on fees statutes.

[4] Court of Claim requires a $15 filing fee for access to this tribunal for claims up to $1,000. 705 ILCS 505/21.

Accordingly, this Court can and should reject Defendants' arguments as contrary to the decision of the Illinois Supreme Court in the instant case. If permitted to stand, the new "requirement" that a successful challenge to the constitutionality of a fee statute must then be followed up by an additional filing, an additional fee, and additional litigation before the tribunal created by the legislature that passed the admittedly unlawful statute in the first place will nullify the work of the Supreme Court in this case, the work of the Supreme Court's own task force, and ignore and contradict the concerns and efforts of the Illinois Supreme Court to call a halt to the imposition of these add-on fees. There is no better way to frustrate protection of the public's right to access to the courts than by burdening citizen-litigants like Reuben Walker with paying the invalid $50 fee, spending a decade working with his counsel to contest the propriety of the fee, and then be told to pay yet another fee and wait possibly years to collect (assuming that the Court of Claims agrees to do so, which is problematic at best). This makes no sense and is a dangerous and unpalatable assault on the public's right to access the courts.

## Introduction

At the heart of this appeal is not only the issue of completing the required restitution to Reuben Walker and other Class Plaintiffs of their own money paid to the Class Defendants under unconstitutional fee statutes in order to access the courts of Illinois, but also the ability of the court system to address and resolve its concerns regarding the burdening of the public's access to the court system created by the large number of add-on fees imposed by the legislature.

Class Defendants have for over a decade refused to provide Reuben Walker his money back for an unconstitutional taking. When this case began and throughout the

course of this litigation, including the proceedings before the Supreme Court and following the 2021 remand, the Circuit Court, and ***not*** the Court of Claims, was the ***only*** forum which had jurisdiction to hear the constitutional challenge and fully resolve the issue of the return of the fees. That resolution requires that the Circuit Court remain the tribunal which must provide Reuben Walker and the other Class Plaintiffs with the necessary relief for the Defendants' taking of Plaintiffs' money in violation of the free access clause of the Illinois State Constitution. The specific, equitable relief of restitution – the return to the Plaintiffs of their own money – is not properly considered as a new assessment of money damages for a past loss but as reimbursement correcting the unjust gain by the Defendants under this facially unconstitutional statute. This specific, equitable, relief does not destroy the subject matter jurisdiction of the Circuit Court because even though the required relief constitutes money, the law does not treat it as money damages. The law treats the refund of the fees as equitable restitution, not money damages.

As both sides have maintained before this Court, whether sovereign immunity applies depends in part upon the type of relief sought (here all equitable relief – declaratory, injunctive and restitution, and no damages). Defendants/Intervenors each claim in their response briefs that no matter what the Defendants want to call the return of the Class Plaintiffs' money paid due to the facially unconstitutional fee, it is considered "money damages" and therefore divests the Circuit Court of jurisdiction under the Sovereign Immunity Act.

Defendants/Intervenors myopic view of "money damages" is incorrect under Illinois law and the law of other states as exemplified by the decisions of the courts, for example, the State of Ohio. Courts recognize the unique differences between equitable

restitution and money damages when considering the application of immunity statutes. These specific differences are set out in detail in the *Raintree Homes* decision of the Illinois Supreme Court found in Class Plaintiffs' opening brief (Opening Brief of Plaintiffs-Appellants, p. 37-38). Plaintiffs will again address restitution in this brief to assist this Court in understanding the inaccuracy of the Defendants' position which they used to mislead the Circuit Court into dismissing the case from the only court which could give meaningful relief for the violation of the significant constitutional right of free access to the courts of Illinois. Payment of restitution by refunding Plaintiffs' own money provides specific, equitable, relief for an unjust gain and not damages for a past wrong. On the opposite end, money damages are normally paid as a substitute for a past wrong. This distinction is significant as to how the law treats these two different concepts, both of which involve money.

In particular, Defendants' reliance on the decision in *Parmar v. Madigan* is not only inappropriate but hardly the "change in the legal landscape" claimed by Defendants. In contrast to the relief sought by Plaintiffs in the present case seeking injunctive relief and restitution only, the plaintiff in *Parmar* did not seek an injunction but instead sought **interest and loss of use damages.** It was that request for interest and loss of use **damages** which implicated sovereign immunity.

When a party fails to seek injunctive relief in cases but instead asks for relief in addition to reimbursement, as in the *Parmar* decision, that additional relief is considered to be money damages rather than equitable relief. Under those circumstances (which are not found here) such a lawsuit is considered as an action against the state rather than against the state officer and as such may only be brought in the Illinois Court of Claims.

Here, Reuben Walker did not ask for what the Supreme Court would consider "money damages" but instead sought an injunction and asked only for the $50 illegally taken from him to be paid back in restitution. He did not seek any further recovery that could even arguably cause the Circuit Court to lose subject matter jurisdiction based on sovereign immunity grounds.

The Illinois Supreme Court has stated on numerous occasions that when a statute is found to be facially unconstitutional, it is void *ab initio* and the statute is treated as if it never existed. Once the declaration of facial unconstitutionality is made, the individual who suffered loss under that statute must be placed back in the same position he or she was in prior to their contact with the wrongful statute. This means that the only work necessary to be performed by the Circuit Court in order to be consistent with the remand by the Supreme Court was to place Reuben Walker and the other Class Plaintiffs in the same position they would have been in if the fee statute had not existed. At the time of the enactment of the invalid statute, Reuben Walker and the other Class Plaintiffs had the money they paid for the add-on fees in their pockets. When the Illinois Supreme Court affirmed the lower court decision here, the only matter left for the lower court to consider was that the Class Plaintiffs here needed to be placed back into the same position they enjoyed prior to the payment of the facially unconstitutional add-on fees. That action equates to restitution. As in *Crocker v. Finley*, 99 Ill.2d. 444 (1984), a trustee/administrator should be assigned and a program put in place to provide restitution to the Class Plaintiffs. There are no decisions that need to be made other than restitution. There are no decisions that need to be made by a finder of fact in the Court of Claims. So, not only is jurisdiction improper in the Court of Claims, but there is nothing for the Court of Claims to decide.

Restitution is not contrary to the reasons why sovereign immunity exists in the State of Illinois. Sovereign immunity does not apply to bar the jurisdiction of the Circuit Court where, like here, the state actor Defendants are involved in an unconstitutional act. Here, suing the Defendants who required payment by Plaintiffs of the unconstitutional fees does not interfere with the lawful function of the state as surely there is no lawful action in mandating that Reuben Walker make payment of facially unconstitutional fees in order to access Illinois courts.

The Defendants note in their response briefs that a reason for sovereign immunity is to protect the citizens' money. But here the citizens who obtain the specific, equitable relief of restitution for an unconstitutional taking are not seen under the law as taking the state's money but are merely receiving in equity Plaintiffs' own money back due to an unjust taking by the state's actor. Without the Circuit Court being allowed to issue restitution, the ability to provide a check by the judiciary on legislative enactments would be crippled. Allowing a legislative tribunal (Court of Claims) to determine whether a refund would be paid to the Class Plaintiffs to remedy the effects of the legislature's unconstitutional statute removes any meaningful constitutional checks by the judiciary and allows the practice of unconstitutional add-on fees to flourish.

In this case, after the Illinois Supreme Court struck down the fee statute as being violative of the Plaintiffs' free access clause rights, the Circuit Court's ruling divesting itself of subject matter jurisdiction in favor of another tribunal (the Court of Claims), adds in effect yet another improper and unequitable filing fee to Reuben Walker's journey towards injustice. At a time when the Illinois Supreme Court has commissioned a court fee task force which is working to remove the monetary barriers for court access, this

additional fee, which Reuben Walker and others would have to pay in addition to those unconstitutional fees already paid, is more than a barrier to justice, it is an affront to justice.

## ARGUMENT

### I. The Circuit Court Was the Only Court Which Had Jurisdiction to Decide the Underlying Claims and the Sovereign Immunity Act Did Not Divest the Circuit Court of Subject Matter Jurisdiction

#### 1. When a Court Declares a Statute Facially Unconstitutional, This Means the Statute is Void *Ab Initio* – it is as if the Statute Never Existed

Once a statute is declared facially unconstitutional, that statute is to be considered void *ab initio* – it is as if the statute never existed. *People v. Gersch*, 135 Ill.2d 384, 390 (1990). The legal effect of such a declaration is that the parties must be returned to the place they were prior to the enactment of the facially unconstitutional statute. *In re: Marriage of Sullivan*, 342 Ill.App.3d 560, 564-65 (2nd Dist. 2003). As the above constitutional mandate notes, both parties are to be placed back to where they were prior to the enactment of the statute. In the instant case, that requires Reuben Walker and the Class Plaintiffs to receive a return of their money – restitution – and requires the Defendants to return their unjust gains – the Plaintiffs' wrongfully taken money. To do otherwise allows the Defendants to profit from their unconstitutional taking. Anything less will encourage continued use of unconstitutional "add-on" fees on litigants to fund the programs of the government which has no real relationship with the business of the courts.

#### 2. Restitution is Not a Money Damage and Does Not Deprive the Circuit Court of Subject Matter Jurisdiction

Defendants argued in their response briefs and in the Circuit Court below that restitution is just another name for "money damages" (Brief and Argument of Defendant-Appellee Class Members 18 Clerks, p. 8, Brief and Argument of Defendant-Appellees, p.

5, Brief and Argument of Defendant-Appellee Iris Martinez, Clerk of the Circuit Court of Cook County, p. 2). They attempt to parse words and seek form over substance when describing restitution as money damages. Reuben Walker sought in his 2012 Complaint a return of fees collected by Defendants paid under the facially unconstitutional statutes (C360). Restitution is defined as "…a legal action serving to cause restoration of a previous state". *Merriam-Webster*. (n.d.). Restitution. In Merriam-Webster.com dictionary. Retrieved May 16, 2023, from https://www.merriam-webster.com/dictionary/restitution. Although Defendants repeatedly argue that restitution is just another form of money damages for past loss (See all Defendants-Appellees' Briefs, *supra*), restitution and money damages are two separate and distinct forms of relief under the law.

Money damages are a substituted relief for a past loss or wrong. *Veluchamy v. F.D.I.C.*, 706 F.3d 810, 816 (7th Cir. 2013) (*infra*.). A good example would be a suit brought for a broken leg. Because the plaintiff seeking recovery cannot receive the specific relief he wants, which would be for his leg to have never been injured, the plaintiff must accept money damages paid as a substitute for this past loss – the broken leg. Restitution on the other hand is a specific equitable relief which does not look to substituted damages for a past loss but simply returns to the parties to their previous state of being (See *Raintree Homes v. Village of Long Grove*, *infra*.). Restitution provides Reuben Walker the specific thing he lacks – which is simply a return of his own money to place him back to where he was before it was taken.

The legal distinction under Illinois law of the terms "restitution" and "money damages" was set out in detail by the Illinois Supreme Court in the *Raintree Homes v. Village of Long Grove*, 209 Ill.2d 248 (2004), as noted in Plaintiffs' opening brief (Opening

Brief of Plaintiffs-Appellants, p. 37-38). The Court was clear in *Raintree Homes* that under a scenario where restitution is given for a refund of fees taken as a result of an unconstitutional statute that refund is NOT considered money damages, or even damages, under Illinois law.

> "Stated another way, plaintiffs' requested relief of a refund may be properly designated as seeking an award of restitution. While restitution may be available in both cases at law and in equity [citations omitted], the concepts of restitution and damages are quite distinct, but sometimes courts use the term damages when they mean restitution. *** The damages award is not the only money award courts make. Court may also award restitution in money; they may also order money payments in the exercise of equity powers. Damages differs from restitution in that damages is measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain." *Id*. at 257.

Further, the federal courts when dealing with federal sovereign immunity reach a similar conclusion under a slightly different analysis to determine whether the money paid to another can be considered "money damages" that cannot be awarded under the Act. The question is whether the money damages are for substitute relief or whether the money damages are paid for specific relief. Reviewing the determination of the Seventh Circuit in *Veluchamy v. F.D.I.C.*, 706 F.3d 810 (7th Cir. 2013) shows that a refund of fees would be considered specific relief and therefore are not considered damages which are forbidden under the Act.

> "A party seeks 'money damages' if he or she is seeking 'substitute' relief, rather than 'specific' relief. In other words, money damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled."

*Veluchamy v. F.D.I.C.*, 706 F.3d 810, 815 (7th Cir. 2013) (citations omitted).

In the present case, as in *Raintree Homes*, Plaintiffs sought restitution – a return of fees paid – under an invalid fee statute. In both cases, Defendants argued that immunity

acts barred the Circuit Court from providing Plaintiffs with a return of the fees paid. In *Raintree Homes*, the Illinois Supreme Court noted that restitution is not money damages and allowed the Circuit Court to provide the refund of the fees which the Plaintiff had paid under the unconstitutional statute *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004). The relief of restitution occurs in the case of a facially unconstitutional fee statute when the Defendants return the invalid fees paid by the Plaintiffs in order to remove the unjust gains from the Defendants. The return of the fees paid (money paid) is restitution. See *Raintree Homes*. The refund of Plaintiffs' own money provides specific, equitable relief for an unjust gain and not damages for a past wrong. *Id*. at 257. Plaintiffs here do not seek interest or any other form of damages for the wrongful taking – just a return of their money.

Illinois is not unique in finding a distinct legal difference between restitution and money damages in the context of refunding or providing back under equity principles the money the plaintiff paid to access the court where a facially unconstitutional court fee was imposed by the defendants. The State of Ohio is another state which recognizes the distinction between restitution and money damages in the context of its sovereign immunity statute. In *Barrow v. Village of New Miami*, 104 N.E.3d 814, 217 (Ohio App. 12 Dist. 2018), a motorist sued in a class action for a declaration that a village ordinance which did not allow court review of penalties issued for speed violations via the Automated Speed Enforcement Program was an unconstitutional restriction of due process. The Class Plaintiffs also made a claim for restitution of penalties paid under the ordinance if it was found to be unconstitutional. The court noted that if the return of money paid in penalties by the Plaintiffs were considered "money damages" then the sovereign immunity statue

barred the restitution. The Ohio Appellate Court found the claim for "the restoration, refund or return" of the penalties the Plaintiffs were forced to pay pursuant to the unconstitutional ordinance were not money damages but equitable relief. *Barrow v. Village of New Miami*, 104 N.E.3d 814, 817 (Ohio App. 12 Dist. 2018).

The difference in seeking the specific equitable relief of restitution and not the payment of money damages as a substitute for a past wrong separates the instant case from the sovereign immunity cases cited by the Defendants in their three response briefs. (See, for example, *Brucato v. Edgar*, 128 Ill.App.3d 260, 83 Ill. Dec. 489 (1st Dist. 1984) (Class action suit for wage differentials seeking lost wages, interest accrued and punitive damages); *Joseph Construction Company v. Board of Trustees*, 2012 IL App 3d 110379, 362 Ill. Dec. 386 (construction contract suit involves money judgment plus pre-judgment interest); *Parmar v. Madigan*, 2018 IL 122265 (taxpayer estate claim for refund, interest and loss of use damages)). Not one of the cases cited by the Class Defendants/Intervenors concerns the issue we face here, which is the return of fees as specific equitable relief of restitution after a fee statute was declared facially unconstitutional.

In particular, in *Parmar v. Madigan*, *supra*, the plaintiff sought interest and loss of use damages which implicated sovereign immunity. *Parmar v. Madigan*, 2018 IL 122265, ¶¶ 44-45. Interest and loss of use are money damages which leads to a wholly separate result as seen in *Parmar v. Madigan*. Here, Reuben Walker asked for only his $50 back in restitution and no further recovery which could ever be considered "money damages" and this relief does not deprive the Circuit Court of subject matter jurisdiction.

### 3. The Issues Involved and Relief Sought by Reuben Walker and the Other Class Plaintiffs Do Not Divest the Circuit Court of Subject Matter Jurisdiction

In determining whether a lawsuit is one against the State of Illinois so that sovereign immunity might apply, one must look at the issues involved and the relief sought. *Jinkins v. Lee*, 209 Ill. 2d 320 (2004). Here, the issues in this class action involve questions related to the constitutionality of add-on fees statutes required for access to the courts (C960-C975.) The Court of Claims has no authority to hear constitutionally related issues. See, *Bennett v. State of Illinois*, 72 Ill. Ct. Cl. 141, 142 (2019) (federal and state constitutional issues are outside the jurisdiction of the Court of Claims). This means the Court of Claims had no jurisdiction and the Circuit Court was the only court with jurisdiction to hear all constitutionality related issues. That leaves the next issue of whether the relief sought divested the Circuit Court of subject matter jurisdiction.

In Reuben Walker's original Complaint, up to and including the Second Amended Complaint filed on behalf of all class members by the representatives, the Plaintiffs have consistently sought withing their Complaint, Amended Complaint, and Second Amended Complaint: (1) a declaratory judgment that the contested statutes were unconstitutional, (2) that the Defendants be enjoined from further taking under the unconstitutional statutes (injunction), and (3) a return of the constitutionally violative fees (restitution) (C377, C338-339, C973).

As noted earlier, the Court of Claims has no jurisdiction to determine constitutional issues and cannot therefore make a determination of whether to declare the fee statutes in this case unconstitutional (See *Bennett, supra*). What was also outside the jurisdiction of the Court of Claims was that tribunal's ability to provide an injunction enjoining the

Defendants from their unlawful actions in demanding payment of facially unconstitutional add-on fees before Plaintiffs were allowed to access the court in mortgage foreclosure matters.

In order for the Court of Claims to have jurisdiction to provide an injunction, the injunction must either (1) control the lawful activities of the state, or (2) involve a present claim against the state. *Management Association of Illinois, Inc. v. Board of Regents of Northern Illinois University*, 248 Ill. App. 3d 599, 608-609 (1st Dist. 1993). The injunction which was issued by order of the Circuit Court in the underlying *Walker* matter was used to control the unlawful operations of the Defendants, so the first prong of the two-part test is not met. As to the second prong, whether there is a "present claim against the state," the second prong must be answered in the negative, as there is no case against the state as by operation of law the state cannot be guilty of unconstitutional action. See, *Leetaru v. Board of Trustees of University of Illinois*, 2015 Il 117485 ¶ 46. Therefore, there is a failure of both prongs of the test as to whether the Court of Claims had jurisdiction to enter the equitable relief of an injunction in the underlying *Walker* case.

Finally, as noted above, and in the Opening Brief of Class Plaintiffs-Appellants (Opening Brief of Plaintiffs-Appellants, p. 13), the final request for relief sought by Reuben Walker and the other Class Plaintiffs is restitution/refund of fees. This relief is equitable in nature and is not considered money damages that divest the Circuit Court of jurisdiction. Therefore, at no time has the Court of Claims ever acquired jurisdiction to provide the relief sought by the Class Plaintiffs.

**4. In the Factually Similar Case of *Crocker v. Finley* in which a Trustee Was Appointed and Ordered to Provide a Program Which Returned the Facially Unconstitutional Add-On Court Fees Paid by the Plaintiffs, Neither the Illinois Supreme Court Nor the Defendants Claimed Such Money Payments Caused the Circuit Court to Lose Subject Matter Jurisdiction**

In their response briefs, none of the Defendants or Intervenors recognized that in the factually similar case of *Crocker v. Finley*, 99 Ill. 2d 444 (1984) (another case where the legislature forced Illinois citizens to pay facially unconstitutional court fees for general social programs unrelated to the court system), the lower court made a determination of unconstitutionality and ordered the trustee who was administering the fund containing the challenged fees to prepare a plan of refund (restitution) to all Class Plaintiffs. 99 Ill.2d at 449. The Court stayed that order setting the refund program until the direct appeal was taken to the Supreme Court of the orders entered by the Circuit Court. *Id*. at 449. The Illinois Attorney General for the People of Illinois and the State's Attorneys of Cook County for Morgan Finley, then the Circuit Court Clerk of Cook County, appealed the decision. At the time *Crocker* went to the Illinois Supreme Court, it was clear from the orders of the Circuit Court that the trustee in charge of the refund program was already in place, and a mandate had been given to the trustee to provide a program allowing the refund of fees to the Class Plaintiffs. *Id*. at 449. The Illinois Supreme Court decision in *Crocker* contains no claim like that being made in the instant case that the Circuit Court lacked jurisdiction to enter orders setting a program for restitution of fees, and that refund of fees can only occur in the Court of Claims. As noted earlier in this brief and in Plaintiffs-Appellants' opening brief, there was good reason for the Defendants not to make such claim of lack of subject matter jurisdiction of the Circuit Court – and that reason is that the

Circuit Court had subject matter jurisdiction to provide a return of the fees taken by the Defendants under a facially unconstitutional statute.

The Illinois Supreme Court in *Crocker,* after making the declaration that the challenged add-on fee statute was facially unconstitutional, returned the case for further proceedings in the Circuit Court where the order setting a program for refund of the fees paid was stayed pending the constitutional challenge of the Defendants. Common sense dictates that the Supreme Court knew what was to occur in the Circuit Court after the declaration of facial unconstitutionality which was that the parties are to be returned to their relative positions held prior to the enactment of the statute. This means return of the fees to the Class Plaintiffs and refund of the invalid fees taken by the Defendants. (See, *Raintree Homes*, *supra*).

Illinois courts are duty bound to determine issues of jurisdiction, even *sua sponte*, if necessary. *Bradley v. City of Marion*, 2015 IL. App ($5^{th}$) 140267 ("Illinois courts have an independent duty to consider subject matter jurisdiction"). See also, *Baldwin v. Illinois Workers' Compensation Comm'n,* 409 Ill App 3d 472, 501-502 (Illinois appellate courts have an independent duty to consider the jurisdiction of the Circuit Court). When the Supreme Court in *Crocker* remanded the case back to the Circuit Court "for further proceedings," the Supreme Court and parties had to understand the only remaining significant issue in the lower court was to complete the program of distribution of the refunded fees to the plaintiff class. It is expected the Supreme Court fulfilled its duty of determining subject matter jurisdiction when it sends a case back to the Circuit Court. And the *Crocker* court would not have remanded to the Circuit Court unless it believed the

Circuit Court had jurisdiction to complete the program to refund fees to the Class Plaintiffs which was begun by order of the Circuit Court and stayed to allow Defendants to appeal.

This action of restitution of fees in the Circuit Court is exactly what should have happened to Reuben Walker and the other Class Plaintiffs here, but did not due to the Circuit Court's misunderstanding of the distinction between restitution and money damages in a facially unconstitutional fee statute case, and that sovereign immunity did not eliminate its jurisdiction to order restitution.

### 5. The Order Below is Inconsistent With the Mandate of the Supreme Court

The decision of the Illinois Supreme Court in the instant case concluded as follows:

"For the following reasons, we affirm the judgment of the Circuit Court of Will County and remand the cause for further proceedings ***consistent with this opinion***." *Walker v. Chasteen*, 2021 IL 126086, ¶ 51.

Following remand to the Circuit Court, that court dismissed the cause of action and instructed Plaintiffs that any further relief required them to file a new proceeding before the Illinois Court of Claims (C3016 V2-3018 V2). That order is patently contrary to and "inconsistent with" the opinion of the Illinois Supreme Court in this case.

The issues addressed by the Supreme Court here all related to or arose from whether the add-on imposed by the legislature impermissibly interfered with litigants' constitutional right of access to the courts. The Court held that this fee did interfere with that right and held that the statute in question was facially unconstitutional. By virtue of that finding, the statute in question was to be treated in further proceedings as void from the beginning and conferred no right whatsoever to charge or retain the fee imposed by this unlawful legislation. On remand, Defendants persuaded the trial court that the mandate of

the Supreme Court required the court system to dismiss the existing cause of action and impose an additional filing fee on Plaintiffs which is required for any filing in the Court of Claims. 705 ILCS 505/21. Accordingly, the decision below "interpreted" the Supreme Court's opinion striking down and holding the imposition of this fee as void as interfering with a constitutional right of access by imposing an additional fee on Plaintiffs seeking relief from a statute which was to be treated as having no existence whatsoever. The trial court's decision was contrary to the directions of the Supreme Court in its mandate and should be vacated by this Court.

The mandatory direction of the Supreme Court in its mandate did not permit the trial court to proceed in any manner that would be inconsistent with its opinion. Following remand, a trial court is limited to "only such further proceedings as conformed to the judgment of the appellate tribunal." *Clemons v. Mechanical Devices Co.,* 202 Ill. 2d 344 (2002). A reviewing court mandate, however, need not provide specific directions in remanding a cause. *Id*. at 353. As the First District pointed out in *Barnai v. Walmart,* 221 IL App (1st) 191306 (2021):

"If a cause is remanded with directions that are not specified, the court to which the cause is remanded must examine the reviewing court's opinion and proceed in conformity with the views expressed in it. [Citing *Clemons*] We must reverse any orders by the Circuit Court that it entered following remand that do not conform to our mandate." *Barnai v. Wal-Mart Stores, Inc*., 2021 IL App (1st) 191306, ¶ 43 citing *Clemons, supra*).

In considering the proper interpretation of a reviewing court's mandate, common sense should prevail in order to reach a result consistent with the issues and opinion of the reviewing court. *Dawkins v. Fitness International, LLC,* 2022 IL 127561, ¶ 40. In the

instant case, where the opinion of the Supreme Court explicitly found the statute which imposed the fee to be unlawful and conferred no right on the government or government officials to collect any additional fees, interpreting that mandate as imposing additional filing fees arising from the original unlawful legislation makes no sense whatsoever and this order of the Circuit Court should be reversed.

## CONCLUSION

The Circuit Court's August 30, 2022, order, if allowed to stand, would upend the role of the judiciary system as the protector of the constitutional rights of citizens. The Class Plaintiffs cannot seek redress in the Court of Claims, as the tribunal has no jurisdiction to hear class actions or constitutional claims. Conversely, although the Circuit Court has jurisdiction to hear class actions and constitutional claims, the Circuit Court has ruled that it has no jurisdiction to provide Reuben Walker and the remaining Class Plaintiffs with a refund they paid in unconstitutional fees. The Circuit Court's ruling effectively declared that the courts have no power to return illegally taken monies to correct the impact of unconstitutional fee statutes on the citizens of the state who paid the fees. It is unjust to allow the Defendant state actors not to return the money to which they are required to return after a finding that a fee statute is facially unconstitutional. Moreover, this ruling ignores the obligation of the courts to provide oversight of and relief from unconstitutional legislative acts.

WHEREFORE, Petitioners Reuben Walker and M. Steven Diamond, individually, and on behalf of themselves and on behalf of all other individuals or institutions who paid residential mortgage foreclosure add-on fees, respectfully request this Court to reverse the judgment of the Circuit Court and to remand this matter with instructions that the Circuit

Court has jurisdiction over this matter and the authority to approve a plan for refund to the Class Plaintiffs of the fees taken by the Defendants.

Respectfully submitted,

REUBEN D. WALKER and M. STEVEN DIAMOND, Class Plaintiffs-Appellants.

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**CERTIFICATE OF COMPLIANCE**

I certify that this reply 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

/s/ Daniel K. Cray
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*One of the Attorneys for Class Plaintiffs-Appellants Reuben D. Walker and M. Stephen Diamond*

**NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on **May 17, 2023**, the undersigned caused to be electronically filed the **Reply Brief of Plaintiffs-Appellants** with the Clerk of the Appellate Court, Third Judicial District, through the Odyssey eFileIL Case Filing System, which will electronically send notification of such filing to defendants' counsel of record. The undersigned further certifies that service of the foregoing document will be accomplished by email to the following parties:

See attached Service List.

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## CERTIFICATE OF SERVICE

Under penalties provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.

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**APPEAL TO THE APPELLATE COURT OF ILLINOIS**
**FOR THE THIRD DISTRICT**

**FROM THE 12th JUDICIAL CIRCUIT OF WILL COUNTY, ILLINOIS**

| | | |
|---|---|---|
| REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, et al.<br><br>Defendants-Appellees. | ) | Case No. 12 CH 5275<br><br>Honorable Judge John C. Anderson<br>Judge Presiding.<br><br>Pursuant to Supreme Court Rules 301 and 303 |

## NOTICE OF APPEAL

PLEASE TAKE NOTICE that Class Plaintiffs Reuben Walker and M. Steven Diamond, by counsel, and pursuant to Illinois Supreme Court Rules 301 and 303 hereby appeal to the Appellate Court of the State of Illinois, Third District, from the following order entered in this matter in the 12th Judicial Circuit of Will County:

- Order of August 30, 2022, granting Will County's Motion to dismiss on the basis that the circuit court lacked jurisdiction to provide any relief to plaintiffs relative to their claim for the restitution of the fees paid under a fee statute found to be facially unconstitutional. The order states that it resolves all matter pending before the court.

A copy of the August 30, 2022 order is attached.

By this appeal, Plaintiff-Appellant will ask the Appellate Court to reverse the order entered and remand this matter to the circuit court for further proceedings.

DATED: September 28, 2022

Respectfully Submitted,

Reuben D. Walker and M. Steven Diamond
Plaintiffs-Appellants

By: /s/Daniel K. Cray
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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

| | | |
|---|---|---|
| REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 12 CH 5275 |
| ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, | ) | John C. Anderson Circuit Judge |
| Defendants. | ) | |

**ORDER**

In March 2020, this Court declared section 15-1504.1 of the Code of Civil Procedure (735 ILCS 5/15-1504.1), and also sections 7.30 and 7.31 of the Illinois Housing Development Act (20 ILCS 3805/7.30 and 20 ILCS 3805/7.31), unconstitutional. The Illinois Supreme Court affirmed. *Walker v. Chasteen*, 2021 IL 126086.

This Court's prior orders did not resolve issues of damages sought in the complaint (specifically, restitution relating to the plaintiff class members' payment of unconstitutional court fees).

Pending before the Court are three motions: (1) Will County's supplemental motion to dismiss; (2) Cook County's motion for summary judgment on damages; (3) the Illinois Attorney General's motion (on behalf of various circuit clerks) for judgment on the pleadings. Even though the three motions are advanced under three different procedural vehicles, they all make the same basic argument. Specifically, the governmental entities all contend that the question of restitution must be litigated in the Court of Claims.

The Court of Claims Act (705 ILCS 505/1 *et seq.*) creates a forum for actions against the State. *Healy v. Vaupel*, 133 Ill. 2d 295, 307 (1990). That statute, with some exceptions not relevant here, provides that the Illinois Court of Claims "shall have exclusive jurisdiction to hear and determine *** [a]ll claims against the State founded upon any law of the State of Illinois." 705 ILCS 505/8(a).

The circuit clerks are nonjudical members of the judicial branch of state government. *See Drury v. McLean Cty.*, 89 Ill. 2d 417 (1982). In other words, the defendant class members are state officers. However, the determination of whether an action is against the State "does not depend on the identity of the formal parties, but rather on the issues raised and the relief sought." *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 186 (1984). If a judgment for plaintiff could operate to control the actions of the State or subject it to liability, the action is effectively against the State and is barred by sovereign immunity. *Currie v. Lao*, 148 Ill. 2d 151, 158 (1992). The justification advanced in support of the doctrine is that it "protects the State from interference in its performance of the functions of government and preserves its control over State coffers." *S.J. Groves & Sons Co. v. State of Illinois*, 93 Ill. 2d 397, 401 (1982), *overruled on other grounds*, *Rossetti Contracting Co. v. Ct. of Claims*, 109 Ill. 2d 72, 79 (1985). Here, the Amended Complaint seeks "[a]n order to return all fees collected pursuant to this statute to Plaintiffs." The Court must conclude that the remaining aspects of the case involve a request for money damages, thereby implicating sovereign immunity.

Plaintiffs suggest that the Court of Claims cannot hear the case because their restitution claim is equitable in nature. Plaintiff's might be right regarding their claim being based in equity. As the Illinois Supreme Court stated in *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248, 257 (2004):

> Stated another way, plaintiffs' requested relief of a refund may be properly designated as seeking an award of restitution. While restitution may be available in both cases at law and in equity, "[t]he concepts of restitution and damages are quite distinct, but sometimes courts use the term damages when they mean restitution." As Professor Dobbs states in his 1993 revision of his Treatise on Remedies:
>
> > "The damages award is not the only money award courts make. Courts may also award restitution in money; they may also order money payments in the exercise of equity powers. Damages differs from restitution in that damages is measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain."
>
> (Internal citations omitted.)

However, even if the restitution sought here should be viewed as a purely equitable remedy, the Court of Claims' jurisdiction is not limited to monetary "damages at law" claims. It has authority

to grant equitable relief. *See Management Ass'n of Illinois, Inc. v. Board of Regents of Northern Illinois University*, 248 Ill.App.3d 599, 610 (1993).

For the reasons stated in the governmental entities' briefs, the Court agrees that the Court of Claims Act, and the Illinois Supreme Court's ruling in *Parmar v. Madigan*, 2018 IL 122265, and that fact that the last remaining issue involves a monetary claim against the State, the Court must agree that it lacks jurisdiction to proceed.

Will County's supplemental motion to dismiss is granted to the extent it seeks dismissal for lack of jurisdiction over plaintiff's restitution claims. This order does not impact the permanent injunction previously entered by the Court; that order was entered with jurisdiction and remains enforceable. However, the Court lacks jurisdiction to provide any relief to plaintiffs relative to their claim for restitution. Accordingly, the prayers for restitution are stricken. Class plaintiffs may pursue their request for restitution in the Court of Claims. Cook County's motion for summary judgment, and the Illinois Attorney General's motion for judgment on the pleadings, are denied as moot. This order resolves all matters pending before this Court. Clerk to notify.

ENTERED:

Dated: August 30, 2022

John C. Anderson
Circuit Judge

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| 12/27/21 | Appearances' on behalf of Defendants Class Member Circuit Court Clerk's of: Adams County; Carroll County; Champaign County; Clark County, Crawford County; Effingham County; Ford County; Livingston County; Logan County; Monroe County; Moultrie County; Olge County; Piatt County | C2744-45 |
| 12/27/21 | Petition to Intervene Clerks of the Circuit Court of Adams, Carroll, Champaign, Clark, Crawford, Effingham, Ford, Livingston, Logan, Monroe, Moultrie, Ogle, and Piatt Counties' | C2746-48 |
| 12/27/21 | Notion of Motion Appearance before Honorable John Anderson present the Petition To Intervene | C2749-52 |
| 12/29/21 | Class Plaintiffs' Objection to the Eighteen Circuit Court Clerks' Petitions to Intervene | C2753-71 |
| 12/29/21 | Notice of Filing Class Plaintiffs' Objection to the Eighteen Circuit Court Clerks' Petition to Intervene | C2772-75 |
| 01/03/22 | Class Plaintiff's Motion for Discovery Order and Sanctions as to Those Defendant Clerks Who Failed to Respond to Discovery | C2776-86 |
| 01/03/22 | Class Plaintiffs' Motion for discovery Order and for Sanctions as to the seven Clerks Who have failed to Provide Complete Written Discovery Answer and Responses | C2799-2810 |
| 01/03/22 | Notice of Motion | C2811-14 |
| 01/03/22 | Class Plaintiffs' Motion for Leave to File a Sur-Response to Defendant Cook County Circuit Court Clerk's Citation of Additional Authority in Support of the Motion to Dismiss and Motion for Summary Judgement | C2815-30 |
| 01/03/22 | Order | C2831-32 |
| 01/04/22 | Intervenor-Defendant Cook County Circuit Court Iris Martinez's Brief In Support of The 18 Clerks Petitions to Intervene | C2833-35 |
| 01/04/22 | Notice of Filing | C2836-37 |
| 01/05/22 | Response to Plaintiffs' Motion for Sanctions | C2838-51 |
| 01/05/22 | Notice of Filing James W. Glasgow Response to Plaintiffs' Motion for Sanctions | C2852-53 |
| 01/10/22 | Order | C2854-55 |
| 01/12/22 | Order | C2856-57 |
| 01/12/22 | Class Plaintiffs' Sur-Response in Opposition to Defendant Cook County Circuit Court Clerk's Citation of Additional Authority in Support of the Motion to Dismiss and Motion for Summary Judgement | C2858-71 |
| 01/12/22 | Notice of Filing | C2872-75 |
| 02/04/22 | Proof of Service Certificate of Service | C2876 |

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| 02/07/22 | Defendant's Answer to Plaintiff's Amended Interrogatories Nos. 2 and 6 Filed for Christian County Circuit Clerk | C2877-90 |
| 02/07/22 | Notice of Filing and Proof of Service | C2891 |
| 02/08/22 | Defendant's Amended Answer to Plaintiff's Amended Interrogatories Nos. 2 and 6 Filed for Christian County Circuit Clerk | C2892-25 |
| 02/10/22 | Order | C2926-27 |
| 02/14/22 | Entry of Appearance (No Fee Previously Paid on Behalf of Other Party) | C2928-31 |
| 02/22/22 | Notice of Filing Filed For Williamson Co Clerk (Impounded) | C2932 |
| 03/16/22 | Class Plaintiff's Petition for Rule to Show Cause | C2933-41 |
| 03/18/22 | Class Plaintiffs' Motion for Disposition/Distribution | C2942-50 |
| 03/18/22 | Notice of Motion Hon. Judge John C. Anderson Class Plaintiffs' Motion for Disposition/Distribution | C2951-54 |
| 03/22/22 | Order | C295556 |
| 03/23/22 | Motion for Judgement on the Pleadings by the Clerks of the Circuit Courts of DuPage, Kane, Kendall, Lake and Winnebago Counties | C2957-58 |
| 03/23/22 | Memorandum of Law in Support of Motion for Judgement on the Pleading Filed by Intervenors Clerk of the Circuit court of DuPage, Kane, Kendall, Lake, and Winnebago Counties | C2959-70 |
| 03/24/22 | Motion for Judgement on Pleadings by the Clerks of the Circuit Courts of DuPage, Kane, Kendall, Lake and Winnebago Counties | C2971-72 |
| 03/24/22 | Memorandum of Law in Support of Motion for Judgement on the Pleadings Filed by Intervenors Clerks of the Circuit Courts of Dupage, Kane, Kendall, Lake, and Winnebago Counties | C2973-84 |
| 03/24/22 | Notice of Filing | C2985-88 |
| 04/07/22 | Order | C2989 |
| 04/08/22 | Notice of Filing | C2990-93 |
| 04/08/22 | The Eighteen Clerks' Memorandum Regarding Plaintiffs' Reliance on the Law of the Case Doctrine | C2994-97 |
| 04/08/22 | Intervenor-Defendant Cook County Circuit Court iris Martinez's Objection and Response to Plaintiff's Motion to Strike Filing Based on the Law-of-the Case Doctrine | C2998-3000 |
| 04/08/22 | Notice of Filing | C3001-02 |
| 06/30/22 | Notice of Change in Contact Information | C3003-05 |
| 06/30/22 | Order | C3006 |
| 07/19/22 | Order | C3007-14 |
| 07/21/22 | Order | C3015 |
| 08/30/22 | Order | C3016-18 |

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 10, 2024, I electronically filed the foregoing Opening Brief and Appendix of Defendants-Appellants 18 Clerks with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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