No. 130033

IN THE
SUPREME COURT OF ILLINOIS

TERRENCE LAVERY and ILLINOIS PROFESSIONALS HEALTH PROGRAM, LLC,	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-22-0990
Plaintiffs-Appellees,	)	
and	)	
ANIL RAMACHANDRAN,	)	There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 2020-CH-01202
Plaintiff,	)	
v.	)	
DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION,	)	The Honorable CAROLINE KATE MORELAND, Judge Presiding.
Defendant-Appellant.	)	

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Plaintiffs' forfeiture arguments are meritless.

The arguments of Plaintiffs-Appellees Terrence Lavery and Illinois Professionals Health Program, LLC, about forfeiture (which they incorrectly label "waiver") are mistaken and overlook several relevant principles. AE Br. 12-17. To begin, forfeiture occurs when a party fails to raise an argument in a lower court. *See Lintzeris v. City of Chi.*, 2023 IL 127547, ¶ 42. By contrast, waiver "is an intentional relinquishment or abandonment of a known right or privilege." *People v. Lesley*, 2018 IL 122100, ¶ 36. Defendant-Appellant Department of Financial and Professional Regulation did not forfeit (much less waive) the arguments that it raises in this Court.

To be sure, the Department did not raise sovereign immunity in the circuit court, and it did not specifically argue in its opening brief in the appellate court that plaintiffs failed to allege that a state officer acted either outside his or her authority or in violation of the law, which is relevant to whether the officer suit exception to sovereign immunity applied. AT App. Br. 9-13; *see also* AE Br. 12.[1] And the Department did not argue in the circuit court or its opening brief in the appellate court that this Court should revisit its decision in *Leetaru v. Bd. of Trs. of the Univ. of Ill.*, 2015 IL 117485. AT

[1] The common law record on review is cited as C __. The Department's opening brief in the appellate court is cited as AT App. Br., and plaintiffs' response brief as AE App. Br. The Department's opening brief in this Court is referred to as AT Br., and plaintiffs' response brief as AE Br.

App. Br. 9-13; *see also* AE Br. 12. But none of this means that the Department forfeited sovereign immunity for several reasons.

First, sovereign immunity involves the circuit court's subject matter jurisdiction, *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992), as plaintiffs concede, AE Br. 26-28. And "subject-matter jurisdiction cannot either be waived," *Currie*, 148 Ill. 2d at 157, or forfeited, *Lebron v. Gottlieb Mem'l Hosp*., 237 Ill. 2d 217, 252 (2010). In short, the Department could raise any issues pertaining to sovereign immunity for the first time on appeal, as the appellate court recognized. *Lavery v. Dep't of Fin. & Pro. Regul.*, 2023 IL App (1st) 220990, ¶ 24.

While theorizing that the Department waived "pleading defects" by not raising sovereign immunity in the circuit court, plaintiffs cite no legal support for this proposed exception to the rule that matters of subject matter jurisdiction, such as sovereign immunity, cannot be forfeited or waived. *See* AE Br. 13. A failure to address a "pleading defect" — evidently plaintiffs' shorthand for the Department's decision not to raise sovereign immunity in a motion to dismiss in the circuit court — does not result in the forfeiture of subject matter jurisdiction. Plaintiffs' invocation of section 612(c) of the Code of Civil Procedure is therefore misplaced because sovereign immunity is a question of subject matter jurisdiction. *E.g.*, AE Br. 13 (citing 735 ILCS 5/2-612(c) (2022) ("defects in pleadings, either in form or substance, not objected to in the trial court are waived")); *see also, e.g., id.* at 12, 13, 15, 16, 21. Given

that subject matter jurisdiction can be neither waived nor forfeited, *see Lebron*, 237 Ill. 2d at 252; *Currie* 148 Ill. 2d at 57, the failure to raise sovereign immunity in a motion to dismiss — or at any time in the circuit court — is of no consequence.

Plaintiffs' contentions fail on other grounds, including their notion that forfeiture occurred because the Department addressed their failure to allege that a state officer acted beyond his or her authority — a component of the officer suit exception to sovereign immunity — only in its reply brief in the appellate court. AE Br. 15-17. That argument collapses under Ill. Sup. Ct. R. 341(g), which allows an appellant to respond to arguments presented in the appellee's brief. *See Solaia Tech., LLC v. Specialty Publ'g Co*., 221 Ill. 2d 558, 590 n.4 (2006) (appellant is "entitled to counter" arguments made in appellee's response brief). Pursuant to that rule, plaintiffs addressed the officer suit exception in their response brief, AE App. Br. 10-12, and the Department replied to those arguments, AT App. RY Br. 4-11. Thus, no forfeiture occurred.

Yet another principle dooms plaintiffs' forfeiture arguments: When an allegedly forfeited issue is "inextricably intertwined" with a preserved issue, this Court can address both issues. *See Holm v. Kodat*, 2022 IL 127511, ¶ 48 (discussing "inextricably intertwined" issues that this Court can reach when neither circuit court nor appellate court explicitly considered them); *cf. Lintzeris*, 2023 IL 127547, ¶ 42 ("When an issue is not specifically raised in a

party's petition for leave to appeal but it is inextricably intertwined with other matters properly before the court, review is appropriate.") (internal quotation marks omitted).

The officer suit exception is "inextricably intertwined" with any discussion of sovereign immunity because it is an *exception* to the general rule that a statute must explicitly, affirmatively, and unequivocally waive the State's immunity from suit. This Court's recent cases on sovereign immunity uniformly discuss the officer suit exception, illustrating how integral the exception is to sovereign immunity. *E.g.*, *Walker v. Chasteen (People ex rel. Raoul)*, 2025 IL 130288, ¶¶ 18-24; *Cahokia Unit Sch. Dist. No. 187 v. Pritzker*, 2021 IL 126212, ¶ 33; *Parmar v. Madigan*, 2018 IL 122265, ¶¶ 18-22; *PHL, Inc. v. Pullman Bank & Tr. Co.*, 216 Ill. 2d 250, 263 (2005). And the Department's argument that this Court should revisit the portion of *Leetaru* holding that a suit may proceed under the officer suit exception even though an arm of the State — rather than an officer — has been made a defendant is inextricably intertwined with sovereign immunity for similar reasons, as well as because the appellate court's decision here relies on *Leetaru*. *Lavery v. Dep't of Fin. & Pro. Regul.*, 2023 IL App (1st) 220990, ¶¶ 43-44.

Finally, even if the Department forfeited some aspect of its argument, which it did not, "forfeiture is a limitation on the parties and not the court," allowing this Court, in the exercise of its discretion, to address forfeited issues. *People v. Custer*, 2019 IL 123339, ¶ 19. This Court should exercise its

discretion and consider any argument that it deems forfeited because the appellate court's opinion deviates from this Court's longstanding precedent and alters sovereign immunity doctrine.

II. Plaintiffs fail to explain how the Act explicitly, affirmatively, and unequivocally waives sovereign immunity.

Plaintiffs argue that this Court should conclude that the Act waives sovereign immunity based on the plain language of the statute. AE Br. 33. This argument, which actually ignores the plain language of the Act, contravenes this Court's longstanding precedent. To waive sovereign immunity, a statute "must *explicitly* indicate, in *affirmative language*" the General Assembly's intent to do so. *Parmar*, 2018 IL 122265, ¶ 31 (emphasis added). The waiver must be "clear and unequivocal." *In re Special Educ. of Walker*, 131 Ill. 2d at 303 (internal quotation marks omitted).

As this Court has explained, "[s]tatutes that use only general terms without an expressed intent to subject the State to liability will not be construed to impair or negate the State's immunity from suit established in the . . . Immunity Act." *Parmar*, 2018 IL 122265, ¶ 32. That principle spans this Court's jurisprudence. *See City of Springfield v. Allphin*, 82 Ill. 2d 571, 578 (1980); *Dep't of Revenue v. App. Ct.*, 67 Ill. 2d 392, 396 (1977); *Dep't of Pub. Welfare v. Lyman*, 373 Ill. 27, 30 (1939); *Am. Legion Post No. 279 v. Barrett*, 371 Ill. 78, 85 (1939); *People ex rel. Barrett v. Or. State Sav. Bank*, 357 Ill. 545, 550 (1934); *People ex rel. Nelson v. W. Englewood Tr. & Sav. Bank*, 353 Ill. 451, 46-62 (1933); *People v. Waukegan State Bank*, 351 Ill. 548, 550

(1933). And statutes that authorize the imposition of attorney fees and costs, like the Mental Health and Developmental Disabilities Confidentiality Act here, 740 ILCS 110/1 *et seq*. (2022), must be strictly construed, especially when attorney fees and costs are sought against the State. *In re Special Educ. of Walker*, 131 Ill. 2d at 307 ("Nothing will be read into such statutes by intendment or implication.").

Despite nearly 100 years of such precedent, plaintiffs assert that the General Assembly intended to waive sovereign immunity in section 15 of the Act. AE Br. 32-36. But no such intent can be discerned from that provision's wording, which does not reference the State and instead generally provides that "[r]easonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act." 740 ILCS 110/15 (2022). Such fees are available to "[a]ny person aggrieved by a violation of this Act . . . ." *Id.* Nowhere in this language did the General Assembly make "explicit" that the State or one of its agencies may be liable for attorney fees and costs. *See Parmar*, 2018 IL 122265, ¶ 31. In short, there is no "affirmative language" indicating that the legislature intended to waive sovereign immunity in section 15 of the Act.

By contrast, explicit, affirmative, and unequivocal language of the type required by *Parmar* and the cases cited above is found in statutes such as the Illinois Educational Labor Relations Act, which states that, "[f]or purposes of this Act, the State of Illinois waives sovereign immunity." 115 ILCS 5/19

(2022). Likewise, the Illinois Toll Highway Act provides that "[t]he State of Illinois hereby consents to" certain "suits against the [Illinois Toll Highway] Authority" that fall into specified categories. 605 ILCS 10/31 (2022).

Despite the distinction between these two statutes' unambiguous waivers and the language in the Act, plaintiffs maintain that a legislative intent to waive sovereign immunity can be gleaned from the Act's plain language. AE Br. 33. When conducting such an analysis, this Court's paramount consideration "is to ascertain and give effect to the intent of the legislature." *Bd. of Educ. of Richland Sch. Dist. No. 88A v. City of Crest Hill*, 2021 IL 126444, ¶ 22. If statutory language is "clear and unambiguous, [the Court] will enforce it as written and will not read into it exceptions, conditions, or limitations that the legislature did not express." *Id.* (internal quotation marks omitted).

Lacking the ability to cite any such plain language, plaintiffs wrongly assert that "waiver does not need to be clearly expressed" because the Act should be read "as a whole." AE Br. 33. In support of this argument, they cite no authority in the sovereign immunity realm. *See id.* And, as the Department explained in its opening brief, a long line of this Court's decisions requires specific statutory waivers without looking to the broader import or wording of an entire statutory scheme. AT Br. 16-17. Those cases hold that the State may not be subject to monetary awards when a statute is silent or lacks explicit, affirmative, and unequivocal language. *Id.* (citing, *e.g.*, *In re*

Special Educ. of Walker, 131 Ill. 2d at 304 (costs not permitted where statute "do[es] not in express terms refer to the State")).

Even if plaintiffs' arguments about interpretative analysis had merit, the additional provision that they identify for context, section 3(b) of the Act, does not strengthen their premise that section 15 contains a "plain language" waiver of sovereign immunity. *See* AE Br. 33-34. And by having to resort to other sections of the Act, plaintiffs implicitly concede that section 15 contains no explicit, affirmative, and unequivocal waiver. *Id*. Nevertheless, plaintiffs invoke section 3(b), which specifies that a therapist's "personal notes" are not "subject to discovery in any judicial, administrative or legislative proceeding." 740 ILCS 110/3(b) (2022). But that language does not, as in other statutes, make clear that the General Assembly intended to waive sovereign immunity as to a monetary award. *Cf., e.g.*, 115 ILCS 5/19 (2022).

And the fact that section 3(b) mentions administrative and judicial proceedings, which sometimes involve only private parties, does not mean that sovereign immunity ceases to apply when the State is party to such a proceeding. *See* AE Br. 34. Plaintiffs infer from this language that in an adversarial proceeding involving the State, if attorney fees and costs are specified, and a private party prevails, it follows that the State must pay attorney fees and costs. *See id*. Plaintiffs' points here, however, ignore this Court's plain meaning analysis by reading into the Act words that do not

appear. *See id.*; *Bd. of Educ. of Richland Sch. Dist. No. 88A*, 2021 IL 126444, ¶ 22 (court will not rewrite statutes).

Plaintiffs' next statutory theory, on the import of the word "any," also falters. *See* AE Br. 34 (highlighting statutory language of "*any* . . . proceeding," "*any person*," and "*any action*") (emphasis in original); *see also id*. at 35. They assert that the use of "any" means that the General Assembly provided an explicit, affirmative, and unequivocal waiver of sovereign immunity. *Id*. at 34-35. But plaintiffs overlook *In re Special Educ. of Walker*, which spurned the idea that "any" was shorthand for a waiver of sovereign immunity. 131 Ill. 2d at 303-05. Like plaintiffs' argument here, the plaintiffs in that case contended, "and the appellate court held, that the language 'or *any* other governmental entity' clearly indicates the legislature's intent to . . . waive the State's immunity because it contains no restriction as to the type or level of governmental entity embraced by the statutory language." *Id*. at 303-04 (emphasis added). In rejecting that argument and reversing the appellate court's decision, this Court concluded that if "the legislature intended to impose liability upon the State, it would have followed its pattern of using explicit language of waiver and it would have expressly referred to the State." *Id*. at 307. That pattern is absent here. Section 15 does not refer to the State.

Plaintiffs' final argument in this area, urging the Court to follow *Grey v. Hasbrouck*, 2015 IL App (1st) 130267 (legislature expressly waived sovereign immunity in allowing fees for violations of the Illinois Constitution in Illinois

Civil Rights Act of 2003), *see* AE Br. 35-36, is unpersuasive. For starters, *Grey* does not overcome plaintiffs' failure to identify the required explicit, affirmative, and unequivocal waiver of sovereign immunity in the Act. AE Br. 35-36. And an appellate court decision like *Grey* does not bind this Court, limiting its value as authority. *Rickey v. Chi. Transit Auth.*, 98 Ill. 2d 546, 551 (1983).

Another oddity of *Grey*, which plaintiffs embrace, is how it flips the longstanding requirement in this Court that a waiver of sovereign immunity be explicit, unequivocal, and affirmatively stated. *E.g.*, *Parmar*, 2018 IL 122265, ¶ 31; *In re Special Educ. of Walker*, 131 Ill. 2d at 307. Contrary to those cases, *Grey* holds that if a statute is *silent* on waiver, then the General Assembly must have intended to subject the State to money damages, plus the imposition of attorney fees and related costs. 2015 IL App (1st) 130267, ¶ 20 ("where the legislature wishes to excuse the State or other entities from filing and other fees imposed by the circuit court in connection with litigation, it knows how and has done so expressly") (internal quotation marks omitted).

This backwards formulation — that statutory silence is consent to a wavier of sovereign immunity — radically departs from the requirement in this Court for nearly a century that a statute must state expressly that the State waives sovereign immunity. Yet plaintiffs' approach would ignore this settled precedent and read into the Act a silent and implicit waiver of sovereign immunity. AE Br. 36 (arguing that if General Assembly "intended

to exclude the State from the inclusive language of the [Act], it needed to, and would have, expressly done so"). That erasure of sovereign immunity principles would entice other plaintiffs to argue that the State could be pursued for money damages under similar provisions that are also silent on the State's liability.

In sum, this Court should conclude that section 15 of the Act lacked the required explicit, affirmative, and unequivocal waiver of sovereign immunity.

III. Plaintiffs fail to advance the appellate court's conclusion that they qualify under the officer suit exception to sovereign immunity.

Plaintiffs' arguments that they qualify under the officer suit exception, or the "prospective injunctive relief exception," to sovereign immunity do not withstand scrutiny for several reasons. To start, the officer suit exception requires a party to allege that a state officer's conduct violates the law or exceeds his or her authority. *Walker*, 2025 IL 130288, ¶¶ 23-25; *Parmar*, 2018 IL 122265, ¶ 22.

Even then, however, the officer suit exception will apply only if "a plaintiff seeks to enjoin future conduct that is alleged to be contrary to law," not compensation "for a past wrong." *Walker*, 2025 IL 130288, ¶ 32 (internal quotation marks omitted). The "essential element" of the officer suit exception is "forward-looking relief." *Id*. ¶ 24 (distinguishing present claims from actions that seek to enjoin anticipated, unauthorized actions by individuals); *see also PHL, Inc.*, 216 Ill. 2d at 261-62 (recognizing difference

between prospective and retrospective relief). Moreover, the officer suit exception is inapplicable when a plaintiff asserts a present claim that has the potential to subject the State to liability. *Ellis v. Bd. of Governors of State Colls. & Univs.*, 102 Ill. 2d 387, 395 (1984) (holding that plaintiff's claim that she was unlawfully discharged from her tenured position, although labeled one for injunctive relief, was actually "a present claim which has the potential to subject the State to liability"). A present claim, which seeks to assess monetary relief for a past occurrence, is a claim against the State barred by sovereign immunity. *Id*.

Plaintiffs' request for attorney fees and costs does not meet either of these threshold requirements — a forward-looking, injunctive-type remedy, and an allegation concerning a state officer's conduct.

A. Attorney fees and costs are not forward-looking relief.

Plaintiffs provide no compelling explanation of how the attorney fees and costs represent forward-looking relief. Instead, plaintiffs largely offer a recap of the underlying dispute about the documents. *E.g.*, AE Br. 23 ("The issue was whether [the Department] was improperly trying to obtain statutorily privileged therapist's notes and the relief sought was a protective order and declaratory judgment to stop" the Department.); *see also id.* at 24-25. But none of the events preceding the protective order bear on the question whether plaintiffs' *pursuit of attorney fees and costs* enjoins "future conduct that is alleged to be contrary to law." *Walker*, 2025 IL 130288, ¶ 32. As this

Court's case law makes clear, plaintiffs are seeking compensation "for a past wrong," *id*., because attorney fees and costs are present compensation for past harm, not future conduct or forward-looking relief, *see State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2018 IL 122487, ¶¶ 18-19 (attorney fees compensate prevailing party's lawyers for work performed, at successful conclusion of litigation, including "reasonable expenses . . . incurred"). Payment of those fees is post-performance. Costs, too, are billed at the conclusion of an action and reflect expenses already incurred.

The non-forward-looking and indeed backward-looking aspect of attorney fees and costs is fatal to plaintiffs' reliance on the officer suit exception. *See Walker*, 2025 IL 130288, ¶ 32. Even if plaintiffs' claim for attorney fees and costs is described as a "*present* claim to redress a past wrong," the officer suit exception does not apply. *Id.* ¶ 38 (emphasis added); *see also Ellis v. Bd. of Governors of State Colls. & Univs.*, 102 Ill. 2d at 395 (present claims are barred regardless of labeling). Although the appellate court appeared to conclude that plaintiffs were seeking injunctive relief against some unspecified future wrongful conduct, that conclusion lacks support. *Lavery*, 2023 IL App (1st) 220990, ¶¶ 27, 43. And plaintiffs neither defend this erroneous conclusion nor squarely rebut the point that attorney fees (to compensate for prior performance) and costs (billed for expenses incurred) are far removed from forward-looking relief. *See* AE Br. 19 (acknowledging that a present claim dooms invocation of officer suit exception); *see also id*. at 22-25.

Despite their implausible characterizations, plaintiffs are focused on past conduct and seek legal fees and costs for what has already occurred.

Even if the focus shifts from attorney fees and costs to the protective order itself, plaintiffs' characterization of the relief they label as "declaratory" is mistaken, *e.g.*, *id.* at 23-24, given that "declaratory relief" ordinarily "cannot remedy past conduct," if the parties do not have an ongoing relationship that requires guidance for future conduct, *RSA Props. Mission Hills, P.C. v. Mission Hills Homeowners Ass'n*, 2024 IL App (1st) 231526, ¶¶ 23-24. And here, the purported declaratory relief is backward-focused because there is no ongoing connection between the parties that necessitates additional guidance for future conduct. The administrative proceedings are over, the protective order for the documents in question is in place, and the surrounding issues cannot be revisited.

Attempting to portray the payment of attorney fees and costs as a forward-looking claim, plaintiffs (and the appellate court) describe those monies as "ancillary" to the protective order. AE Br. 25-32; *Lavery*, 2023 IL App (1st) 220990, ¶¶ 29, 31-34, 45. But this moniker does not advance plaintiffs' cause because the attorney fees and costs were in no sense imposed to ensure compliance with the protective order. Nor did the attorney fees and costs facilitate or enable the protective order. Indeed, plaintiffs could have prevailed in obtaining the protective order and never sought attorney fees and

costs. The order and compensation for the work expended to achieve them thus are independent of each other.

That distinguishes the situation from *Grey*, which plaintiffs place a great deal of reliance on. *E.g.*, AE Br. 29. But *Grey* is flawed in several respects, as the Department cataloged in its opening brief. AT Br. 18-19. Plaintiffs provide no response to many of those arguments, including the Department's criticism that *Grey* relies on a case where the monies owed by the State were part and parcel of the injunctive relief sought, not a separate money judgment. *Grey*, 2015 IL App (1st) 130267, ¶ 27 (citing *Wilson v. Quinn*, 2013 IL App (5th) 120337, ¶ 15)). By contrast here, attorney fees and costs and the protective order are inextricably linked. Plaintiffs struggle to explain how the attorney fees and costs facilitated the protective order, never acknowledging that a party can obtain a protective order and not elect to recover attorney fees and costs. *See* AE Br. 35-36.

And the federal decisions that plaintiffs rely on are similarly inapt. *See* AE Br. 29-31 (citing, *e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978)); *see also* AT Br. 21-24. Unlike in *Hutto*, where a fee award was issued to ensure compliance with an order granting injunctive relief, 437 U.S. at 690-91, the facts here involve the imposition of attorney fees and costs on the State after plaintiffs prevailed in a discovery dispute. Plaintiffs offer no convincing response to that distinction.

The "ancillary" contrivance fares no better with a string of cases cited by plaintiffs. AE Br. 25-26. Whereas none of them discuss sovereign immunity, only one involves claims against the State. *Id.* (citing *Stein v. Spainhour*, 196 Ill. App. 3d 65, 70 (4th Dist. 1990); *Duncan Publ'g, Inc. v. City of Chi.*, 304 Ill. App. 3d 778, 782-83 (1st Dist. 1999); *Poilevey v. Spivack*, 368 Ill. App. 3d 412,415 (1st Dist. 2006); *Staake v. Dep't of Corr.*, 2022 IL App (4th) 210071, ¶ 32)).

Meanwhile, plaintiffs' citation of *Ill. Dep't of Fin. & Pro. Regul. v. Rodriquez*, 2012 IL 113706, which nowhere mentions the "ancillary" concept, overlooks the key fact that the case involved a law that applies exclusively against governmental actors — the Illinois Administrative Procedure Act, 5 ILCS 100 *et seq.* (2022). The APA contains a fee shifting provision that logically can apply only against the State's agencies. 5 ILCS 100/10-55(c) (2022). That is not how the Act, which applies to both private and public parties, operates here.

B. No officer acted unlawfully.

Plaintiffs also fail to meet the second threshold requirement of the officer suit exception: an allegation that a state officer's conduct violates the law or exceeds his or her authority. *See Walker*, 2025 IL 130288, ¶¶ 23-25; *Parmar*, 2018 IL 122265, ¶ 22. Indeed, this Court's cases have described such conduct as "illegal." *Senn Park Nursing Ctr. v. Miller*, 104 Ill. 2d 169, 187-88 (1984). The required identification of an individual officer hold — principally

since *Leetaru* — that "a plaintiff may obtain relief in the circuit court even when the named defendant is a state board, agency, or department." *Walker*, 2025 IL 130288, ¶ 21 (citing *Leetaru*, 2015 IL 117485, ¶ 44). As the Department argues below, however, that aspect of *Leetaru* should be revisited by this Court because it conflicts with longstanding precedent and creates needless confusion. See section IV, *infra* at 20-22.

Despite their extensive deviation into an issue not before this Court — namely, whether the documents sought by the Department were protected by the Act from disclosure — plaintiffs do not explain how a never-identified state official acted in excess of delegated authority or in violation of the law. *See* AE Br. 22-25. By devoting much of their argument to an irrelevant examination of the procedural background and the ultimate result of the parties' dispute about the confidentiality of Dr. Lavery's notes, *see id.*, plaintiffs are focused on irrelevant details instead of answering the key question: Who is the official who acted *ultra vires*? Having conceded that they did not intend to identify the ALJ as the official acting unlawfully, *see Lavery*, 2023 IL App (1st) 220990, ¶ 38; C439, plaintiffs have never pointed to anyone else who is plausibly the wrongful actor. Identifying such an officer is an essential facet of the officer suit exception. *But see Leetaru*, 2015 IL 117485, ¶ 44. But here, that person remains unnamed.

Quoting the appellate court, plaintiffs repeat speculation that "'the *Department knew* that the documents might be privileged, *resisted* plaintiffs'

efforts to settle that question, and *doggedly persisted* in its demand for their production.'" *Id.* at 11 (quoting *Lavery*, 2023 IL App (1st) 220990, ¶ 42 (emphasis added)). These personal characterizations, involving thought and action, imply that a person or people are referenced. At one point, plaintiffs appear to home in on the litigation decisions of the attorney representing the Department before the ALJ and in the circuit court, yet repeatedly refer to the Department itself, not an individual state actor. AE Br. 10-11. But neither the appellate court nor plaintiffs cite any authority holding that an attorney representing her client within the bounds of the law and in compliance with ethical obligations somehow acts beyond the scope of her authority by advocating for her client. All that plaintiffs muster here is that *the Department's* "resistance to the necessity of an *in camera* inspection . . . caused Plaintiffs to be aggrieved and . . . caused attorney's fees to be incurred." *Id*. at 25. Elsewhere, plaintiffs state that "it is reasonable to infer" that the Department's litigation strategy and decisions "in violation of the [Act] were taken at the behest of or with the consent of an [Department] agent or employee." *Id*. But again, no such person is identified, and the mystery of the responsible, wrongful actor persists.

If the Department's attorney is that person by implication, plaintiffs did not seek to sanction her in the circuit court for arguing that the documents should be produced. Nor did they have any basis to do so. *See Ingram v. Intili*, 2022 IL App (1st) 210656, ¶ 9 (sanctions under Ill. Sup. Ct. R. 137 should not

be used "penalize attorneys or litigants who were zealous but unsuccessful"). And the appellate court's characterization of how the Department (but again, not the attorney) "*knew* that the documents might be privileged, resisted plaintiffs' efforts to settle that question, and doggedly persisted in its demand for their production" is baseless. *Lavery*, 2023 IL App (1st) 220990, ¶ 42 (emphasis added). The "knowledge" of Department officials and their attorney during the circuit court proceedings is privileged and not part of this record. And the Department's right to vindicate its position in an adversarial system, with its attorney performing her job on behalf of her client, is not tantamount to actions taken in excess of authority or in violation of the law. Such advocacy is certainly not "illegal." *See Senn Park Nursing Ctr*, 104 Ill. 2d at 187-88. No decision by this Court holds that an unfavorable discovery ruling by a trial court is the basis for a party to successfully invoke the officer suit exception to sovereign immunity. This case should not create that rule.

And because they have failed to identify both a forward-looking claim and an officer who acted in excess of her authority or unlawfully, allowing plaintiffs to amend their complaint on remand would serve no purpose. Plaintiffs devote significant argument space to this prospect. AE Br. 21-22; *see also id*. at 13, 17, 37. But amendment would be futile because plaintiffs cannot cure the defect in their complaint by amending it on remand. *See Clay v. Kuhl*, 189 Ill. 2d 603, 614 (2000).

In sum, given the backward-looking nature of a bill for attorney fees and costs, along with the absence of an identified state actor who exceeded her authority, the officer suit exception does not apply, and no amendment of the complaint can cure its essential defect.

IV. Plaintiffs supply no lifeline for *Leetaru*.

Finally, plaintiffs offer no compelling arguments for why this Court should not overrule the portion of *Leetaru* holding that an action is viable under the officer suit exception when a plaintiff neglects to name an officer — an actual, identifiable person — as a defendant. AE Br. 17-21; *see Leetaru*, 2015 IL 117485, ¶ 44.

This aspect of *Leetaru* is unworkable because it creates confusion that can easily be avoided. In particular, *Leetaru*'s substance-over-form rule that allows "'a plaintiff [to] obtain relief in the circuit court even when the named defendant is a state board, agency, or department,'" *Walker*, 2025 IL 130288, ¶ 21 (quoting *Leetaru*, 2015 IL 117485, ¶ 44), sounds plausible in theory but proves too difficult in practice for parties to use and courts to administer.

In this case, for instance, the substance never emerged to make sense of the form. The appellate court, which relied on *Leetaru*, *e.g.*, 2023 IL App (1st) 220990, ¶¶ 43-44, strained to identify a party who acted in excess of her authority. Then, the court imposed human characteristics on an inanimate entity. *See Lavery*, 2023 IL App (1st) 220990, ¶ 42 (describing how "the Department knew that the documents might be privileged, resisted plaintiffs'

efforts to settle that question, and doggedly persisted in its demand for their production"). Plaintiffs themselves have never identified the supposed bad individual actor, either in the appellate court or now in this Court, but have implied without factual or legal support that the attorney representing the Department in the administrative proceedings may have exceeded her lawful authority. *See* section III.B, *supra* at 16-20.

Plaintiffs cite a line of cases that predate *Leetaru* and take the same approach, but that lineage does not justify *Leetaru*'s departure from an even more established and equally precedential foundation of authority, as the dissenting justices in *Leetaru* highlighted. AE Br. 18; *Leetaru*, 2015 IL 117485, ¶¶ 95, 99 (Burke, J., joined by Freeman and Theis, JJ.) (listing cases). And plaintiffs appear to concede that naming an individual is an efficient solution to the confusion created by the *Leetaru* approach: The Department, according to plaintiffs, "can only make decisions through State officers." AE Br. 21. Precisely. An agency does not ordinarily make decisions. And a board is made up of easily identifiable individuals. *Cf. Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) ("Although Walker did not name the state's Department of Corrections as a defendant, he did name its director, who stands in for the agency he manages."). It follows that it is not an unreasonable imposition on any plaintiffs to name such decision makers when they wish to avail themselves of the officer suit exception. Otherwise, *Leetaru* creates an exception that swallows the rule and renders meaningless the bedrock

principle that the State and its agencies cannot be named in a suit seeking monies from the State.

In sum, this Court should overrule the problematic formulation of *Leetaru*.

CONCLUSION

For these reasons, Defendant-Appellant Illinois Department of Financial and Professional Regulation requests that this Court reverse the appellate court's judgment.

Respectfully submitted,

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March 26, 2025

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 to be appended to the brief under Rule 342(a), is 5,420 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 26, 2025, I electronically filed the foregoing Reply Brief of Defendant Appellant with the Clerk of the Court for the Illinois Supreme Court, 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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