No. 124417

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS ex rel. KWAME RAOUL, Attorney General of the State of Illinois, Plaintiff-Appellant, v. ELIZABETH REENTS, an individual, Defendant-Appellee, and STATELINE RECYCLING, LLC, an Illinois limited liability corporation, Defendant.	)	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-17-0860, There Heard on Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Winnebago County, Illinois, No. 17 CH 60, The Honorable J. EDWARD PROCHASKA, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellant

ANN C. MASKALERIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2090
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
amaskaleris@atg.state.il.us

ORAL ARGUMENT REQUESTED

E-FILED
7/16/2020 9:56 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

Page(s)

ARGUMENT 1

I. Neither the constitutionality of section 4 of the Act nor the Agency's stand-alone authority to access the site under that provision is before this Court. 1

415 ILCS 5/4(d)(1) (2018) 2

People v. Krull,
107 Ill. 2d 107 (1985) 2-3

Illinois v. Krull,
480 U.S. 340 (1987) 3

Bionic Auto Parts v. Fahner,
721 F.2d 1072 (7th Cir. 1983) 3

New York v. Burger,
482 U.S. 691 (1987) 3

59th & State St. Corp. v. Emanuel,
2016 IL App (1st) 153098 3

II. Reents effectively concedes that no constitutional issues were implicated here, a *prima facie* error necessitating reversal of the appellate court's judgment. 5

People ex rel. Gen. Motors Corp. v. Bua,
37 Ill. 2d 180 (1967) 5

Monier v. Chamberlain,
31 Ill. 2d 400 (1964) 5

Shamrock Chi. Corp. v. Wroblewski,
2019 IL App (1st) 182354 6

City of N. Chi. v. N. Chi. News, Inc.,
106 Ill. App. 3d 587 (2d Dist. 1982) 6

Plooy v. Paryani,
275 Ill. App. 3d 1074 (1st Dist. 1995) 6

Vukusich v. Comprehensive Accounting Corp.,
150 Ill. App. 3d 634 (2d Dist. 1986) 6

First Capitol Mortg. Corp. v. Talandis Constr. Corp.,
63 Ill. 2d 128 (1976) 6, 7

Ferris, Thompson & Zweig, Ltd. v. Esposito,
2016 IL App (2d) 151148 ..... 6, 7

In re Z.L.,
379 Ill. App. 3d 353 (4th Dist. 2008) 7

III. In the alternative, this Court should not require some standard other than that contained within this Court's civil discovery rules, which already ensures constitutional reasonableness, to review this discovery order and those entered on a government litigant's request. 7

U.S. Const. amend. IV 8

Ill. Const. art. I, § 6 8

Ferris, Thompson & Zweig, Ltd. v. Esposito,
2017 IL 121297 8

Kaull v. Kaull,
2014 IL App (2d) 130175 ..... 8, 11

Kunkel v. Walton,
179 Ill. 2d 519 (1997) 8

U.S. v. Alavi Found.,
830 F.3d 66 (2d Cir. 2016) 9

U.S. v. Eng,
971 F.2d 854 (2d Cir. 1992) 9

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 10

Camara v. Mun. Ct. of City & Cty. of San Francisco,
387 U.S. 523 (1967) 10

New York v. Burger,
482 U.S. 691 (1987) 10

Michigan v. Tyler,
436 U.S. 499 (1978) 10

A. Reents effectively concedes that *Burger* cannot apply to civil discovery requests, including the one here, in crafting a discovery order thus necessitating reversal of that portion of the appellate court's judgment. 12

New York v. Burger,
482 U.S. 691 (1987) 12

59th & State St. Corp. v. Emanuel,
2016 IL App (1st) 153098 13

Vukusich v. Comprehensive Accounting Corp.,
150 Ill. App. 3d 634 (2d Dist. 1986) 13

First Capitol Mortg. Corp. v. Talandis Constr. Corp.,
63 Ill. 2d 128 (1976) 14

B. Neither constitutional provisions nor an exercise of the circuit court's discretion requires of the government an evidentiary showing or anything more than the protections in this Court's rules. 14

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 15

Michigan v. Tyler,
436 U.S. 499 (1978) 15, 16

Camara v. Mun. Ct. of City & Cty. of San Francisco,
387 U.S. 523 (1967) 15, 16

Conner v. City of Santa Ana,
897 F.2d 1487 (9th Cir. 1990) 15, 16

Redwood v. Lierman,
331 Ill. App. 3d 1073 (4th Dist. 2002) 15-16

Bezayiff v. City of St. Louis,
963 S.W.2d 225 (Mo. App. 1997) 16

Illinois v. Krull,
480 U.S. 340 (1987) 16

Leeson v. State Farm Mut. Auto. Ins. Co.,
190 Ill. App. 3d 359 (1st Dist. 1989) 16, 17

Mistler v. Mancini,
111 Ill. App. 3d 228 (2d Dist. 1982) 17

Lasley v. McDermott,
2015 IL App (4th) 140690 18

Kaull v. Kaull,
2014 IL App (2d) 130175 ..... 18, 20, 22

Jarke v. Mondry,
2011 IL App (4th) 110150 ..... 18, 19

Carlson v. Jerousek,
2016 IL App (2d) 151248 ..... 19, 20, 22

Ill. Sup. Ct. R. 201(c)(3) 19

Hiatt v. W. Plastics, Inc.,
2014 IL App (2d) 140178 21

Zagorski v. Allstate Ins. Co.,
2016 IL App (5th) 140056 21

Ill. Const. art. I, § 6 22

United City of Yorkville v. Fid. & Deposit Co.,
2019 IL App (2d) 180230 22

Ill. Sup. Ct. R. 341(h)(7) 22

Kunkel v. Walton,
179 Ill. 2d 519 (1997) 22

Shamrock Chi. Corp. v. Wroblewski,
2019 IL App (1st) 182354 22

ARGUMENT

The appellate court erred, for multiple reasons, in reversing the circuit court's discovery order compelling Reents' compliance with the Attorney General's Rule 214(a) request. That request was for his representatives to inspect the site, which was relevant to the subject matter of this action, under this Court's civil discovery rules within a civil environmental enforcement action. Reents incorrectly attempts to enlarge the issues before this Court. (*Infra* I). And her silence in response to two bases requiring reversal of the appellate court's judgment effectively concedes those errors. (*Infra* II; III, A). Even more, because this Court's civil discovery rules' existing protections, and orders entered under them, are constitutionally reasonable no other standard or evidentiary showing is constitutionally required as the appellate court concluded and Reents asserts. (*Infra* III, A & B). Likewise, the Attorney General did not have to submit evidence of the site inspection's relevance for the circuit court to exercise its discretion in allowing it. And there is no problem with the circuit court allowing the requested discovery considering Reents made no non-constitutional objections or requests for limitations in that court. (*Infra* III, B).

I. Neither the constitutionality of section 4 of the Act nor the Agency's stand-alone authority to access the site under that provision is before this Court.

The issue before this Court is the propriety of the circuit court's discovery order allowing the Attorney General's representatives access to the

site under Rule 214(a). The appellate court recognized this (AT Br. at A8, ¶ 17; A9, ¶ 19) and rejected that the constitutionality of section 4 of the Act or the Agency's authority under that provision to inspect the site, for which it ultimately secured an administrative inspection warrant (*id.* at A9, ¶ 19), was before it or necessary to its resolution of the appeal (*id.* at A33-34, ¶¶ 67-68). The Attorney General reinforced those limits on the issues before this Court. (*Id.* at 11, 18-19). Nonetheless, Reents presses this Court to "strike as facially unconstitutional" section 4 of the Act if it allows warrantless searches by the Agency (AE Br. at 11-13, 29-34), and conclude that the circuit court's allowance of the request for Agency personnel to separately inspect the site under that provision within the discovery proceedings was unconstitutional (*id.* at 5-6, 17-19, 27-29). But as explained (AT Br. at 11, 18-19; *infra* pp. 2-4), this Court should not opine on those issues.

True, the Agency has stand-alone authority under section 4 "in accordance with constitutional limitations" to enter onto and inspect property to investigate and ascertain possible violations of the Act. 415 ILCS 5/4(d)(1) (2018). Reents contends that section 4, if it allows warrantless administrative searches by the Agency, is a regulatory scheme without sufficient safeguards to provide a constitutionally adequate substitute for a warrant and cites authority addressing the constitutionality of regulatory schemes and searches under them authorizing warrantless administrative inspections of commercial premises in heavily regulated industries, AE Br. at 11-14, 29-34 (citing *People*

v. Krull, 107 Ill. 2d 107, 112-14, 116-17 (1985); *Illinois v. Krull*, 480 U.S. 340, 346, 350 (1987); *Bionic Auto Parts v. Fahner*, 721 F.2d 1072, 1078, 1080-82 (7th Cir. 1983); *New York v. Burger*, 482 U.S. 691, 693-95, 702-03 (1987)). But section 4 does not govern a court-ordered discovery site inspection by Attorney General representatives within this civil litigation; this Court's rules do, and the circuit court followed them in entering the discovery order.

Accordingly, the propriety of any separate Agency inspection of the site under its section 4 authority is not at issue here. After the circuit court entered the discovery order (*see* C351; AT Br. at 11), it issued an administrative warrant for Agency personnel to enter, inspect, and photograph the then-locked site under the Agency's stand-alone statutory authority to ascertain possible on-going or additional violations of the Act (AT Br. at 11, A42-60). Though Reents admits that an administrative warrant issued (AE Br. at 4) and makes no contention that Agency personnel conducted a section 4 inspection after entry of the discovery order and before the warrant issued (*see* AE Br. at 5-34), she asks this Court to consider and conclude that the allowed separate request during discovery to permit Agency representatives to conduct an inspection of the site under section 4 (C240-44, 246, 351) was unconstitutional (AE Br. at 17-19, 27-28, 32). But as explained by the Attorney General (AT Br. at 18) and recognized by the appellate court (*id.* at A9, ¶ 19; A33, ¶ 68), once the administrative warrant issued there was no reliance solely upon section 4 of the Act as a basis to authorize Agency

representatives to separately complete an inspection of the site while accompanying Attorney General representatives during their discovery site inspection under Rule 214.

Similarly, this Court should not consider Reents' claim that the administrative warrant should be quashed because no evidence supported the request for the Agency's inspection of the site under its section 4 authority. (AE Br. at 5-6). An affidavit of Agency personnel was submitted in support of the request for the Agency's administrative inspection warrant during those separate proceedings (AT Br. at A42-48), but the circuit court's issuance of the warrant (*id.* at A40-41) and its propriety is not encompassed by this appeal and those issues were not before the appellate court (*id.* at A9, ¶ 19) nor are they before this Court. Thus, this Court should not analyze the constitutionality of section 4 of the Act or the Agency's authority under it to separately inspect the site for which it obtained a warrant.

Similarly baseless is Reents' claim that the Attorney General filed the civil enforcement action to seek civil discovery to circumvent both the Act's requirements and constitutional requirements and conduct a "fishing expedition" for other violations. (AE Br. at 7-8, 19-20, 26, 31). In addition to the points previously addressed (AT Br. at 42-43), the Attorney General recognized the limits of a discovery site inspection under Rule 214(a) because there was a separate request for the Agency's inspection of the site under section 4 of the Act subsequently secured by an administrative warrant

potentially to discover continuing or new violations (C240-44, 246; AT Br. at A40-60). If Attorney General representatives were to discover other violations during its discovery site inspection, then Reents could challenge that during separate applicable proceedings, *see, e.g., 59th & State St. Corp. v. Emanuel*, 2016 IL App (1st) 153098, ¶¶ 23-31, but that should not prohibit the discovery site inspection within this civil proceeding under this Court's rules.

II. Reents effectively concedes that no constitutional issues were implicated here, a *prima facie* error necessitating reversal of the appellate court's judgment.

The appellate court mistakenly decided this case on constitutional grounds and never explained why its decision could not rest upon non-constitutional grounds, alone warranting reversal of its judgment. (AT Br. at 27-33). Even when a party asserts a constitutional objection (including under the Fourth Amendment and the state analog) to an order compelling the discovery of relevant information, as did the discovery order here (*id.* at A22, ¶ 42; R16) without a relevance objection by Reents below (C257, 281-88, 341; R1-21), no "debatable constitutional issues" exist for review, necessitating resolution of the matter on non-constitutional grounds. *See People ex rel. Gen. Motors Corp. v. Bua*, 37 Ill. 2d 180, 191-95 (1967); *Monier v. Chamberlain*, 31 Ill. 2d 400, 400-05 (1964). Thus, the appellate court has consistently rejected attempts to constitutionalize a purported error in a discovery order compelling the production of relevant information, entered after applying the civil discovery rules' requirements, when unnecessary to resolve the case before it

and reviewed the order for an abuse of discretion. *See, e.g.*, *Shamrock Chi. Corp. v. Wroblewski*, 2019 IL App (1st) 182354, ¶¶ 32-38; *City of N. Chi. v. N. Chi. News, Inc.*, 106 Ill. App. 3d 587, 591-93 (2d Dist. 1982). Accordingly, the appellate court here erred in holding unconstitutional this Court's civil discovery rules and the discovery order, instead of reviewing it for an abuse of discretion, though as noted, Reents did not raise non-constitutional objections to or seek limitations of it. (AT Br. at 31-33).

Reents neither responds to this dispositive preliminary point, nor develops a cohesive argument why this Court's precedent should not be followed here. (*See* AE Br. at 5-34). Indeed, her silence on this point is the equivalent of not filing a brief, *see Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088 (1st Dist. 1995) (Rule 341's requirement to present argument supported by authority applied equally to appellant and appellee), and so she has conceded this point, *see Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 644 (2d Dist. 1986).

True, there should be no *pro forma* or summary reversal of a lower court's judgment when an appellee fails to answer an appellant's argument, *see First Capitol Mortg. Corp. v. Talandis Constr. Corp.*, 63 Ill. 2d 128, 130-31 (1976); *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2016 IL App (2d) 151148, ¶ 7, *aff'd* 2017 IL 121297, as Reents did here, because this Court may still decide the merits of the issue, *Talandis*, 63 Ill. 2d at 133; *Plooy*, 275 Ill. App. 3d at 1088. But if an appellant "demonstrates *prima facie* reversible error,"

Talandis, 63 Ill. 2d at 133; *see In re Z.L.*, 379 Ill. App. 3d 353, 376 (4th Dist. 2008) (noting appellant's burden to show error in lower court's decision), then this Court may reverse the lower court's judgment on the grounds asserted and to which the appellee did not respond, *Talandis*, 63 Ill. 2d at 133, without "advocate[ing] for the appellee," *id.*, and searching on its own for a basis to affirm, *Ferris*, 2016 IL App (2d) 151148, ¶ 7.

Here, the Attorney General demonstrated *prima facie* reversible error in the appellate court's decision. *See id.* (defining *prima facie*). As explained, contrary to this Court's established and followed precedent the appellate court unnecessarily and without explanation decided this case on constitutional grounds, when it instead should have at most reviewed for an abuse of discretion the circuit court's discovery order. (AT Br. at 27-33). For this reason alone, this Court should reverse the appellate court's judgment and, at most, either review whether the circuit court abused its discretion in entering the discovery order as it did or remand the matter to the appellate court to do so.

III. In the alternative, this Court should not require some standard other than that contained within this Court's civil discovery rules, which already ensures constitutional reasonableness, to review this discovery order and those entered on a government litigant's request.

As explained (AT Br. at 21-27, 33-43 (citing authority)), this Court's civil discovery rules, with their limitations and protections that apply to government and non-government litigants alike, and the circuit court's

discovery order here, which compelled the relevant site inspection under those rules, are constitutionally reasonable. The guarantee against unreasonable searches and seizures, U.S. Const. amend. IV; Ill. Const. art. I, § 6, is satisfied by proper application of the rules, drafted to satisfy constitutional concerns of a responding party and "strongly presum[ed]" constitutional. (AT Br. at 22-25, 34-41 (citing cases)).

Specifically, prior to compelled production during discovery the rules require relevance of non-privileged matters and proportionality, where constitutional reasonableness is a function of both; notice and opportunity for the responding party to be heard in a public forum; and judicial oversight of a request and objections thereto to ensure compliance with the rules' requirements. (*See* AT Br. at 21-27, 33-43 (citing authority)). Contrary to Reents' assertion (AE Br. at 5-6), Rule 214 does not require a party, whether the government or otherwise, to make an evidentiary showing to establish the "reasonableness and relevance of the requested search." Because the rule's plain language contains no such prerequisite, it should not be read as having one. *See Ferris*, 2017 IL 121297, ¶ 22. Had this Court been of the opinion that the "Fourth Amendment required a greater showing than relevance, it would have said so." *See Kaull v. Kaull*, 2014 IL App (2d) 130175, ¶ 69; *see also Kunkel v. Walton*, 179 Ill. 2d 519, 538 (1997) ("in the context of civil discovery, reasonableness is a function of relevance").

In addition, the appellate court and Reents err in concluding that the constitutional reasonableness standard is not satisfied by the rules' protections (nor can orders properly entered pursuant to them be constitutionally unreasonable) and that some standard other than or in addition to that contained in them is constitutionally necessary. To begin, Reents contends that a party's civil discovery production obligations neither displace nor render inapplicable Fourth Amendment rights, protections, and remedies. (AE Br. at 6-7 (citing *U.S. v. Alavi Found.*, 830 F.3d 66, 98, 105-06 (2d Cir. 2016)) (concluding that Fourth Amendment protections required that after unconstitutional search in criminal case government make "detailed showing" evidence would have been inevitably discovered during subsequent civil discovery proceedings to except it from application of exclusionary rule in criminal case); *U.S. v. Eng*, 971 F.2d 854, 861-62 (2d Cir. 1992) (same)). If Reents implies that a Fourth Amendment analysis must apply to civil discovery rules and all orders entered pursuant to them, her cited authority is limited to the narrow circumstances of those cases and does not support their broader application here. Indeed, some courts have questioned whether a Fourth Amendment analysis applies in the circumstances raised here (AT Br. at 33-34 (citing cases)), but this Court need not decide that issue (*id.* at 34) for even if so, this Court's rules are constitutionally reasonable and ensure the constitutional reasonableness of orders entered in compliance with them (*id.* at 21-27, 33-43). Thus, the discovery rules do not "apply without

Constitutional limitation" (AE Br. at 17); rather, they protect constitutional rights (*see* AT Br. at 33-43).

Also incorrect are Reents' statements that warrantless searches and seizures are not constitutionally reasonable. (AE Br. at 9). As she acknowledges (*id.* at 10), there are specifically defined instances in which a non-consensual search of property is constitutionally reasonable without the government securing a warrant. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 528-29 (1967); *see, e.g.*, *Burger*, 482 U.S. at 702-03. One of those is the allowance of the government's request for relevant and proportional discovery within civil litigation pursuant to judicial oversight under this Court's rules because they, and thus orders entered thereunder, are constitutionally reasonable.[1] (*See* AT Br. at 33-43 (citing cases)).

[1] This presupposes that a government litigant's request for discovery within a civil proceeding pursuant to this Court's rules constitutes a "search" of a responding party's premises in which they maintain a reasonable expectation of privacy such that the Fourth Amendment and Illinois' analog provision apply. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 504-06 (1978). Reents repeatedly contends the constitutional reasonableness standard applied here because she maintained an expectation of privacy in the commercial property that the Attorney General requested to search (AE Br. at 2, 5, 8-11, 15-16, 20-24), as the appellate court concluded (*see* A30, ¶ 58). The Attorney General has not contested those points (*see* AT Br. at 35), instead proceeding upon the basis that even if Reents had a reasonable expectation of privacy in the property upon which the Attorney General's representatives requested to enter such that the constitutional provisions apply, as the circuit court contemplated they did (R16), the reasonableness standard is met.

Yet Reents presses this Court to disregard those lines of authority and pioneer a conclusion, *see Kaull*, 2014 IL App (2d) 130175, ¶ 27 (recognizing dearth of authority holding civil discovery rule violates Fourth Amendment), that its rules and the discovery order entered here (and orders entered under them when a government party requests relevant discovery) are not inherently constitutionally reasonable. In asserting that something more is constitutionally required than the rules' existing protections, Reents both (1) fails to respond to the Attorney General's point that *Burger*'s three-part test, that the appellate court directed the circuit court to apply on remand (AT Br. at A33-34, ¶¶ 66-70), is inapplicable to and unworkable in civil discovery proceedings and (2) distances herself from its application here, thereby conceding the impropriety of its application in this case and in civil discovery proceedings generally. (*See infra* III, A).

Instead, Reents reverts to her previous position (*see* C257, 281-88) and goes even further than the appellate court (*see* AT Br. at A32, ¶ 63 (noting probable cause and warrant requirements have "lessened application" here)), contending that for civil discovery requested by a government litigant to be constitutionally reasonable, including the Attorney General's allowed request here, the government must make a factual showing by "credible, persuasive evidence," via affidavit, oath, and/or affirmation, to establish probable cause to secure a warrant in lieu of, in addition to, or in order to, satisfy the protections in the civil discovery rules. (*See* AE Br. at 6, 8, 16, 19-26). But this Court

should reject that proposed evidentiary standard because it is not constitutionally required. (*See infra* III, B).

A. Reents effectively concedes that *Burger* cannot apply to civil discovery requests, including the one here, in crafting a discovery order thus necessitating reversal of that portion of the appellate court's judgment.

The three-part *Burger* test allows a court to evaluate the constitutional reasonableness of a statutorily sanctioned warrantless administrative inspection by the government of a closely regulated business, in which the owner of the commercial property has a reduced expectation of privacy, to enforce the regulatory scheme outside of and before litigation without judicial oversight. 482 U.S. at 693-95, 702-03. The appellate court incorrectly directed the circuit court on remand to apply that test in crafting a discovery order because it is inapplicable to and unworkable for this and all similar requests. (AT Br. at 43-49). That is because regulatory administrative inspections are completely different from civil discovery proceedings (*id.* at 47) and the three criteria are unworkable within such proceedings (*id.* at 47-49). In short, both legislatively prescribed administrative inspections of closely regulated businesses and civil discovery inspections may be constitutionally reasonable depending upon their particular protections evaluated in a manner pertinent to each scheme.

Reents does not defend the appellate court's judgment on this ground. (*See* AE Br. at 18-20). Instead, she questions its application here and fails to respond to the merits of the Attorney General's argument.

Reents first seems to contend that *Burger* is inapplicable here because she has not conducted business or allowed others to do so on the site and has not chosen to conduct a landfill there so she neither is involved in a highly-regulated business nor subjects the site to regulatory administration as a landfill (AE Br. at 4-5, 18, 22-23), contrary to the appellate court's determination that she "all but acknowledged the status of the site as a landfill" (AT Br. at A33, ¶ 66). But this should not divert this Court's attention from examining the impropriety of ordering the *Burger* test's application to civil discovery proceedings.

She does state that "this Court must still apply *Burger* to determine the reasonableness of the [Attorney General's] demand" for a civil discovery site inspection. (AE Br. at 18). But apart from that single statement, recounting *Burger*'s three criteria (*id.* at 18-19), and noting an Illinois court's application of it in an appropriate circumstance (*see id.* at 9, 19 (citing *59th & State St. Corp.*, 2016 IL App (1st) 153098, ¶¶ 18-21) (regulatory scheme allowing warrantless administrative inspections of liquor stores was constitutionally unreasonable under *Burger*)), Reents neither explains why *Burger* should apply here (or to any request for discovery by the government) nor responds to the merits of the Attorney General's argument on this point. Thus, she has conceded the appellate court's error in requiring the application of *Burger*'s test here and to civil discovery requests by a government litigant generally. (*See* AT Br. at 43-49); *see also Vukusich*, 150 Ill. App. 3d at 644 (appellee

concedes point by failure to respond to appellant's argument). This *prima facie* error supports reversal of that portion of the appellate court's judgment. *See Talandis*, 63 Ill. 2d at 133.

B. Neither constitutional provisions nor an exercise of the circuit court's discretion requires of the government an evidentiary showing or anything more than the protections in this Court's rules.

Reents insists that the Fourth Amendment "demands" that a government litigant make a "factual showing" by "credible, persuasive evidence," which the state constitution requires be made by affidavit, to "support a finding of probable cause" "sufficient to obtain an administrative warrant" for a circuit court to approve its discovery request, including the site inspection requested by the Attorney General. (AE Br. at 6, 8, 16, 19-26). But she does not settle on whether such a requirement is in lieu of, in addition to, or in satisfaction of the civil discovery rules' protections, for she asserts all three. (*See* AE Br. at 6, 8, 16, 24 for "in lieu of" (stating a factual showing via affidavit, oath, or affirmation establishing probable cause sufficient to obtain an administrative warrant is required); *id.* at 20-25 for "in addition to" (stating a "factual showing of credible, persuasive evidence in addition to being relevant and proportional" is required); *id.* at 16-17, 24-26 for "in order to satisfy" (stating credible, persuasive evidence to establish the government's reasonable need to inspect the property and its relevance to the issues presented is required)).

Regardless, an evidentiary showing sufficient to establish probable cause and obtain a warrant by a government litigant during civil discovery is not required to render a discovery request or order entered under this Court's rules constitutionally reasonable. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 319 (1978) (probable cause in criminal law sense not even required in administrative search warrant context). Rather, discovery compelled pursuant to this Court's rules' constitutionally reasonable protections (AT Br. at 27-43) serves the same purpose as the warrant process, providing assurances from a neutral officer that the inspection is constitutionally reasonable and authorized under neutral legal criteria, *Marshall*, 436 U.S. at 323. The circumstances and authority relied upon by Reents are inapposite.

To start, Reents incorrectly likens the Attorney General's discovery request within civil litigation to statutory schemes that allow government inspectors to conduct warrantless administrative searches either to abate a nuisance or determine compliance with municipal code requirements outside of litigation without prior judicial approval to enforce those schemes. (*See* AE Br. at 10-11 (citing cases)). In those situations, the inspection was not constitutionally reasonable without consent or a warrant because the legislative schemes under which they took place lacked traditional safeguards that the Fourth Amendment guarantees and the warrant requirement protects. *See Tyler*, 436 U.S. at 504-05; *Camara*, 387 U.S. at 532-34; *Conner v. City of Santa Ana*, 897 F.2d 1487, 1489-92 (9th Cir. 1990); *Redwood v.*

Lierman, 331 Ill. App. 3d 1073, 1081-84 (4th Dist. 2002); *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 231-35 (Mo. App. 1997). Because the Fourth Amendment safeguards the privacy and security of individuals against arbitrary invasions by government officials, *Camara*, 387 U.S. at 528-29, those searches and seizures were problematic because they occurred without guidelines and any prior judicial authorization, *Conner*, 897 F.2d at 1492. Thus, a government official ordinarily must have a warrant to conduct those inspections and seizures of property. *See Tyler*, 436 U.S. at 506.

But the constitutional deficiencies in those cases are non-existent in civil discovery proceedings, which compel production only within the judicial process under the auspices of the neutral circuit court judge who ensures that a discovery request and ensuing order's parameters comply with this Court's rules' reasonable protections after the responding party has notice and an opportunity to be heard. *See Krull*, 480 U.S. at 348 (noting neutral judicial officers are not inclined to "ignore or subvert the Fourth Amendment"). Clearly, there is no arbitrary invasion by a government official's inspection when a discovery request must first be allowed pursuant to the rules' requirements.

In addition, Reents' reliance on Illinois authority (AE Br. at 24-26)[2] fares no better. To start, in *Leeson v. State Farm Mutual Automobile*

[2] Reents' citation to the unpublished *Pate v. Pace Suburban Bus Division of the Regional Transportation Authority*, 2013 IL App (1st) 123322-U, violates Rule 23 and will not be discussed.

Insurance Co., 190 Ill. App. 3d 359, 361-63, 365-66 (1st Dist. 1989), and *Mistler v. Mancini*, 111 Ill. App. 3d 228, 229-30, 233 (2d Dist. 1982), the courts considered whether the circuit court abused its discretion in allowing the requested documentary and deposition discovery on relevance grounds. In explaining this Court's civil discovery rules, those courts stated that a discovery request should be denied "where there is insufficient evidence that the requested discovery is relevant or will lead to such evidence." *Leeson*, 190 Ill. App. 3d at 366; *Mistler*, 111 Ill. App. 3d at 232. But that merely was a general statement made with no requirement that the requesting party had to "submit evidence" to "establish" the relevance of the request to render it constitutionally reasonable. *Leeson*, 190 Ill. App. 3d at 366; *Mistler*, 111 Ill. App. 3d at 232. And in neither case was the court's review of the propriety of the discovery order based on a lack of or insufficient evidence tendered with the discovery request. Indeed, in both cases it appears that no evidence was submitted in support of the discovery requests but rather statements and arguments in support of their relevance. *Leeson*, 190 Ill. App. 3d at 363, 366; *Mistler*, 111 Ill. App. 3d at 230, 233. Thus, those courts' passing references to "insufficient evidence" seem not to mean that a proponent of discovery failed to submit evidence establishing the relevance of discovery but rather that the proponent failed to demonstrate a connection between the requested discovery and relevance to the case.

In two limited instances courts have imposed an evidentiary standard upon the proponent of discovery in order to substantiate the request as a non-constitutional matter. (*See* AE Br. at 24-26 (citing cases)). But neither instance nor the reasons for imposing the standard are present here.

The first involves a proceeding to determine heirship, where one heir contests another's paternity in seeking their disinheritance, and the request is for DNA testing. *Lasley v. McDermott*, 2015 IL App (4th) 140690, ¶¶ 4-6; *Kaull*, 2014 IL App (2d) 130175, ¶¶ 1, 3-5; *Jarke v. Mondry*, 2011 IL App (4th) 110150, ¶¶ 1, 5-6. A circuit court should allow a request under Rule 215 for the challenged heir to submit to a DNA test only if the "court is presented with persuasive and credible evidence that would lead the court to believe the DNA test would result in the disinheritance." *Jarke*, 2011 IL App (4th) 110150, ¶ 29; *see also Kaull*, 2014 IL App (2d) 130175, ¶¶ 72-73; *Lasley*, 2015 IL App (4th) 140690, ¶ 25. Following *Jarke*, the *Kaull* court stated that the request for DNA testing should be denied when there is insufficient evidence that it would be "relevant or would lead to relevant evidence," and that an evidentiary hearing is not necessarily required. *Kaull*, 2014 IL App (2d) 130175, ¶ 73. Moreover, although a circuit court may abuse its discretion in ordering a DNA test without that showing, *Jarke*, 2011 IL App (4th) 110150, ¶¶ 18, 27, 33; *Kaull*, 2014 IL App (2d) 130175, ¶ 72, that evidentiary standard was not deemed constitutionally required, *see Jarke*, 2011 IL App (4th) 110150, ¶¶ 25-30; *Kaull*, 2014 IL App (2d) 130175, ¶¶ 57-58, 70-73 (concluding

"good cause" requirement removed from Rule 215 not constitutionally required in part because of evidentiary standard). Instead, it was necessary because of the deep roots of the common law presumption of paternity and the reasons underlying that presumption, including discreet legal and emotional issues. *Jarke*, 2011 IL App (4th) 110150, ¶¶ 25-26, 30.

The second instance is confined to a party's request for forensic imaging of the other's computer in search of electronically stored information (ESI), where most of the information sought fell into categories of ESI identified by this Court's rules as presumptively not discoverable and for which the proportionality requirement was added to protect against abusive requests. *See Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶¶ 1-5, 28-30, 43-44, 47-49, 65-66 (citing Ill. Sup. Ct. R. 201(c)(3)). In *Carlson*, plaintiff objected to defendants' forensic imaging request based on overbreadth, undue burden, and relevance, where their request was not supported by evidence from an expert in computer technology describing the information retrievable through or the methods to be used in the search. *Id.* at ¶¶ 4-5, 11-13. As a result, the circuit court abused its discretion in allowing the request as it was hampered by the lack of expert testimony regarding the definitions and parameters of the proposed forensic imaging to ensure its relevance and proportionality. *Id.* at ¶¶ 44-45, 51-54, 58-63, 69-70. Those technical matters involve complicated information and require technical expert involvement in its production with which attorneys are unfamiliar and are beyond a layperson's knowledge. *Id.* at

¶¶ 44-45, 58-63. In addition, the search of computerized devices and discovery of ESI can raise unique privacy concerns. *Id.* at ¶¶ 39-41, 44-45, 64.

This authority does not undermine the established points that the discovery rules' relevance and proportionality requirements ensure the constitutional reasonableness of discovery orders, including the one here. *See Kaull*, 2014 IL App (2d) 130175, ¶ 47 (unnecessary to engage in constitutional analysis of discovery order for if it satisfies this Court's rules' requirements it satisfies any constitutional concerns). To be sure, in those circumstances the evidentiary standards were not constitutionally required, nor were they likened to a probable cause showing sufficient to obtain a warrant for which Reents advocates. Rather, the unique evidentiary requirements in those two discreet situations aid circuit courts in exercising their discretion when determining the relevance and proportionality of requested discovery in light of specific concerns underlying those situations. But similar concerns are not at issue in the site inspection here.

As a result, this Court also should reject Reents' alternative argument that under this line of authority the circuit court abused its discretion in granting the Attorney General's site inspection request without an evidentiary basis to support its "reasonableness" or its relevance to any of the alleged unlawful conditions on the site. (*See* AE Br. at 5-7, 25-26). During discovery proceedings the Attorney General asserted and the circuit court agreed that the site not only was relevant to but was the subject matter of the action and it

allowed the relevant inspection of this specific property at a designated time. (C239-40, 244-46, 340-43, 351; R8-16).

Indeed, Reents interposed neither a non-constitutional evidentiary objection nor relevance or scope objections to the requested site inspection (C257, 281-88; R10-15), potentially waiving them (*see* AT Br. at 31 (citing cases)). The circuit court was not obligated to relieve Reents from exercising minimal effort to identify any non-constitutional objections and act as her advocate in limiting the allowed relevant discovery request, *see, e.g., Hiatt v. W. Plastics, Inc.*, 2014 IL App (2d) 140178, ¶ 106, as Reents now claims (*see* AE Br. at 28-29). In addition, Reents' assertion that there is no need for the Attorney General's representatives' discovery site inspection subsequent to the alleged violations where Agency personnel already knew of the site's status (AE Br. at 7), makes no sense, for discovery is always an after-the-fact investigation of the circumstance or incident at issue. In the absence of timely particularized objections and supporting grounds to the discovery request and order, *see Zagorski v. Allstate Ins. Co.*, 2016 IL App (5th) 140056, ¶ 35, this Court may refuse to consider these belated arguments (*see* AT Br. at 31). But, in any event, concerns about the scope of the discovery order should have been or could be addressed by remanding the matter for the circuit court to implement additional limitations or protections allowed under the rules. (*See* AT Br. at 31-32).

Finally, Reents makes general statements about Illinois' privacy clause, Ill. Const. art. I, § 6 (AE Br. at 9-10, 13-16, 24), but she has forfeited any such alternative basis for affirming the appellate court's judgment by failing to articulate and develop a cohesive argument. *See United City of Yorkville v. Fid. & Deposit Co.*, 2019 IL App (2d) 180230, ¶¶ 127-28 (citing Ill. Sup. Ct. R. 341(h)(7)). Moreover, neither this Court's rules nor the discovery order here would violate the privacy clause, as it guards against the collection and exploitation of intimate personal information, including private medical information, correspondence, reading materials, and information relating to intimate relationships. *Carlson*, 2016 IL App (2d) 151248, ¶ 34. To the extent that the privacy clause even applies to the site inspection requested here, *see id.*; *Kaull*, 2014 IL App (2d) 130175, ¶¶ 42-43, that provision does not afford an absolute protection against invasions of privacy without a warrant (*see* AE Br. at 9), only unreasonable ones, *Kunkel*, 179 Ill. 2d at 538. Again, it is reasonable to require full disclosure of relevant information. *Id.* And for the same reasons that this Court's rules and the relevant discovery order entered here are constitutionally reasonable under the Fourth Amendment so, too, are they under the privacy clause. *See Shamrock*, 2019 IL App (1st) 182354, ¶ 32; *Kaull*, 2014 IL App (2d) 130175, ¶ 45.

CONCLUSION

For these reasons, Plaintiff-Appellant People of the State of Illinois ex rel. Kwame Raoul, Attorney General of the State of Illinois, requests that this Court reverse the judgment of the appellate court, affirm the circuit court's discovery order, and remand the matter to the circuit court for Defendant-Appellee Elizabeth Reents to comply with the discovery order and for further proceedings.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellant

ANN C. MASKALERIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2090
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
amaskaleris@atg.state.il.us

Dated: July 16, 2020

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) statement of points and authorities, and the Rule 341(c) certificate of compliance, the certificate of filing and service, and those matters to be appended to the brief under Rule 342(a) is 5673 words.

/s/ Ann C. Maskaleris
ANN C. MASKALERIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2090
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
amaskaleris@atg.state.il.us

CERTIFICATE OF FILING AND SERVICE

I certify that on July 16, 2020, I electronically filed the foregoing Reply Brief of Plaintiff-Appellant with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Mark Rouleau
Rouleau-law@comcast.net
ccf@rouleau-law.com

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.

/s/ Ann C. Maskaleris
ANN C. MASKALERIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2090
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
amaskaleris@atg.state.il.us