Nos. 122349, 122411 (consolidated)

IN THE
SUPREME COURT OF ILLINOIS

INSTITUTE FOR JUSTICE, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellee.	On Appeal from the Appellate Court of Illinois, First Judicial District, Nos. 1-16-2141, 1-16-2294 (consol.) There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 14 CH 19381 The Honorable RODOLFO GARCIA, Judge Presiding.
CHRISTOPHER J. PERRY and PERRY & ASSOCIATES, LLC, Plaintiffs-Appellants, v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellee.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-16-1780 There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 14 CH 19381 The Honorable RITA M. NOVAK, Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

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NATURE OF THE CASES

Plaintiff-Appellee Institute for Justice (the Institute) filed a complaint in the circuit court under the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/11 (2012), against Defendant-Appellee Illinois Department of Financial and Professional Regulation (Department), seeking the disclosure of complaints against licensed cosmetologists and hair braiders. The parties filed cross-motions for summary judgment under 735 ILCS 5/2-1005 (2014). The Department argued, in part, that the complaints were exempt from disclosure under section 7(1)(a) of FOIA and section 4-24 of the Barber, Cosmetology, Esthetics, Hair Braiding, and Nail Technology Act of 1985 (Cosmetology Act), 225 ILCS 410/2-24 (eff. Jan. 1, 2015). The circuit court granted the Institute's motion and denied the Department's motion, concluding in part that section 4-24 of the Cosmetology Act could not be applied to the FOIA action because it was not effective at the time of the Institute's initial FOIA request. The Department appealed. The appellate court reversed. This Court granted the Institute leave to appeal. No questions are raised on the pleadings.

Plaintiffs-Appellants Christopher J. Perry and Perry & Associates, LLC (collectively, Perry) filed a complaint in the circuit court under FOIA, 5 ILCS 140/11 (2014), against the Department seeking the disclosure of a complaint filed with the Department against Christopher J. Perry. Perry moved for summary judgment under 735 ILCS 5/2-1005 (2014). The circuit court denied in part and granted in part the motion. Perry moved to reconsider. Before the

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circuit court ruled on the motion, section 2105-117 of the Civil Administrative Code of Illinois (CAC), 20 ILCS 2105/2105-117 (eff. Aug. 3, 2015), took effect. It provided that complaints filed with the Department were expressly exempted from disclosure. The circuit court applied section 2105-117 to the action and concluded that the information Perry sought was exempt from disclosure. Perry moved to reconsider. The circuit court denied that motion. Perry appealed. The appellate court affirmed. This Court granted Perry leave to appeal. No questions are raised on the pleadings.

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ISSUE PRESENTED FOR REVIEW

Whether a FOIA action for the disclosure of information determines a present or past right to information.

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STATEMENT OF FACTS

The Institute and Perry sought information from the Department under FOIA. Specifically, they sought complaints from members of the public involving professional licensees that were filed with the Department. The Department denied the requests based on several FOIA exemptions. (IC15–16, 145–46; PC99–100).[1] The Institute and Perry disagreed and filed FOIA actions for declaratory and injunctive relief in the circuit court. (IC3–10; PC6, 9). While their FOIA actions were pending, new statutes took effect that specifically prohibited disclosing the information that they sought. *See* 225 ILCS 410/2-24 (eff. Jan. 1, 2015); 20 ILCS 2105/2105-117 (eff. Aug. 3, 2015). In these appeals, the Institute and Perry object to the application of those new statutes to their FOIA actions, even though FOIA authorizes the court to declare their present right to information and, if presently entitled to any information, order the future disclosure of it.

The public's right to information under FOIA and the means to enforce that right

FOIA provides the public with a right to information from public bodies. *See* 5 ILCS 140/1 (2016). All information held by public bodies is presumptively available to the public, *id.* § 1.2, except as otherwise provided in section 7 of FOIA, *id.* § 3(a) (also referencing section 8.5 for information

[1] This brief cites the common law records as "(IC__)" for *Institute* and "(PC__)" in *Perry*. The reports of proceedings are cited as "(IR__)" for *Institute* and "(PR__)" for *Perry*. The Institute's brief is cited as "Institute Br. __" and Perry's brief is cited as "Perry Br. __."

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available online). A public body has the burden of establishing that the information is not subject to disclosure. *Id.* §§ 1.2, 11(f).

Section 7 of FOIA contains several exemptions to disclosure, many of which were invoked by the Department at the beginning of this litigation. (*See* IC15–16, 145–46; PC96, 99–100). The only FOIA exemption relevant now is section 7(1)(a), which exempts "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a) (2016). The law "specifically prohibit[ing]" disclosure in these appeals is section 4-24 of the Cosmetology Act and section 2105-117 of the CAC, which provide that all complaints against professional licensees filed with the Department "shall not be disclosed." 225 ILCS 410/4-24 (2016) (eff. Jan. 1, 2015); 20 ILCS 2105/2105-117 (2016) (eff. Aug. 3, 2015).

If there is disagreement over whether information must be disclosed, FOIA provides two paths to resolution. One is to seek review of the request with a Public Access Counselor (PAC) in the Office of the Illinois Attorney General, *see* 5 ILCS 140/9, 9.5 (2016); the other is to file an action in the circuit court, *id.* § 11. PAC review is not a predicate for filing an action in the circuit court. But if PAC review is sought first, it can result in either a binding decision that is subject to judicial review under the Administrative Review Law, 735 ILCS 5/3-101 *et seq.* (2016), *see* 5 ILCS 140/9.5(f), 11.5, or an advisory opinion, *id.* § 9(h). If an advisory opinion is issued, the requestor can still file

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an action in the circuit court, which proceeds *de novo*. *See id.* §§ 9.5(g)–(h), 11(a), 11(d).

FOIA also provides for penalties and attorney's fees for prevailing parties. *Id.* §§ 11(i) (attorney's fees), 11(j) (penalties). Section 11(j) of FOIA allows a court to impose penalties against a public body if it finds that it willfully and intentionally violated FOIA or otherwise acted in bad faith. *Id.* § 11(j). If a person prevails in a FOIA action, "the court shall award such person reasonable attorney's fees and costs" based on the degree to which the requestor prevailed. *Id.* § 11(i).

The Institute's FOIA action

In September 2013, the Institute sent a FOIA request to the Department seeking "[a]ll complaints regarding licensed cosmetologists and hair braiders received by the [Barber, Cosmetology, Esthetics, Hair Braiding, and Nail Technology Board] from 2011 to the present." (IC11, 139).

The Department denied the request, citing six FOIA exemptions. (IC15–16, 145–46 (citing 5 ILCS 140/7(1)(a), (b), (c), (d)(ii), (d)(iv), (f) (2012))).

The Institute sought PAC review. (IC8, 22–26, 152–58). Before the PAC issued any response, in December 2014 the Institute filed an action under section 11 of FOIA in the circuit court seeking a declaration of its right to the requested information and injunctive relief compelling the disclosure of the information, along with penalties and attorney's fees. (IC3–10).

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In May 2015, the Institute moved for summary judgment. (IC116). The Institute argued that not only did the Department's cited FOIA exemptions not apply (IC122–26), but also that the Department could not rely on section 4-24 of the Cosmetology Act, 225 ILCS 410/4-24 (eff. Jan. 1, 2015), a statutory amendment made effective on January 1, 2015, while the FOIA action was pending (IC127). Section 4-24 states that

> [a]ll information collected by the Department in the course of an examination or investigation of a licensee or applicant, including, but not limited to, any complaint against a licensee filed with the Department . . . shall be maintained for the confidential use of the Department and shall not be disclosed. . . .

225 ILCS 410/4-24 (eff. Jan. 1, 2015). This amendment applied to the FOIA action through section 7(1)(a) of FOIA, which exempted from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a) (2014). The Institute argued that applying section 4-24 to its case would be an impermissible retroactive application of law (IC128–31) and would "'result in inequitable consequences'" (IC131 (quoting *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30)).

The Department responded and cross-moved for summary judgment (C286–88), arguing that section 4-24 of the Cosmetology Act, via section 7(a)(1) of FOIA, exempted the requested information (IC233–39), among other FOIA exemptions (IC240–46).

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In a November 2015 hearing, the circuit court concluded that none of the exemptions invoked by the Department were applicable. (IR3–23, 43). Regarding section 4-24 of the Cosmetology Act, the circuit court stated that "to trigger the exemption . . . [the Department needed] to establish that it applie[d] to the request submitted in 2013, even though the section itself makes very clear that its effective date [was not] until January of 2015." (IR 25.) The circuit court determined that section 4-24 did not apply retroactively and thus was inapplicable. (IR34.)

In December 2015, the circuit court issued an order determining, by applying the retroactivity analysis from *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), that section 4-24 of the Cosmetology Act could not be applied to the Institute's FOIA request or its FOIA action. (IC297–98). The circuit court declined to issue penalties but awarded $35,000 in attorney's fees and costs. (IC600).

The Department appealed. (IC611–12).

Perry's FOIA action

Perry's two FOIA requests related to a 2010 complaint filed with the Department against Christopher J. Perry, a licensed structural engineer, by an individual whose identity was not disclosed to Perry (C3–10), although Perry apparently knew who it was (PC72–73). The Department conferred with Christopher J. Perry regarding the complaint's allegations, and nothing further became of the matter. *See* Perry Br. 7; (PC26).

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In January 2013, Perry filed its first FOIA request with the Department seeking "[a]ll documents submitted to the [D]epartment by Kenneth M. Floody, Ingenii LLC (or on their behalf)." (PC99.) The Department denied the request, citing seven FOIA exemptions. (PC99–100 (citing 5 ILCS 140/7(1)(a), (b), (c), (d)(ii), (d)(iv), (f), (m) (2012)).

Perry sought PAC review. (PC72 & n.2, 85 & n.2, 106, 113). The PAC issued an advisory opinion, concluding that the Department properly withheld the information under section 7(1)(d)(iv) of FOIA, while declining to address the six other exemptions. (PC72–74). Section 7(1)(d)(iv) exempts information from disclosure if it would "'unavoidably disclose the identity of a confidential source, . . . or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies.'" (PC73). The PAC concluded that disclosure "would unavoidably identify an individual who [ ] filed a complaint." (PC74).

Perry filed a second FOIA request seeking "the complaint received from any source . . . redacted to exclude proper names and 'confidential information.'" (PC75). The Department again denied the request. (PC88–91).

In December 2014, Perry filed an action in the circuit court under section 11 of FOIA seeking declaratory and injunctive relief for the disclosure of the complainant that he had been seeking, along with attorney's fees and penalties. (PC9–10).

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Perry moved for summary judgment or *in camera* inspection of the requested information. (PC46). The Department responded that the information Perry sought was exempted under section 7(1)(d)(iv) of FOIA, and it noted that the exemption was intended to protect those who file complaints from retaliation for doing so, thus encouraging professional misconduct reporting. (PC96).

After conducting a hearing and *in camera* inspection in July 2015 (PC133, 180–99), the circuit court concluded that all information, except two exhibits attached to the complaint, was exempt from disclosure (PC158–61).

Perry moved to reconsider. (PC139). The Department then raised section 2105-117 of the CAC, 20 ILCS 2105/2105-117 (eff. Aug. 3, 2015), an amendment that took effect on August 3, 2015, while the action was pending, as a basis to find all of the information exempt under section 7(a)(1) of FOIA. (PC177). That amendment provides that

> [a]ll information collected by the Department in the course of an examination or investigation of a licensee, . . . including, but not limited to, any complaint against a licensee or registrant filed with the Department and information collected to investigate any such complaint, shall be maintained for the confidential use of the Department and shall not be disclosed. . . .

20 ILCS 2105/2105-117 (eff. Aug. 3, 2015).

Perry replied that section 2105-117 of the CAC did not apply because it was not in effect at the time of its FOIA request. (PC201–02, 206).

At a hearing on the motion to reconsider (PC214 (order), 223 (transcript)) the circuit court concluded that section 2105-117 of the CAC

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applied because it had become effective "while the case was still open, while the Court still had jurisdiction over the case, and while the controversy was still alive" (PC236). Citing *Kalven v. City of Chicago*, the circuit court stated "that the statute that is in effect at the time of the decision is the one that the Court has to apply." (PC238 (citing 2014 IL App (1st) 121846, ¶¶ 9–10)). The circuit court determined that section 2105-117 specifically exempted the information. *Id.*

Perry again sought reconsideration. (PC217). It argued that the circuit court should not have dismissed its action after applying section 2105-117 of the CAC without considering whether it was entitled to attorney's fees based on the earlier partial grant of summary judgment. (PC218). Perry contended that whether the public body should be assessed penalties for denying disclosure at the time that the FOIA request was made was a separate issue from whether the information presently was subject to disclosure. (PC219–20, 253–54). Perry also argued that the circuit court erred in its application of *Kalven* when it held that the relief authorized under FOIA could not apply retroactively based on *J.T. Einoder*, a case in which this Court determined that a statutory amendment allowing mandatory injunctions could not be applied retroactively. (PC219–22).

The Department argued that the circuit court correctly decided the case under the applicable law because "'[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is

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not retroactive.'" (PC245 (quoting *Landgraf*, 511 U.S. at 273 (1994)). FOIA authorized prospective relief, so the application of section 2105-117 was not retroactive. (PC245–48).

The circuit court again concluded that applying section 2105-117 here was not a retroactive application of law. (PR17). It stated that it need not "go any further than *Kalven*," which "was a perfectly analogous situation." (PR18). *Kalven*'s "rationale was that FOIA created prospective rights, and, therefore, it[s] changes [in] the law, did not interfere with any vested rights or did not ultimately effectuate a retroactive application of the law." *Id.* Describing *Kalven*, the circuit court noted that there "'[t]he 2009 FOIA statute was in effect when plaintiff filed suit. The statute [was] amended. . . . [T]o determine whether plaintiff [was] entitled to production of the documents, [the court] must, therefore, apply the version of the statute that is currently in effect.'" (PR19 (quoting 2014 IL App (1st) 121846, ¶ 10)).

The circuit court added that *J.T. Einoder* "in no sense overruled *Kalven*." *Id.* In *J.T. Einoder*, an intervening statutory amendment "allowed for mandatory injunctions, whereas the old statute that was applied or that was in existence when the alleged wrong was done only provided for prospective injunctive relief." (*Id.*) The statutory amendment in *J.T. Einoder*, which did not involve FOIA, "would operate . . . to be a retroactive application of law." (*Id.*) The amendment authorizing mandatory injunctions "'created an entirely new type of liability, . . . which was not available under the prior

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statute'" and "'[a]pplying it retroactively [ ] would impose a new liability on defendant's past conduct.'" (PR21 (quoting *J.T. Einoder*, 2015 IL 117193, ¶ 36)). In other words, before the amendment, the statute authorized injunctive relief which, if ordered, tells a defendant to "'[q]uit violating the statute.'" (PR22). But a mandatory injunction would tell a defendant, "'[n]ow you're going to take some remedial steps', which, of course, costs money, which, of course, imposes obligations after the cessation of activity on the defendant in an environmental enforcement action," and thus "imposed additional liabilities on a party after the conclusion of the party's activities." *Id.*

In contrast to *J.T. Einoder*, the circuit court found that "what brought the matter to the court remained in controversy. That is, whether or not the FOIA statute allowed the production of these documents." *Id.* Section 2105-117 of the CAC was "simply a change in the law that applies to a pending case, just as was true in *Kalven*." (PR23).

Finally, the circuit court determined that the attorney's fees provision under section 11(i), and the penalty provision under section 11(j), of FOIA did not create vested rights that precluded the circuit court from applying section 2105-117 of the CAC. (PR25–29). While the case was pending the law changed so that Perry was not a prevailing party. (PR26–27). Nor could the circuit court consider penalties under section 11(j) of FOIA for violating FOIA

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willfully or intentionally, or otherwise in bad faith, because it believed that it needed to first find that Perry was entitled to the information. (PR27–28).

Perry appealed. (PC262).

The Appellate Court's decisions in *Institute* and *Perry*

The appellate court reversed the judgment of the circuit court in *Institute for Justice v. Dep't of Fin. & Prof'l Regulation*, 2017 IL App (1st) 162141-U, ¶¶ 23, 29, and affirmed the judgment of the circuit court in *Perry v. Dep't of Fin. & Prof'l Regulation*, 2017 IL App (1st) 161780, ¶¶ 1, 47. In substantively similar decisions, the appellate court determined that the application of an intervening amendment to a pending FOIA action was not a retroactive application of law because FOIA determines the availability of prospective relief to order the present or future disclosure of information. *See Institute*, 2017 IL App (1st) 162141-U, ¶¶ 23–24; *Perry*, 2017 IL App (1st) 161780, ¶¶ 41–42.

Both Perry and Institute petitioned this Court for leave to appeal the appellate court decision in their respective cases. This Court allowed leave to appeal and consolidated the cases.

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ARGUMENT

The answer to the question presented in these appeals is well settled and straightforward: "[A]pplication of new statutes passed after the events in suit is unquestionably proper . . . . [w]hen the intervening statute authorizes or affects the propriety of prospective relief, [because] application of the new provision is not retroactive." *Landgraf*, 511 U.S. at 273. As this Court has repeatedly recognized, an action for prospective declaratory and injunctive relief "does not hinge upon a retroactivity analysis." *Wisniewski v. Kownacki*, 221 Ill. 2d 453, 463 (2006); *see, e.g.*, *Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶ 26 (intervening statute affecting "only the present and future eligibility of plaintiffs to continue to use their health care licenses . . . . [was] solely prospective and not impermissibly retroactive within . . . *Landgraf*"). Thus, the retroactivity test from *Landgraf* as modified by Illinois law, *see, e.g.*, *People v. Hunter*, 2017 IL 121306, ¶¶ 20–22, does not even apply here.

Here, FOIA authorizes prospective relief through declaratory judgments (to announce a present right to information) and injunctions (to order the future disclosure of information). The Institute and Perry were not at the time that the circuit court declared their rights, and are not now, entitled to the information that they seek. A court therefore cannot grant an injunction ordering the Department to disclose that information.

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A. In a FOIA action, a court declares the scope of a person's present right to information through declaratory relief and orders the future disclosure of that information, if any, through injunctive relief.

When a person files a *de novo* action in the circuit court under section 11 of FOIA, the statute authorizes injunctive or declaratory relief, *see* 5 ILCS 140/11(a), 11(f) (2016), "to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access," *id.* § 11(d). Declaratory and injunctive relief are prospective relief. *See Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2982 n.6 (2010) ("[Plaintiff's] suit, after all, seeks only declaratory and injunctive—that is, prospective—relief."). Prospective relief operates in the present and future, while retrospective relief looks back at a completed event and remedies any wrongs with money damages. *See, e.g.*, *Los Angeles Cty. v. Humphries*, 131 S. Ct. 447, 449 (2010) (contrasting "monetary damages" with "prospective relief, such as an injunction or a declaratory judgment"). This distinction is rooted in the reality that a court cannot change the past, but it can shape the future.

A declaratory judgment is "[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." Black's Law Dictionary 918 (9th ed. 2009). Declaratory relief determines whether or to what extent an injunction should follow to enforce the rights of the parties. *See Green v. Mansour*, 474 U.S. 64, 73 (1985)

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(declaratory relief improper where "[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction"); *cf.* 735 ILCS 5/2-701 (2016) ("The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed . . . ."). When declaring rights, a court determines those rights under present law; it does not issue advisory opinions based on outdated law and facts that do not bind parties. *See, e.g.*, *Bartlow v. Costigan*, 2014 IL 115152, ¶¶ 30–31; *accord Landgraf*, 511 U.S. at 273–74; *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam) (declaratory relief claim moot where "[n]o 'present right' of appellee was at stake" because party's "primary claim of a present interest in the controversy is that he will obtain emotional satisfaction"); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937) (declaratory judgment "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts").

Declaratory relief would often not be consequential without accompanying coercive relief—injunctive relief. Injunctions operate in the future to correct ongoing violations. *See Menard v. Hood*, 68 Ill. 121, 122 (1873) ("writ of injunction is only called into use to afford preventive relief," not "to give affirmative relief, or to correct wrongs and injuries already perpetrated, or to restore parties to rights of which they have been deprived"); *accord Landgraf*, 511 U.S. at 274 (injunctions operate *in futuro*); *Dombrowski*

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v. Pfister, 380 U.S. 479, 485 (1965) ("injunctive relief looks to the future"); *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) ("injunction deals primarily, not with past violations, but with threatened future ones; . . . an injunction may issue to prevent future wrong"). Moreover, as this Court has recognized, the disclosure of information "takes place only in the present or the future . . . . not in the past." *Wisniewski*, 221 Ill. 2d at 463; *accord City of Chi. v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777, 783 (7th Cir. 2005) ("relevant event for assessing retroactivity here is the disclosure of the withheld data, which is a potential future event, not a past, completed event").

Together, in a FOIA action, declaratory relief allows a court to announce the scope of a person's present right to information and injunctive relief allows it to order the public body to disclose information in the future based on present rights. That is why the application of a statute that becomes effective during a pending FOIA action "is not retroactive." *Landgraf*, 511 U.S. at 273; *see* Institute Br. 26–30 (branding this the "Injunction Rule"). In other words, a law applies so long as it is effective at the time that the court determines, under current law, whether a public body can be ordered to disclose information in the future.

This Court faced the question of whether the future disclosure of information had any retroactive impact in *Wisniewski* and correctly concluded that it did not. There, an alleged victim of sexual abuse by a priest sued his

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church for, among other things, fraud and conspiracy for moving the priest to his church while knowing that the priest had abused a child at another parish. 221 Ill. 2d at 455. The victim sought discovery of the priest's mental health and alcohol-abuse counseling records. *Id.* The church objected, citing two Illinois statutes that made mental health and substance abuse records confidential, not subject to disclosure. *Id.* The victim argued that applying the statutes to his request had an unconstitutional retroactive impact because the records that he sought were created before either statute had been enacted, *i.e.*, he had a right to them at some point in the past. *Id.* at 459, 462. But this Court held that the applicability of the statutes did "not hinge upon a retroactivity analysis." *Id.* at 463. Both statutes regulated disclosure of information, and disclosure could take place only in the present or future, not in the past. *Id.* They did not impair any right regarding a past transaction. *Id.*

Other courts dealing with the future disclosure of information also have determined that there is no retroactive application of law when statutes enacted after the filing of an action affect the availability of prospective relief. As illustrated by *Center for Biological Diversity v. United States Department of Agriculture*, intervening amendments affecting prospective relief apply to pending actions for the disclosure of information. 626 F.3d 1113 (9th Cir. 2010). There, conservationists requested under the federal FOIA the global positioning system (GPS) coordinates of wolf attacks on ranchers' lands to

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which a federal agency had responded. *Id.* at 1115. The agency denied the request, claiming that a federal FOIA exemption for personal privacy prevented disclosure because the request implicated ranchers' privacy. *Id.* The conservationists filed a FOIA action in the district court. *Id.* At that point, the agency raised another FOIA exemption "for matters exempted from disclosure by certain other statutes." *Id*. But the district court determined that the other statute on which the agency relied—section 8791 of the Food, Conservation, and Energy Act of 2008—could not be applied because it was not in existence when the agency denied the conservationists' FOIA request. *Id.* at 1116.

The appellate court reversed, finding that "[s]ection 8791 applie[d] in th[e] case despite taking effect after the [agency] withheld the GPS coordinates," because "there [was] no impermissible retroactive effect under *Landgraf* in applying a new statute to a pending FOIA [action]." *Id.* at 1117. Because the conservationists sought "the prospective relief of an injunction directing the [agency] to provide it with certain information," section 8791 affected only the propriety of that relief and was "therefore not impermissibly retroactive when applied in th[e] case." *Id.* at 1118.

Similarly, in *City of Chicago v. ATF*, an intervening statutory amendment that affected the propriety of prospective relief for the disclosure of information was applied to a pending action for the disclosure of information on appeal. There, the City filed a FOIA request with a federal

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bureau for its gun sales and tracing data. *See* 423 F.3d at 778. The bureau disclosed some information, but claimed that other information "was protected under FOIA exemptions for privacy and law enforcement purposes." *Id.* at 778–79. The City sued under the federal FOIA, and the district court ordered disclosure of all of the requested information. *Id.* at 779. Ultimately, after the appellate court affirmed, the United States Supreme Court granted the bureau's petition for writ of certiorari. *Id.* Congress then passed an appropriations rider prohibiting the use of funds for any action based on any FOIA provision involving gun sales and tracing data. *Id.* The Court vacated and remanded the case to determine whether the rider affected the case. *Id.* "After the remand but before oral argument, Congress passed another appropriations rider that prohibited the use of appropriated funds" to publicly disclose gun sales and tracing data. *Id.* The appellate court again found for the City because the rider did not alter the scope of its statutory right to information, and it allowed the City to retrieve the data at its own expense. *Id.* The bureau sought rehearing. *Id.* "While that petition was pending, Congress passed the Consolidated Appropriations Act of 2005, which contained yet another rider provision" that specifically exempted the gun sales and tracing data, unlike the previous riders that only prohibited the use of appropriated funds to retrieve that data. *Id.* at 779.

On rehearing, the appellate court held that because the City sought to enjoin the bureau from withholding information and compel disclosure, the

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relief operated prospectively and the exemption in the Consolidated Appropriations Act of 2005 applied to the case. *Id.* at 783. "[T]he relevant event for assessing retroactivity here [was] the disclosure of the withheld data, which [was] a potential future event, not a past, completed event. In these circumstances, 'the plaintiff ha[d] no vested right in the decree entered by the trial court,' . . . and it [was] accordingly proper to apply the law in effect at the time of [the] decision." *Id.* (quoting *Landgraf*, 511 U.S. at 274).

In short, a FOIA action resolves whether the plaintiff *is* entitled to information, not whether it *was* entitled to information. In these appeals, both section 4-24 of the Cosmetology Act and section 2105-117 of the CAC specifically prohibited the disclosure of the information that the Institute and Perry sought. Neither the Institute nor Perry is presently entitled to the requested information. So there is no basis to order the Department to disclose it in the future.

B. There is no retroactive application of law here.

Neither the Institute nor Perry has confronted head-on that application of an intervening statute affecting the availability of prospective relief is "not retroactive." *Landgraf*, 511 U.S. at 273. Instead, they start from the misunderstanding that a right to information vested at some point before the the intervening amendments became effective. *See* Institute Br. 13–23, 25–26; Perry Br. 15–17. Yet they cannot settle on exactly when a right vested—at the time of the FOIA request or when the FOIA action was filed in the circuit

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court—or whether the right involved is a right to information or a right to a cause of action under FOIA. *Compare* Institute Br. 1 (at time of request) *with id.* at 12 (either request date or FOIA action filing date) *with id.* at 18–19 (right to FOIA action accrued when denied information) *with id.* at 22 (at the time of request) *with* Perry Br. 14, 16 (either request date or FOIA action filing date).

Regardless, they argue that the circuit court may now determine whether the Department's withholding of information was proper before the intervening amendments came along—and they presume that the Department's originally cited FOIA exemptions were wrong. *See* Institute Br. 13–23, 25–26; Perry Br. 15–17. They contend that the application of the intervening amendments was an impermissible retroactive application of law to their FOIA actions under Illinois's modified *Landgraf* test. *Id.* That contention is wrong.

FOIA determines present rights, not past rights. If an action involves prospective relief, as it does under section 11 of FOIA, there can be no vested right at issue because prospective relief merely allows a court to declare present rights and order future compliance with those rights. Because prospective relief is the only relief available here, the court need not engage in Illinois's modified *Landgraf* retroactivity analysis. Unlike in the typical *Landgraf* analysis, the court is not looking back at an event and applying present law to a past moment to determine whether a right that vested should

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remain free from interference. *Cf.* Institute Br. 4 (Institute "filed this litigation to remedy the Department's improper denial"). And because it is not retrospectively assessing the legality of a past event involving a vested right, no present laws are being applied retroactively.

There is no dispute that section 4-24 of the Cosmetology Act and section 2105-117 of the CAC only apply prospectively from their effective dates onward. *See* Institute Br. 13, 17–18; Perry Br. 14, 16. No one is arguing that laws can somehow be applied before they become effective. But the Institute and Perry fail to recognize that applying these intervening amendments to a claim for solely prospective relief is not properly characterized as a retroactive application of law to begin with. The Institute and Perry skip this question and proceed straight to a retroactivity analysis. That, however, is the wrong starting point. And their analysis cannot be squared with any case, state or federal, involving claims for prospective relief for the disclosure of information.

The Institute's and Perry's positions require that they have a vested right in the law not changing, or that new law cannot apply to them because it would upset their earlier expectations based in old law. *See* Institute Br. 17, 21–22; *but see* (IC11, 139 (Institute seeks complaints "from 2011 *to the present*" based on prior law (emphasis added))). But that cannot be true, for "there is no vested right in the mere continuance of a law." *First of Am. Trust Co. v. Armstead*, 171 Ill. 2d 282, 291 (1996) (citation omitted). "The legislature has an ongoing right to amend a statute." *Id.* And "[a] statute does not

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operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, . . . or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269; *see, e.g.*, *Hayashi*, 2014 IL 116023, ¶¶ 25–26 (citing *Cox v. Hart*, 260 U.S. 427, 435 (1922) ("A statute is not made retroactive merely because it draws upon antecedent facts for its operation.")).

The Institute and Perry likely would not advocate for applying a retroactivity analysis if an intervening amendment specifically *allowed* the disclosure of their requested information. *See, e.g.*, P.A. 96-542 (2010 FOIA amendment repealing section 7(1)(c)(iii) exemption for professional license applications, among others). If a requestor were denied information and filed a FOIA action in the circuit court, and then an intervening amendment that specifically allowed disclosure became effective, it would be odd for her and the public body to continue arguing about old law and not about the new amendment that allowed disclosure. That illustrates why the Institute's and Perry's arguments are out of place in an action for prospective relief.

The Institute and Perry also mischaracterize the effect of the intervening amendments by asserting that they were deprived of their entire cause of action or claim. *See* Institute Br. 18–21; Perry Br. 15–16. That makes no sense. Both the Institute and Perry always had and still have causes of action under section 11 of FOIA. What changed, however, were intervening laws that affected their present right to information under FOIA, which is what a court is charged with determining in a FOIA action.

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In addition, the Institute asserts that it had an "honest and indeed correct 'expectation' of the law at the time of its request." Institute Br. 22. But, of course, how honest or correct the Institute believed itself to be does not determine the extent of its present statutory right to information under FOIA. And in any event, the Institute's supposed entitlement to the information that it sought before section 4-24 of the Cosmetology Act became effective was not as clear-cut as it submits, as evidenced by the decisions of the PAC and the circuit court in *Perry*. *See also Korner v. Madigan*, 2016 IL App (1st) 153366, ¶¶ 4–7 (similar FOIA action involving similar request in which the Department prevailed, but appeal decided on other grounds).

Relatedly, the Institute contended that there are "collateral rights" to consider because it expected to get attorney fees based on its belief that it was correct notwithstanding section 4-24 of the Cosmetology Act. Institute Br. 23. That is as irrelevant as it is incorrect. It again wrongly presumes that it was correct before section 4-24 became effective. And attorney fees have nothing to do with the scope of a person's right to information under FOIA. Fee awards are determined by the disposition of the case.

C. *J.T. Einoder* involved retrospective relief and has no relevance to a FOIA action for prospective relief.

The Institute and Perry also argued that this Court's decision in *J.T. Einoder* created a new exception allowing a court to order the future disclosure of information based on old law where applying present law would be "inequitable." Perry Br. 17–19; Institute Br. 23–25. That is wrong as well.

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J.T. Einoder has nothing to do with the scope of a statutory right to information under FOIA. *J.T. Einoder* involved a mandatory injunction, a form of relief that operates *retrospectively*. *See* 2015 IL 117193, ¶ 23. In that case, the Illinois Attorney General sued landfill operators for violations of the Illinois Environmental Protection Act (IEPA), 415 ILCS 5/1 *et seq.* (2000), among other claims. *Id.* at ¶ 13. At the time the complaint was filed, the IEPA authorized prohibitory injunctions to restrain ongoing violations, *id.* at ¶ 25, similar to injunctions under FOIA. During the pendency of the case, the landfill stopped operating. *Id.* at ¶ 26. Four years later and while the case was still pending, the IEPA was amended to authorize mandatory injunctions as well to compel IEPA violators to clean-up illegal landfills, *id.*, a type of retrospective relief that is not available under FOIA.

A prohibitory injunction would stop the operator from continuing to operate the landfill. *Id.* at ¶ 27. A mandatory injunction, on the other hand, operates retrospectively because it requires the landfill operator to remove the landfill, not just stop operating it, *id.* (citing *People ex rel. Ryan v. Agpro, Inc.*, 214 Ill. 2d 222, 226–32 (2005)), as a way of remedying past harms and imposing "new liability on defendants' past conduct" that already ceased. *Id.* at ¶ 36. As the circuit court in *Perry* put it, injunctive relief commands a defendant to "'[q]uit violating the statute,'" whereas a mandatory injunction instructs a defendant to "'take some remedial steps', which, of course, costs

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money, which, of course, imposes obligations after the cessation of activity on the defendant in an environmental enforcement action." (PR22).

Indeed, there was never a dispute in *J.T. Einoder* as to whether a mandatory injunction is retrospective or prospective in nature; it was undisputed that a mandatory injunction is a form of retrospective relief. The issue was whether under Illinois's modified *Landgraf* test the mandatory injunction amendment could be applied retroactively to the landfill operator. *See* 2015 IL 117193, ¶¶ 23, 27–28. Thus, *J.T. Einoder* has nothing to do with amendments that "affect[ ] the propriety of prospective relief." *Landgraf*, 511 U.S. at 273. In these cases, however, the Institute and Perry ignore that FOIA authorizes prospective relief only for the disclosure of information. Instead, they jump right to the Illinois's modified *Landgraf* test, an analysis that this Court, as in *Wisniewski* and *Hayashi*, never needs to reach.

Even if *J.T. Einoder* were relevant, there is no inequity in the correct interpretation of statutory rights. *See* Institute Br. 23–25; Perry Br. 17–19. The Institute, specifically, believed that inequity is established by attacking the merits of the Department's originally cited section 7 exemptions, mistakenly presuming that the Department "unlawfully denied the request on grounds so weak that it has not even chosen to appeal them." Institute Br. 24. It also submits that its attorney's expectation that he would win the case and be awarded fees is relevant to the equities. *Id.* at 25–26.

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But the Institute's confidence in the correctness of its position before section 4-24 came into effect has nothing to do with the outcome that is mandated by the proper application of present law to determine present statutory rights. The Department's abandonment of certain FOIA exemptions on appeal does not concede their merit because it would have continued litigating those exemptions if section 4-24 of the Cosmetology Act did not provide a straight-forward outcome. The disposition of these cases also has nothing to do with the amount of attorney fees or how earnest the party's or its attorney's expectation that it would win might be, regardless of how wrong they were.

D. Reliance on Eleventh Amendment cases is misplaced.

The Institute and Perry attempt to recast their request for declaratory and injunctive relief for the disclosure of information as somehow retrospective. *See* Institute Br. 30; Perry 16. They rely on cases involving the Eleventh Amendment to the United States Constitution in which declaratory relief based on past violations of federal law that accompanied prospective injunctive relief. *See* Institute Br. 30–31 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Machete Prods., L.L.C. v. Page*, 809 F.3d 281 (5th Cir. 2015); *Lewis v. Bd. of Educ. of Talbot Cty.*, 262 F. Supp. 2d 608 (D. Md. 2003)); Perry Br. 16, 20 (citing *Green v. Mansour*, 474 U.S. 64 (1985)).

Aside from the fact that FOIA does not authorize retrospective declaratory relief and that there is no such thing as a retrospective injunction

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for the future disclosure of information, these cases are irrelevant. They involve the Eleventh Amendment's bar to suing a sovereign State in federal court for retrospective monetary relief. *See, e.g.*, *Green*, 474 U.S. at 68. The Eleventh Amendment does not bar an action against State officers in federal court for prospective relief "to end a continuing violation of federal law." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 155–56, 159 (1908)). In *Quern v. Jordan*, though, the United States Supreme Court held a federal court did not violate the Eleventh Amendment by sending notice to putative plaintiff class members, ancillary to prospective relief already ordered, to inform them that their federal suit had ended, that the federal court could provide no more relief, and that state-based avenues for further relief might be available. 440 U.S. 332, 349 (1979). These cases at best illustrate the general difference between retrospective and prospective relief.

To be sure, some courts have used the label "retrospective declaratory judgment" to describe the declaration of a party's rights that accompanies the disposition of a claim for retrospective relief. *See, e.g.*, *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847–48 & n.5 (9th Cir. 2002) (involving prospective relief but explaining the retrospective declaratory relief concept); *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) (citing *F.E.R. v. Valdez*, 58 F.3d 1530, 1533 (10th Cir. 1995)). Indeed, declaring the parties' legal rights is intrinsic to the judicial task. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) (courts "say what the law is" in

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"particular cases"). But "retrospective declaratory judgment" claims are always intertwined with claims for money damages, not injunctive relief, and so retrospective declaratory relief is "superfluous in light of the damages claim." *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997); *F.E.R.*, 58 F.3d at 1533 ("[Plaintiffs'] claim for a declaratory judgment is similar to their claim for damages. In each, [they] ask the court to determine whether a past constitutional violation occurred.").

Here, the Institute and Perry seek the disclosure of information under FOIA, not money damages. The only relief suited to their claims is the prospective relief that is authorized under FOIA. The concept of "retrospective declaratory judgment" is thus inapplicable here.

E. Attorney fees and penalties under FOIA do not make relief for the disclosure of information retrospective.

Perry also argued that the Department conceded that FOIA is retrospective based on its acknowledgment that FOIA contains a penalty provision for past intentional and willful violations of FOIA and an attorney fees provision for prevailing parties. *See* Perry Br. 20–22. Perry adds that this action should be remanded so that the circuit court can determine whether the Department willfully and intentionally violated FOIA or otherwise acted in bad faith by denying its FOIA request. *See* Perry Br. 21, 28.

Perry conflates the prospective relief under section 11(a) with reasonable attorney fees for prevailing parties under section 11(i) and

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penalties for willful FOIA violations under section 11(j). It also misstates the Department's position. Section 11(j) penalties retrospectively remedy past willful and intentional violations of FOIA with monetary penalties, but Perry is incorrect that this provision changes the nature of the prospective relief that FOIA authorizes under section 11(a) for declaring a person's present right to information and ordering future disclosure. Whether Perry is presently entitled to information under FOIA is an independent question from whether the Department willfully and intentionally violated any FOIA provision in the past. *See, e.g., Roxana Cmty. Unit Sch. Dist. No. 1 v. Envtl. Prot. Agency*, 2013 IL App (4th) 120825, ¶ 42 (plaintiffs' request for information under FOIA moot, but not request for penalties and attorney fees); *Rock River Times v. Rockford Pub. Sch. Dist. 205*, 2012 IL App (2d) 110879, ¶ 40–42, 51–54 (newspaper not entitled to information from school district under FOIA, but school district penalized for failing to comply with FOIA request).

In *Perry*, the circuit court made no finding on whether the Department willfully and intentionally violated FOIA. (PR27–28). It believed that it did not need to reach the issue after concluding that Perry was not entitled to the information. (PR28). The circuit court was mistaken because penalties for past conduct (monetary remedy) is a separate question from whether Perry is presently entitled to information under FOIA (prospective remedy).

Perry, however, has forfeited any claim for penalties, *see Perry*, 2017 IL App (1st) 161780, ¶ 47, and makes no argument to this Court that the

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appellate court's forfeiture finding was an abuse of discretion, *see Kovera v. Envirite of Ill., Inc.*, 2015 IL App (1st) 133049, ¶ 47. It also has provided no reason for a remand and hearing on whether the Department willfully and intentionally violated FOIA or was entitled to attorney fees. On the fees issue, section 2105-117 of the CAC determined the prevailing party—the Department. A fee provision for prevailing parties does not create a vested right in the continuance of old law. *See supra* section B, pp. 26, 29.

As for the penalties issue, forfeiture aside, Perry has failed again to articulate a basis for finding that the Department willfully and intentionally violated FOIA. From the beginning, Perry's complaint alleged no facts to support willful and intentional violations of FOIA. *See Turner v. Mem'l Med. Ctr.*, 233 Ill. 2d 494, 499 (2009) ("Illinois is a fact-pleading jurisdiction."). To the extent Perry believes that the Department's position before the effective date of section 2105-117 was so legally baseless that it warranted penalties, it cannot make that showing. That position had a basis in law, as confirmed by the PAC and the circuit court, which required only the disclosure of some exhibits. (*See* PC85, 133, 159–61). And even if Perry prevailed in this action, a losing argument alone does not establish willful or intentional conduct. *Cf. Lake Envtl., Inc. v. Arnold*, 2015 IL 118110, ¶ 15 ("[Ill. S. Ct. R. 137] is designed to discourage frivolous filings, not to punish parties for making losing arguments.").

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* * *

The Institute, Perry, and *amici* are worried that public bodies will try to extinguish specific FOIA requests by lobbying the legislature to pass disclosure exemptions if this Court does not rewrite FOIA and invent a new type of relief that would allow certain persons to freeze the law in place.

Illinois's representative branches of government specifically prohibited the disclosure of complaints from members of the public that are filed with the Department against professional licensees. Before these confidentiality provisions became effective, the Department took the same position that these complaints were not subject to disclosure under the long-standing general exemptions in section 7 of FOIA. *Compare, e.g.*, P.A. 83-1013 (the first version of FOIA, including exemption under section 7(b)(v) for "information revealing the identify of persons who file complaints with or provide information to administrative . . . agencies") *with* 5 ILCS 140/7(1)(d)(iv) (2016) (no disclosure if it would "unavoidably disclose the identity of . . . persons who file complaints with or provide information to administrative . . . agencies"). Given the general nature of the exemptions, requestors questioned their applicability to their specific requests. The General Assembly and Governor merely foreclosed any question with the enactment of section 4-24 of the Cosmetology Act and section 2105-117 of the CAC, which are only two of many professional regulation statutes that also were amended to include a confidentiality provision. *See, e.g.*, 225 ILCS 115/25.2a (eff. Dec. 31, 2013) (Veterinary

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Medicine and Surgery Practice Act); 225 ILCS 412/157 (eff. Aug. 16, 2013) (Electrologist Licensing Act); 225 ILCS 63/193 (eff. July 13, 2012) (Naprapathic Practice Act); 225 ILCS 105/24.5 (eff. July 14, 2011) (Boxing and Full-contact Martial Arts Act); 225 ILCS 430/26.5 (eff. July 22, 2011) (Detection of Deception Examiners Act). Moreover, many of these statutes contain sunset clauses. *See, e.g.*, 5 ILCS 80/4.36 (2016) (providing that the Cosmetology Act, among others, will become ineffective on January 1, 2026).

The analysis and outcome that the Institute, Perry, and *amici* envision for preventing effective legislation from being applied to pending actions for prospective relief would rewrite the relief that FOIA authorizes and provide new relief that does not exist in any American jurisdiction. As in *Wisniewski* and *Hayashi*, there is no retroactive application of law in this context. When the remedy authorized under a cause of action is prospective, a court is empowered only to declare present rights and enjoin future wrongs.

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CONCLUSION

For these reasons, this Court should affirm the judgments of the appellate court.

February 14, 2018

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) 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 36 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 14, 2018, I electronically filed the foregoing **BRIEF OF DEFENDANT-APPELLEE** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the 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 under 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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