No. 122878

IN THE
SUPREME COURT OF ILLINOIS

THE CITY OF CHICAGO and THE VILLAGE OF SKOKIE,	)	
Plaintiffs-Appellees,	)	On Petition for Leave to Appeal from the Illinois Appellate Court,
v.	)	First District, No. 1-15-3531
THE CITY OF KANKAKEE; THE VILLAGE OF CHANNAHON; MTS CONSULTING, LLC; INSPIRED DEVELOPMENT LLC; MINORITY DEVELOPMENT COMPANY LLC; CORPORATE FUNDING SOLUTIONS; and CAPITAL FUNDING SOLUTIONS,	)	There Heard on Appeal from the Circuit Court of Cook County, Nos. 11 CH 29744, 11 CH 29745, and 11 CH 34266 (cons.)
	)	Honorable Peter Flynn, Presiding
Defendants-Appellants.	)	

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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POINTS AND AUTHORITIES

ARGUMENT

Plaintiffs' whole argument boils down to the semantic fiction that a suit entirely about tax revenues, arising entirely out of the General Assembly's comprehensive tax and finance scheme, somehow originates in the common law and can be clothed in the garb of equity. Plaintiffs' artful characterization of their claim should be rejected.

No matter how many times Chicago and Skokie insist on using the term "unjust enrichment," there simply is no common law analog to this suit. Plaintiffs themselves repeatedly admit that their claim arises from the allegation that the taxpayers "falsely reported" their taxes, which is just another way of saying that the taxpayers failed to comply with state tax laws. Indeed, some variant of the term "falsely reported" appears sixteen times in Plaintiffs' brief. (Pl. Br. 1, 6, 7, 8, 11, 15, 19, 24, 29, 30, 35, 37, 46, 47, 49, 54.) Plaintiffs also lament that the suit is necessary because "IDOR never examined whether it had misallocated tax revenue from the sales at issue," *id*. at 37—a frank and correct acknowledgment that this is a function within IDOR's sphere of responsibility.

In short, this is a purely statutory claim within the exclusive domain of the administrative agency charged with its enforcement. It is not a claim that has a counterpart at common law or that exists outside of the General Assembly's comprehensive legislative framework. The circuit court was right to see this claim for what it is and to dismiss it, and the appellate court erred in reversing that court's decision.

I. IDOR has exclusive jurisdiction over this dispute.

As relevant here, the Court has set forth three criteria to determine whether IDOR has exclusive jurisdiction over this dispute: *first*, whether the General Assembly has enacted a comprehensive legislative framework; *second*, whether the right asserted by plaintiff has a counterpart in law or equity; and *third*, that the determination of whether such a counterpart exists turns on the true substantive nature of that claim rather than on what a plaintiff artfully tries to call it. See generally Def. Br. 16 (citing *J & J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, as to the first two elements) & 20 (citing *Sundance Homes, Inc. v. Cty. of DuPage*, 195 Ill. 2d 257 (2001) for the third element).

A. Plaintiffs do not dispute that the General Assembly has enacted a comprehensive legislative framework.

There is no dispute here as to the first element. The appellate court found, and the plaintiffs agree, that the first criterion has been met.

Plaintiffs ignore the wellspring of this authority, however. The General Assembly's power comes directly and exclusively from the Illinois Constitution—specifically Article IX, Section 1 of the Illinois Constitution, which provides:

> The General Assembly has the *exclusive power* to raise revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away.

IL Const. 1970, art. IX, § 1 (emphasis added). This constitutional origin is not a mere curiosity; it has substantive import because it means that the power to tax and

distribute tax revenue has an exclusively legislative, rather than common law genesis.

There can also be no real question that, in turn, the General Assembly empowered IDOR with broad authority to enforce its comprehensive regulatory scheme. As noted in our opening brief, the General Assembly granted IDOR the relevant powers here through a long list of statutes. (Def. Br. 18-19.) These include several catchall provisions, including the grant of power to IDOR "to administer and enforce *all* the rights, powers, and duties contained in the Retailers' Occupation Tax Act [ROTA]" and "to exercise *all* the rights, powers, and duties vested in the Department by the Use Tax Act [UTA]." 20 ILCS 2505/2505-25, -90 (emphasis added).

Plaintiffs contend that "those provisions do not help here" because they "merely state" that IDOR has the powers set forth in ROTA and UTA, and that "[n]either provision identifies the powers those other two statutes confer on IDOR or take away from the courts." (Pl. Br. 35-36.) But they don't have to; "all" means *all*. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25 ("Words should be given their plain and obvious meaning unless the legislative act changes that meaning.") A review of the plain terms of ROTA and UTA reveals that one of those powers is the power to enforce compliance. 35 ILCS 105/11 (UTA provision granting the Director the power to "hold investigations and hearings concerning *any matters* covered herein" explicitly "[f]or the purpose of administering and *enforcing*" the Act) (emphasis added); 35 ILCS 120/8 (same for ROTA). Furthermore, in a statute entitled

"Failure to comply with tax laws," IDOR is granted the specific power to bring enforcement actions for failure to comply with "any law" that IDOR is charged with administering. 20 ILCS 2505/2505-300. Where the General Assembly has granted the Director "all" powers to "enforce" the two acts, including powers to bring enforcement actions for "failure to comply" with those acts, it is not plausible to claim that the legislature intended for municipalities such as Chicago and Skokie to bring parallel claims in the courts. On the contrary, it is a manifestation of the General Assembly's intent to vest exclusive jurisdiction in IDOR. Indeed, in finding that the Gaming Board had exclusive jurisdiction over location agreements in *J & J Ventures*, this Court pointed to nearly identical language in the Video Gaming Act. *J & J Ventures*, 2016 IL 119870, ¶ 27 (noting that the act "explicitly vests the Gaming Board with authority to administer the Act by granting the Board 'all powers necessary and proper to fully and effectively execute [its] provisions'") (citation omitted).

Though Plaintiffs concede the existence of comprehensive legislative framework of state tax and finance law of which ROTA and UTA form a part, they raise several misguided or irrelevant points to suggest that this statutory apparatus does not manifest an intention to vest exclusive jurisdiction in IDOR.

Plaintiffs inexplicably begin their argument with two irrelevant lines of jurisprudence. *First*, Plaintiffs survey a series of decisions holding that the General Assembly must *expressly* state its decision to create exclusive agency jurisdiction—specifically, *People v. NL Industries*, 152 Ill. 2d 82 (1992), *Employers Mutual Cos. v.*

Skilling, 163 Ill. 2d 284 (1994), *Village of Itasca v. Village of Lisle*, 352 Ill. App. 3d 847 (2d Dist. 2004), and *State ex rel. Beeler, Schad and Diamond, P.C. v. Ritz Camera Centers, Inc.*, 377 Ill. App. 3d 990 (1st Dist. 2007). (Pl. Br. 18-21.) But as explained in our opening brief, and as Plaintiffs themselves acknowledge, this Court held in *J & J Ventures* that express language was *not* necessary for that purpose. Even the appellate court recognized that, as a consequence, these pre-*J & J Ventures* decisions were not controlling precedent; it therefore did not rest its decision on their holdings. Opinion, *City of Chicago v. City of Kankakee*, 2017 IL App (1st) 153531, ¶ 32 n.11 (A21) ("Op."). Plaintiffs nevertheless contend that according to *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, express language of exclusion is still "the most important factor." (Pl. Br. 25.) This mischaracterizes *Zahn*, which does not say this anywhere, and which does not privilege any particular criterion in determining the legislature's explicit intention. Rather, as the Court instructed in *J & J Ventures*, "[a]ll provisions of a statute must be viewed as a whole, with the relevant statutory provisions construed together and not in isolation." *J & J Ventures*, 2016 IL 119870, ¶ 25.

Second, Plaintiffs discuss the doctrine of primary jurisdiction, a doctrine that Plaintiffs admit we "do not rely on." (Pl. Br. 26.) It is therefore a mystery why Plaintiffs spend two pages arguing about it. *Id*. at 26-27.

Third, Plaintiffs contend that the General Assembly "has not acted" to deprive courts of jurisdiction over court decisions to identify locations for purposes of taxation, in particular since *Village of Itasca* and *Beeler*. This ignores Section 8-11-21

of the Illinois Municipal Code, 65 ILCS 5/8-11-21, which took effect in 2004 (the year *Village of Itasca* was decided) and which has been amended several times since. Section 8-11-21 gives one Illinois municipality a right of action against another where the latter has entered into an agreement to rebate sales taxes if, absent the agreement, the taxes would have been paid to another unit of local government where the retailer maintains a retail location or warehouse. 65 ILCS 5/8-11-21(a). As noted in our opening brief, this statute was the *original* basis for this lawsuit, and Chicago and Skokie amended their complaints twice when it was clear that they could not identify even one retailer who fit the statutory elements. (Def. Br. 10-11.)

Plaintiffs say nothing at all about Section 8-11-21—their brief literally contains no reference to it—and this omission is remarkable. Section 8-11-21 is Exhibit A for the proposition that when the General Assembly intends to carve out an exception to IDOR's exclusive jurisdiction, grant jurisdiction to the circuit courts over enforcement of a tax statute, and authorize one municipality to sue another for recovery of misallocated tax revenue, *it knows how to do so*.

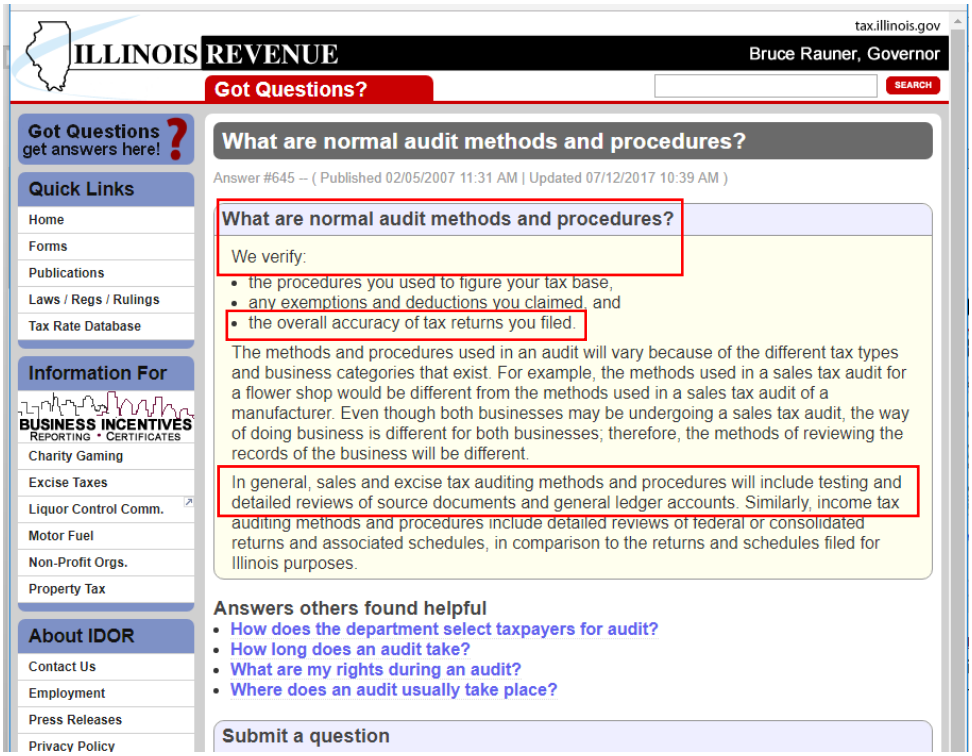
The appellate court misapprehended this issue as well, though at least the court acknowledged its importance. The appellate court held that "[f]or us to conclude that plaintiffs' claims are precluded by a statute designed to remedy an essentially identical harm would be absurd" because there is "nothing in Section 8-11-21 . . . that evinces a legislative intent to preclude a municipality from suing another municipality to recover use tax revenue to which it would otherwise have been entitled." Op. at 20-21 (A20-21). This misses the point. Section 8-11-21 is not

significant because of how it operates, but rather for its mere existence. It demonstrates that in order for a municipality to have the right to sue in court about mis-sourcing or misreporting of use taxes, *the municipality must be given that right by the General Assembly*. That body authorized courts to entertain inter-municipal suits for mis-sourced sales taxes but did not enact any analog for use taxes (or more precisely, for Plaintiffs' current claim of a "use tax–sales tax swap"). Consequently, the legislature cannot be deemed to have created an exception to IDOR's current exclusive jurisdiction to "administer and enforce" the laws relating to such claims.

Fourth, Plaintiffs contend that it is within the conventional competence of courts to determine the situs of sales for purposes of finding whether a sale should be subject to use tax or sales tax. (Pl. Br. 29-30.) Perhaps that might be true if the claim involved a single sale, but here Chicago and Skokie propose to scrutinize hundreds of thousands of sales made over the course of several years: in other words, *to conduct an audit*. As noted in our opening brief, this involves a complicated review and retroactive calculus, which even Plaintiffs concede is a "calculation [that] requires several steps." (Pl. Br. 34.)

Plaintiffs nevertheless insist that "this case does not involve any of the taxation functions Kankakee and the brokers identify," *id*. at 33, and deny that they are seeking to conduct an audit. In a textbook example of doublespeak, Plaintiffs argue that it is "manifestly incorrect" that they are trying to conduct an audit because they "seek merely to have the circuit court confirm that the retailers made the subject sales outside Illinois but falsely reported to IDOR they made the sales in

Kankakee, and wrongfully paid sales tax, rather than use tax, on them." *Id.* at 28-29. *That is exactly what an audit is*, as IDOR's own webpage suggests:



See http://tax.illinois.gov/QuestionsAndAnswers/645.htm (accessed May 11, 2018) (red boxes added).[1] IDOR itself states that a "normal audit" involves verification of "the overall accuracy of tax returns you filed," and that auditing involves "detailed review of source documents and general ledger accounts." That is precisely the exercise that Plaintiffs want the circuit court to perform here.

[1] The Court may (and is requested to) take judicial notice of this site. Ill. R. Evid. 201(b) (court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *City of Chicago v. Soludczyk*, 2017 IL App (1st) 162449, ¶ 3 n.1 (holding that under Rule 201, the court could take judicial notice of a government website) (citation omitted).

Plaintiffs also contend that the "conventional competence" of courts includes identifying the source of sales because that is "a simple, discrete task" (Pl. Br. 29), and on this basis seek to distinguish *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166. This misapprehends the import of that phrase. Complexity is a factor to consider in the question of exclusive agency jurisdiction, but it is neither a dispositive nor even a necessary one; the Court in *J & J Ventures* did not consider it at all, for example. The more important question is whether the dispute involves *subject matter* that, according to the legislature, falls within the agency's delegated sphere of enforcement responsibility. The subject matter in *J & J Ventures* was contracts. Though it is among the most basic and longstanding functions of courts to adjudicate contract disputes, the Court nevertheless held that the Gaming Board had exclusive jurisdiction because the *kind* of contracts at issue in that case were assigned by the General Assembly to the exclusive oversight of the agency. The same thing is true here.

Finally, Plaintiffs contend that there would be no adverse consequences in allowing tax-compliance suits under the attire of unjust enrichment claims. Plaintiffs dismiss as "inflated" Defendants' concerns about the threats to taxpayer privacy, the prospect of tax vigilantism, the problem of inconsistent determinations between IDOR and the courts, and the cloud of uncertainty over the heads of both retailers and municipalities as to whether reporting decisions will be second-guessed in court—long after expiration of the normal statute of limitations for sales or use tax assessments. (Pl. Br. 38-41.) But Plaintiffs' assurance on these points is

mere say-so and provides little comfort.[2] The General Assembly and IDOR have intentionally created mechanisms for the express purpose of resolving these various questions—for example, by creating taxpayer protections (35 ILCS 120/11, 20 ILCS 2520/1 *et seq.*), or by creating a mechanism for adjusting distributions to offset earlier misallocations (65 ILCS 5/8-11-16; 30 ILCS 105/6z-18). The legislature's considered judgment should not be undermined by creative plaintiffs.

A further problem is that Plaintiffs offer no limiting principle to their formulation of the claim. According to Plaintiffs, an unjust enrichment action will lie where any putative beneficiary of a public fund can claim that a taxpayer "falsely reported" taxes that might have been allocated to the fund, thus resulting in their misallocation. This issue is not confined to municipalities and ROTA or UTA. On the same principle, any taxpayer, under any tax, can plausibly make out an argument that somebody else was "unjustly enriched" because they were the intended beneficiary of the tax: students or teachers can sue homeowners who fail to report their property taxes because some portion of the fund goes to schools; retirees can sue employers who fail to report their withholding taxes because some portion goes to pensions, and so forth. Confining jurisdiction to the agency charged with enforcing the tax and finance laws is substantially more prudent and legally

[2] Plaintiffs' assurance is further belied by the brief of *amicus curiae* The Regional Transportation Authority. The brief identifies three lawsuits that *RTA alone* has brought against various businesses and other Illinois municipalities, such as Sycamore and Genoa, on theories similar to those advanced by Plaintiffs here. This is in addition to the suit, related to this action, that RTA filed against the defendants in this case. It is not for Chicago and Skokie to brush off tax vigilantism as an idle fear when there is an actual tax vigilante already hard at work in the circuit courts.

justifiable than the course of action recommended by Plaintiffs, which is simply to hope for the best.

B. Plaintiffs do not dispute that that their claim turns on substance rather than form, and here the substance of their claim is not one that has a counterpart in law or equity.

Plaintiffs also do not dispute the third element (that a claim turns on substance rather than form)—at least in principle. Nor can they; the Court has made clear that courts should look past artful pleading. *Sundance Homes, Inc. v. Cty. of DuPage*, 195 Ill. 2d 257, 282 (2001) (disapproving the use of "artful pleading designed to cloak the cause in the attire of equity" in order to avoid statutory limitations on recovery). The parties dispute the *application* of this principle here, however. Plaintiffs contend that they are not violating the principle at all, and that their statutory claim *really is* an equitable claim.

Plaintiffs are wrong. It exalts form over substance to call their action one for "unjust enrichment." This is a private action for tax-law compliance that has no counterpart in law or equity. For example, Plaintiffs agree with our own point that the substance of their claim "turns *fundamentally* and *unavoidably* on whether the transactions that generated the revenues were subject to the sales tax or [instead to] the use tax." (Pl. Br. 31 (quoting Def. Br. 2, emphasis in original).) As noted above, they frequently refer to their claim as one that seeks to remedy "false reporting." And they expressly state that "our claim is that the tax *should have been paid* as use tax, from which we were entitled to a portion of the revenue." (Pl. Br. 30 (emphasis added).) In yet more doublespeak, they claim that they "do not seek a redistribution

in either substance or form," *id*. at 31, but rather to have the circuit court order defendants "to pay us, directly, money equal to the amount of which we were deprived" after "IDOR disbursed sales tax revenue monthly to Kankakee." *Id*. at 29-30. In other words, it is not redistribution because this time, a court rather than IDOR will direct where the money goes. This is a distinction without any material difference.

Consequently, Plaintiffs also cannot meet the second factor noted above, namely whether their cause of action has a counterpart in law or equity. The irreducible problem for Plaintiffs is that their claim would not exist but for state tax and finance *statutes*. Plaintiffs contend that "the common-law action for unjust enrichment existed long before the pertinent statutes" (Pl. Br. 43), but they cannot seriously contend that their equitable claim would exist *without* those statutes. *There is no common-law right to sales or use tax revenue*. Plaintiffs' entire claim is predicated on the existence of these statutes, which not only establish the rights and duties appurtenant to those taxes in the first place, but which also contain their own mechanisms for enforcement.

For that reason, Plaintiffs are misguided when they speak of whether the revenue statutes here "abrogate" the common law. The legislative scheme here distinguishes this case from those cited by Plaintiffs, such as *Rush University Medical Center v. Sessions*, 2012 IL 112906, or *K. Miller Construction Co., Inc. v. McGinnis*, 394 Ill. App. 3d 248, 257-63 (1st Dist. 2009), *aff'd in part, rev'd in part on different grounds,* 238 Ill.2d 284 (2010). In those cases, common-law rights really *were* at issue, such as

whether the Uniform Fraudulent Transfer Act abrogated the common law rule that a person cannot settle his estate in trust for his own benefit (*Rush*), or whether the Home Remodeling and Repair Act abolished *quantum meruit* actions when it provided that oral contracts for home repair work exceeding $1,000 were unlawful (*K. Miller*). Here there is no common law right to abrogate. Plaintiffs' effort to distinguish cases such as *Kosicki v. S.A. Healy Co.*, 380 Ill. 298 (1942)—which held that "where a statute creates a new right or imposes a new duty or liability, unknown to the common law, and at the same time gives a remedy for its enforcement, the remedy so prescribed is exclusive," *id*. at 302—is therefore inapt.

Plaintiffs also contend that IDOR has limited authority and that if they cannot bring their equitable claim, they will have no other remedy. As an initial matter, this is wrong as a matter of law. Plaintiffs claim that "IDOR's authority to correct faulty tax returns is limited to circumstances where 'the taxpayer agrees that he or she has made a reporting error that should be corrected.'" (Pl. Br. 36 (quoting 20 ILCS 2505/2505-475).) But that statute concerns the correction of tax record errors for purposes of alerting the Treasurer. It does not diminish IDOR's broad authority, noted above, to bring enforcement actions for failure to comply with "any law" that IDOR is charged with administering. 20 ILCS 2505/2505-300.

Nevertheless, Plaintiffs complain that they "lack statutory authority to initiate proceedings at IDOR or to compel IDOR to initiate proceedings." (Pl. Br. 6; see also *id*. at 23, 51 (same).) Note the careful word choice: "initiate" or "compel." But there is nothing that prevents Plaintiffs from notifying IDOR of the transactions at

issue here, or lodging a formal complaint that would entitle the Department to use its broad investigatory powers in order correct the "false reporting" and "misallocation" that Plaintiffs complain of. 20 ILCS 2505/2505-305. Chicago and Skokie do not disagree that IDOR *could have* brought claims if the agency saw grounds to do so; their objection is that IDOR *did not in fact* do so. But this exercise of discretion is consistent with, not in contravention of, the statutory scheme. As noted in our opening brief (Def. Br. 30-31), the fact that remedies may be limited is not a license to ignore them. They are limited *because the General Assembly designed them that way*. Plaintiffs offer no explanation for why they are entitled not only to the same, but *greater* enforcement authority than IDOR itself—for example, by asserting equitable claims covering a period of years when the statutes in question allow IDOR to make corrections only for a six-month period. 65 ILCS 5/8-11-16; 30 ILCS 105/6z-18.

When Plaintiffs' cause of action is viewed by its substance rather than its form, it is a clear attempt to enforce statutes within a comprehensive legislative framework that has no counterpart in law or equity. The criteria of *J & J Ventures* have been met, and the subject matter is one over which IDOR has exclusive jurisdiction. The appellate court erred in concluding to the contrary.

II. This suit is an exercise of power beyond Chicago and Skokie's constitutional home-rule authority.

Chicago and Skokie claim that this suit does not exceed their home-rule powers because theirs is not a suit to "collect or distribute any tax." (Pl. Br. 43-44.) As described above, this assertion rests on a false semantic distinction. By Plaintiffs'

own admission, their suit seeks recompense for "false reporting" of taxes and "misallocation" of tax revenues, by which they mean *state* taxes and *state* tax revenues. Under the criteria of *City of Chicago v. StubHub, Inc.*, 2011 IL 111127, their suit is therefore a matter of "statewide rather than local dimension" beyond their constitutional authority because "the state has a vital interest" and "a traditionally exclusive role" in regulating taxes and tax revenues. *Id.* at ¶¶ 24-25.

Plaintiffs' sole response to this is to offer the example of one municipality seeking to recover a laptop wrongfully retained by another municipality. (Pl. Br. 44.) This example is inapt. Tax revenues collected by the state are not personal property of the city, like a laptop, and there is no statewide legislative scheme for the collection and distribution of laptops. The home rule units here have no constitutional power to usurp the traditional role of a state agency in enforcing tax and finance laws of statewide application.

Conclusion

For the foregoing reasons and those stated in our opening brief, the judgment of the appellate court should be reversed.

Dated: May 17, 2018

Respectfully submitted,

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Certificate of Compliance

The undersigned, an attorney, certifies 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, and the certificate of service, is 4,003 words.

I further certify that the PDF version of this brief that is being filed electronically has been scanned for viruses using Sophos version 10.8, and no virus was detected.

/s/ Scott C. Solberg
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Certificate of Service

The undersigned certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on May 17, 2018, the foregoing Reply Brief of Defendants-Appellants was filed with the Supreme Court of Illinois using the court's electronic filing system and served on all parties to this appeal that are listed with that system. On May 17, 2018, I also served each party to this appeal by emailing the Brief directly to one of its attorneys at the email address specified below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Scott C. Solberg
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