No. 122349 (consolidated with No. 122411)

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 Illinois Appellate Court, First Judicial District, Case 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 Hon. J. Rodolfo Garcia, *Judge Presiding*

BRIEF OF PLAINTIFF-APPELLANT INSTITUTE FOR JUSTICE

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POINTS AND AUTHORITIES

NATURE OF THE CASE

This case is about an Illinois public body that breached its statutory duty to turn over information in response to a valid Illinois Freedom of Information Act ("FOIA") request.

In September 2013, Plaintiff-Appellant Institute for Justice ("IJ") made a straightforward FOIA request to the Department of Financial and Professional Responsibility ("Department"). The Department at first ignored the request and then refused to comply. To vindicate IJ's right to information, it sought an administrative appeal and eventually filed this lawsuit. Throughout this time period, the Department presented a broad array of exemptions to justify its FOIA denial. But the Department has abandoned these exemptions. It is no longer claiming that it had a valid exemption to the FOIA request in September 2013. In other words, the Department should have turned over the requested information in 2013, and this lawsuit should never have been necessary.

After IJ filed this lawsuit, a new law became effective. In a fortuitous coincidence for the Department, after IJ's FOIA request, the Illinois General Assembly passed a law to limit the disclosure of the precise information sought by IJ. Even though IJ had a statutory right to the requested information at the time it made its FOIA request, and it accrued a valid cause of action to enforce that right, the question for this Court is whether the new law should be interpreted to retroactively apply to this case. Applying the new law—

rather than the law at the time of the request or the Complaint—would nullify IJ's right to the requested information and defeat this litigation.

The Chancery Court granted summary judgment for IJ, declaring that the Department should turn over the requested documents and awarding $35,000 in costs and attorney's fees. The Appellate Court reversed in a split decision. *Institute for Justice v. Dep't of Fin. & Prof. Reg.*, 2017 IL App (1st) 162141 ("Order") (A7). In dissent, Justice Delort warned that allowing public bodies to retroactively change the documents subject to the Illinois FOIA "would encourage governmental bodies to stall FOIA responses" and "actively lobby for an amendment which shields particularly embarrassing records from disclosure." *Id.* ¶ 38. IJ filed a Petition for Rehearing, and then timely filed a Petition for Leave to Appeal the Appellate Court's Order. This Court granted IJ's Petition and consolidated the case with *Perry,* which contains a similar legal question. No questions are raised on the pleadings.

JURISDICTIONAL STATEMENT

The Chancery Court granted summary judgment for the Institute for Justice ("IJ") on November 12, 2015, rejecting all of the Department's claimed exemptions under the Illinois FOIA. (C292–99). The Chancery Court then granted IJ $35,000 in attorney's fees and costs as the prevailing party and entered final judgment for IJ on June 30, 2016. (C600–01, 610) The Department appealed, and the Appellate Court reversed (with Justice Delort dissenting), entering judgment for the Department on April 14, 2017. (C611–12, A7–22) IJ filed a Petition for Rehearing, and on May 18, 2017 the Appellate Court denied the Petition (again with Justice Delort dissenting). (A23) IJ filed a timely Petition for Leave to Appeal, and this Court granted IJ's Petition on September 27, 2017. (A24) This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.

ISSUE PRESENTED

The effective date of Section 4-24 (225 ILCS 410/4-24) is fifteen months after IJ made its FOIA request and also after it filed this litigation to remedy the Department's improper denial.

Did the Appellate Court err when it applied Section 4-24 to this litigation where the Illinois General Assembly did not intend the law to apply retroactively, where applying the new law would impair IJ's rights, and where applying the new law would result in inequitable consequences?

STATUTES INVOLVED

225 ILCS 410/4-24

"Confidentiality. All 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 and information collected to investigate any such complaint, shall be maintained for the confidential use of the Department and shall not be disclosed. The Department may not disclose the information to anyone other than law enforcement officials, other regulatory agencies that have an appropriate regulatory interest as determined by the Secretary, or a party presenting a lawful subpoena to the Department. Information and documents disclosed to a federal, State, county, or local law enforcement agency shall not be disclosed by the agency for any purpose to any other agency or person. A formal complaint filed against a licensee by the Department or any order issued by the Department against a licensee or applicant shall be a public record, except as otherwise prohibited by law."

5 ILCS 70/4

"No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act."

5 ILCS 140/11(d)

The circuit court shall have the jurisdiction 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.

STATEMENT OF FACTS

A. The Institute for Justice's FOIA Request

The Institute for Justice ("IJ") is a nationwide, non-profit public interest law firm dedicated to advocacy on behalf of individuals whose most basic rights are denied by the government. (C118).[1] As part of its mission to free citizens from unreasonable licensing requirements, IJ conducts extensive quantitative research on the impact of administrative regulations and often uses state laws allowing or mandating the disclosure of information to obtain the information necessary for such research. (C118).

On September 12, 2013 IJ sent a request pursuant to the Illinois Freedom of Information Act ("FOIA") to the Illinois Department of Financial and Professional Regulation ("Department") requesting "[a]ll complaints regarding licensed cosmetologists and hair braiders" "from 2011 to the present." (C119). IJ's request to the Department related to a larger research project on regulation of hair braiders by various states. (C118–19). IJ sent out FOIA requests on this topic to every state with a unique hair braiding designation. (C136) These FOIA responses, including the one to the Department, were "necessary to complete this research" and to understand the justification for such regulations. (*Id.*) Indeed, IJ represented to the Chancery

[1] The record on appeal contains three common law volumes cited as "C__," and one volume of reports of proceedings cited as "Tr. __." The appendix to this brief is cited as "A___."

Court that it "relies on the availability of complaints against hair braiders and cosmetologists through state FOIA requests to perform its research." (*Id.*)

On September 18, 2013 the Department requested a five business day extension to respond to the FOIA request. (C118–19; C141; C294). Despite the extension, the Department failed to respond to the request by the statutory deadline. (C119–20; C294–96). Indeed, only after additional inquiries by IJ did the Department provide a denial letter. (C120; C142–43, 145–46). The denial letter claimed six exemptions to IJ's request under FOIA sections 140/7 (a), (b), (c), (d)(ii), (d)(iv), and (f). (C120; C145–46).

On November 22, 2013, IJ appealed the denial of its FOIA request by filing a Request for Review with the Public Access Counselor ("PAC"). (C152–58; C295). In response, the Department wrote a letter claiming that the request was not improperly denied, asserting the same six blanket exemptions it had previously cited, along with a new claim of undue burden. (*Id.*) The PAC—which is within the Illinois Attorney General's office—promised to issue a non-binding opinion but never did. (C120, C137).[2] After waiting nine months for a PAC opinion, IJ decided to file this lawsuit. (*Id.*)

B. Section 4-24 of the Cosmetology Act

After IJ made its original FOIA request, and after IJ sought review by the PAC, the Illinois General Assembly was presented with a brand new bill

[2] The final reply letter to the PAC was sent on January 10, 2014. (C137). On March 5, 2014, the PAC told IJ that it would issue a non-binding advisory opinion. (C137). It never did. (*Id.*)

(House Bill 4790) that would restrict access to the types of complaints against hair braiders and cosmetologists being sought by IJ in its FOIA request. The bill was eventually passed into law and the relevant section became Section 4-24 of the Barber, Cosmetology, Esthetics, Hair Braiding, and Nail Technology Act. 225 ILCS 410/4-24 (eff. 1/1/2015). Section 4-24 states in relevant part that "information collected by the Department" related to investigations of licensees "shall be maintained for the confidential use of the Department and shall not be disclosed" except under certain circumstances including "lawful subpoena[s]." *Id.* Notably, Section 4-24 was not in effect until after this lawsuit had been filed.

C. Chancery Court

IJ filed this lawsuit on December 3, 2014 seeking an order that the Department produce the improperly withheld documents as well as civil damages and attorneys' fees. (C295). After several extensions, the Department answered the Complaint on March 23, 2015. (C121; C295). In this Answer, the Department raised for the first time its argument that Section 4-24 protected the requested documents from disclosure. (C295).

IJ filed a Motion for Summary Judgment on May 11, 2015, and the Department filed a Cross-Motion for Summary Judgment on November 5, 2015. (C116–34; C286–88). The Chancery Court held a hearing on the motions on November 12, 2015. (Tr. 3).

During the hearing, Judge Garcia systematically rejected each exemption put forth by the Department. (Tr. 10-23; Tr. 34). The Chancery

Court subsequently formalized its oral rulings in a written order on December 16, 2015. (C299). In rejecting the Department's reliance on Section 4-24, the Chancery Court engaged in a full analysis under *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), as modified by the Illinois Supreme Court. (C296–98). That court concluded that Section 4-24 contained no explicit language indicating that it should apply retroactively to existing litigation and thus could not be used as an exemption to disclosure for a FOIA request that was made prior to the Section's effective date. (C297). In short, because IJ's FOIA request was made in 2013, well before Section 4-24's effective date of January 1, 2015, the Department could not rely on Section 4-24. (C297–98).

Subsequent to the summary judgment ruling, the parties briefed and the Chancery Court ruled that IJ prevailed such that $35,000 in attorneys' fees and costs should be awarded to IJ. (C600). The Chancery Court entered its Final Judgment and the Department appealed. (C611–12).

D. Appellate Court

The Department chose to appeal only one issue to the Appellate Court: whether Section 4-24 should apply retroactively to the pending litigation. *Institute for Justice v. Dep't of Fin. & Prof. Reg.*, 2017 IL App (1st) 162141, ¶ 6 ("Order") (A9). In doing so, the Department "abandoned" its original reasons for denying IJ's FOIA request. *Id.* ("[T]he Department has abandoned its claim that the requested documents were exempt from disclosure pursuant to the six enumerated FOIA exemptions upon which it originally relied."). Accordingly,

it is now legally undisputed that the Department should have provided the requested documents in September 2013 in response to the original request.

The three justices in the Appellate Court could not agree on the issue before them. Two justices—writing the majority decision—reversed the Chancery Court. The majority decision states that Section 4-24 "has no impermissible retroactive effect and therefore the amendment must be applied by the court if it is in effect at the time of the court's decision." *Id.* ¶ 22 (A15). In addition, the majority justices wrote that "because the Institute sought injunctive relief" the "circuit court must apply the law in effect at the time of its decision, *i.e.* section 4-24." *Id.* ¶ 24 (A16). Justice Delort dissented, asserting that the "Institute's right to the subject records, having vested when it made its FOIA request, did not abate when section 4-24 of the Barber Act became effective." *Id.* ¶ 40 (Delort J., dissenting) (A22). Justice Delort wrote that applying Section 4-24 to this case would "have inequitable consequences." *Id.* ¶ 38 (internal quotations omitted) (A21). He further warned that the ruling would "encourage governmental bodies to stall" and then "actively lobby for an amendment which shields particular embarrassing records from disclosure." *Id.* (citation omitted). IJ filed a Petition for Rehearing. The majority justices denied the IJ's Petition for Rehearing without explanation; Justice Delort again dissented. (A23)

IJ timely filed a Petition for Leave to Appeal. This Court granted the Petition on September 27, 2017. (A24)

E. Consolidation With Perry's Appeal

In granting IJ's Petition for Leave to Appeal, this Court chose to consolidate the case with *Perry v. Department of Financial and Professional Regulation* (Case No. 122411). (A24)

The same three justices in the Appellate Court that ruled on IJ's case issued an opinion in *Christopher J. Perry and Perry & Associates, LLC v. Illinois Department of Professional and Financial Responsibility*, 2017 Ill. App. (1st) 161780. Similar to this case, Perry made a FOIA request to the Department, it was denied, and during the litigation to enforce the original FOIA request, a new law was enacted that narrowly restricted the information Perry requested from disclosure. *Id.* ¶¶ 6–20. The Appellate Court Order highlights that the legal issue in *Perry* is similar to the issue in this case. Order ¶ 25 ("[O]ur holding here is in accord with the recent case, *Christopher J. Perry*.") (A16). The argument sections in the two orders are identical with the same citations and quotes from the same cases. *Compare* Order ¶¶ 11–25, 26–28 (A11–A17) *with Perry*, 2017 Ill. App. 161780, ¶¶ 29–45. Justice Delort wrote the same dissent in both cases on the same grounds. *Compare* Order ¶¶ 31–40 (A17–A22) *with Perry*, 2017 Ill. App. 161780, ¶¶ 29–45.

STANDARD OF REVIEW

A ruling on a motion for summary judgment is subject to *de novo* review. *Weather-Tite, Inc. v. Univ. of St. Francis*, 233 Ill. 2d 385, 389 (2009). Because the Order on appeal determines whether an exemption under the Illinois FOIA applies to IJ's original FOIA request, and all records in the possession of a

public body are presumed to be open to inspection, the Department bears "the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2.

ARGUMENT

Had the Department complied with its legal obligation in September 2013 to provide the requested information in response to IJ's valid FOIA request, this lawsuit would not be necessary. Instead, the Department resisted a valid FOIA request for over a year, forcing IJ to file this lawsuit to vindicate its rights. Conveniently for the Department, after IJ made a narrow request for documents, the Illinois General Assembly changed the law to protect the precise documents requested by IJ from disclosure. That law was not in effect when IJ made its FOIA request, nor when it filed this lawsuit. Accordingly, the Appellate Court erred when it accepted the Department's argument that the new law, Section 4-24, should apply to this litigation and defeat IJ's otherwise valid cause of action to enforce its FOIA request.

Based on this Court's retroactivity framework and the Illinois General Assembly's statutory presumption against retroactivity, it is clear that the Illinois General Assembly did not intend Section 4-24 to apply retroactively to pending litigation. Indeed, it is particularly inappropriate for Section 4-24 to apply to this case because doing so would impair IJ's rights, it would defeat a valid cause of action, and it would be inequitable. The Appellate Court's ruling runs afoul of this Court's retroactivity framework and precedent. In addition, the Appellate Court's ruling broadly undermines the purpose of the Illinois

FOIA by creating a loophole for public bodies to change the rules when they receive FOIA requests they would prefer not to answer. In sum, this Court should reverse the Appellate Court's Order.

I. THE ILLINOIS GENERAL ASSEMBLY DID NOT INTEND FOR SECTION 4-24 TO APPLY RETROACTIVELY TO PENDING LITIGATION.

Section 4-24 does not contain any express language intending it to apply retroactively, and therefore, under Illinois case law, it is presumed to apply only to FOIA requests made after the effective date and lawsuits filed after the effective date. Section 4-24 adds a paragraph limiting the right to access certain information collected by the Department under the Barber, Cosmetology, Esthetics, Hair Braiding, and Nail Technology Act.[3] Section 4-24 became effective over a year after IJ's FOIA request and also after this lawsuit was filed. Accordingly, under this Court's jurisprudence, Section 4-24 is presumed to apply prospectively, not to prior FOIA requests or pending lawsuits.

In Illinois, courts apply a modified version of the *Landgraf* approach to determine whether a new statute may be applied retroactively. *People v. Hunter*, 2017 IL 121306, ¶¶ 20–23; *People ex rel. Madigan v. J.T. Einoder, Inc.*,

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[3] Section 4-24 states, in relevant part, 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 . . . shall be maintained for the confidential use of the Department and shall not be disclosed" except to certain regulatory agencies or in response to a "lawful subpoena." 225 ILCS 410/4-24 (eff. 1/1/2015).

2015 IL 117193, ¶¶ 29–34. Under this approach, a court first looks to whether the "legislature has clearly indicated the statute's temporal reach." *Hunter*, 2017 IL 121306, ¶ 20; *J.T. Einoder*, 2015 IL 117193, ¶ 29. If so, "assuming no constitutional prohibition, the legislature's intent will be given effect." *Hunter*, 2017 IL 121306, ¶ 20. If the legislature has not done so, "the court must determine whether applying the statute has a retroactive impact." *Id.*; *J.T. Einoder*, 2015 IL 117193, ¶ 29. An amendment has a retroactive impact if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Hunter*, 2017 IL 5894180, ¶ 20 (citations omitted); *J.T. Einoder*, 2015 IL 117193, ¶ 30 (citations omitted).

But this Court has since deviated from the original federal framework by focusing on Illinois' general savings clause that codifies a presumption against retroactivity. 5 ILCS 70/4. This means that, in Illinois, the "legislature *always* will have clearly indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section 4 of the Statute on Statutes." *Caveney v. Bower*, 207 Ill. 2d 82, 95 (2003); *J.T. Einoder*, 2015 IL 117193, ¶¶ 31–32. Accordingly, "it is ***virtually inconceivable*** that an Illinois Court will ever go beyond step one of the *Landgraf* approach." *Caveney v. Bower*, 207 Ill. 2d at 94 (emphasis added); *see also id.* at 92 ("[S]ection 4 forbids retroactive application of substantive changes to statutes." (citation omitted)). "[W]here . . . the legislature does not

expressly indicate its intent with regard to the temporal reach of the amended statute, a presumption arises that the amended statute is not to be applied retroactively. The amendatory provision may be applied retroactively, however, if it is merely procedural in nature." *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 34.

In this case, the Appellate Court applied Section 4-24 retroactively to nullify IJ's FOIA request and defeat this litigation. Focusing on the first step of this Court's retroactivity framework, Section 4-24 does not contain an express temporal reach.[4] Notably it does not reference whether the law should apply to pending lawsuits or whether it should be applied to disclosure requests prior the effective date. 225 ILCS 410/4-24. Accordingly, with no express intent, the Illinois presumption against retroactivity steps in, and the law is "presumed" not to apply retroactively. *J.T. Einoder*, 2015 IL 117193, ¶ 31.[5]

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[4] Based on earlier briefing, the Department agrees that "the temporal reach of the statute is not indicated in the text." (C235)

[5] Section 4-24 is a substantive change because it changes the confidentiality for certain documents and alters the scope of a person's right to information. *See People v. Atkins*, 217 Ill. 2d 66, 72 (2005) (Procedural law is the "machinery for carrying on a suit"—"procedure embraces pleading, evidence, and practice."); *see id.* (Amendment is "clearly substantive because it altered the scope of the [statute]."). Because Illinois' statutory presumption against retroactivity applies to substantive laws, there is no need to evaluate whether Section 4-24 would have a "retroactive impact"—part two of the original *Landgraf* test. However, to present a full analysis for this Court, IJ addresses retroactive impact in Part II.

That presumption is bolstered by Section 4-24's delayed effective date—meaning that the Illinois General Assembly delayed the effective date of the law for some period of time after it was passed. (C129; C238). This Court has held that "the delayed implementation date of [an] amendment indicates a clear legislative intent for the prospective application of the provision." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 187 (2011) (where an amendment was signed in August 2005 and became effective on January 1, 2006, legislative intent was clear that the amendment must be prospectively applied); *see also People v. Blanks*, 361 Ill. App. 3d 400, 410 (1st Dist. 2005) ("[W]e consider the postponement of the effective date as direct evidence that a retroactive application was not intended.").

Instead of following this Court's retroactivity test to its clear conclusion, the Appellate Court tries to fit this case into unavailable or nonexistent exceptions to this Court's straightforward retroactivity analysis.

II. SECTION 4-24 CANNOT APPLY TO THIS CASE BECAUSE IT IMPAIRS IJ'S RIGHTS AND IT WOULD RESULT IN INEQUITABLE CONSEQUENCES.

Even assuming for the sake of argument that the legislative intent of Section 4-24 were not clear, this Court has articulated a secondary backstop to prohibit the unfair application of new statutes. A court may not apply a new law retrospectively to a pending lawsuit or controversy where it "would have a retroactive impact or result in inequitable consequences." *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30. Here, applying Section 4-24 to this case would both

create a retroactive impact—by impairing IJ's rights—and result in inequitable consequences. Accordingly, Section 4-24 cannot apply to this case.

A. Applying Section 4-24 To This Case Would Impair IJ's Rights Because It Had An Accrued Cause Of Action And It Had Settled Expectations Regarding Its Right To The Information.

Applying Section 4-24 retroactively to this litigation impermissibly impairs IJ's rights in several ways: It nullifies IJ's statutory right to the information, it strips away a valid cause of action to enforce that right, and it undermines IJ's settled (and correct) expectations under the law. *See J.T. Einoder*, 2015 IL 117193, ¶ 30 (an amendment has an impermissible retroactive impact where it "would impair rights a party possessed when he acted"); 5 ILCS 70/4 ("No new law shall be construed to repeal . . . any right accrued, or claim arising under the former law.").[6]

1. The Illinois General Assembly Intended The Access To Information Under The Illinois Freedom Of Information Act To Be A Right.

[6] The Appellate Court held that Section 4-24 "has no impermissible retroactive effect" because it does not involve the imposition of new duties on past conduct. Order ¶¶ 27–28 (A17). This is an improperly narrow interpretation of this Court's precedent. This Court has identified three different ways that a new law can have a retroactive impact: "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30. The Appellate Court simply skipped over the impairment of rights prong. It similarly did not address how Section 4 of the Statute of Statutes protects "right[s] accrued" or a "claim arising under the former law." 5 ILCS 70/4.

As a threshold matter, IJ has a right to the requested information under the Illinois FOIA. This right is articulated in the statute. Under the Illinois FOIA, "the people . . . have a ***right*** to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affects the conduct of government and the lives of any or all of the people." 5 ILCS 140/1 (emphasis added); *see also id.* ("[R]ights of the people to access to information."). The Illinois FOIA is a cornerstone of government transparency and states that such access to information is "necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.* To the extent that there is a question regarding whether IJ had a "right" to the requested information—as compared to a mere privilege or expectation—the statutory language should govern. This right is impaired by the application of Section 4-24 in this case.

2. Applying Section 4-24 Retroactively Strips IJ Of A Valid, Statutory Cause Of Action.

If applied retroactively, Section 4-24 would impair IJ's rights by stripping it of an accrued cause of action against the Department. Once IJ's FOIA request was denied, it had a statutory right to bring a lawsuit against the Department. *See* 5 ILCS 140/11. Illinois courts have routinely found that an accrued cause of action or defense represents a vested right. Once a cause of action accrues, it is "protected from being cut off or destroyed by an act of

the legislature." *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 404–05 (1998), *abrogated on other grounds by Commonwealth Edison Co.*, 196 Ill. 2d at 39; *see also Harraz v. Snyder*, 283 Ill. App. 3d 254, 263 (2d Dist. 1996) (citation omitted) ("[P]laintiff's accrued cause of action became a vested right and the statute cannot be applied retroactively to impair that right. . . . The crucial date for determining the applicability of a statute is not when the rights are asserted by the filing of the complaint but when the cause of action accrued.").[7]

Moore v. Jackson Park Hospital is instructive on this point. 95 Ill.2d 223 (1983). There, plaintiffs in three consolidated cases brought medical malpractice claims, but the trial courts held that a statutory amendment imposing a four-year statute of limitations applied to claims that accrued prior to the effective date of the new law such that their claims were now barred. *Id.* at 227–29. Affirming the appellate court's reversal, this Court held that a statute cannot retroactively apply to instantly strip the plaintiffs of their accrued causes of action. *Id.* at 231 ("Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to

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[7] *See also Wilson v. All-Steel, Inc.*, 87 Ill. 2d 28, 42 (1981) (following the "general rule" that "a limitations defense which has fully accrued vests a property right in the defendant entitled to due process protection").

protect it." (internal quotation marks and citations omitted)).[8] In short, this Court does not allow a new statute to defeat an accrued cause of action. *Id.*

This reasoning continued even as this Court's retroactivity jurisprudence has evolved. Consider for example *Lazenby v. Mark's Const., Inc.*, 236 Ill. 2d 83 (2010). There, a firefighter brought suit after he was injured while fighting fire in a house that a general contractor was working on. *Id.* at 86. The statute in question, Section 9f of the Fire Investigation Act, 425 ILCS 25/9f, was enacted at the time the case was pending, and imposed a duty of reasonable care on a landowner as to a firefighter who is injured due to the landowner's lack of maintenance. *Id.* at 87, 92–93. Recognizing that the defendant had a "vested right" to total immunity under the law before the statute's enactment, and that a "vested ground of defense is as fully protected from being cut off or destroyed by an act of the legislature as is a vested cause of action," this Court held that applying the statute retroactively would violate the due process clause of the Illinois Constitution. *Id.* at 95–99 (quoting *Henrich*, 186 Ill. 2d at 404–05) (internal quotation marks omitted).[9]

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[8] *Moore v. Jackson Park Hosp.*, 95 Ill. 2d 223, 241 (1983) (Ryan, C.J., specially concurring, joined by Underwood and Moran, JJ.) ("[T]he causes of action that accrued before the effective date of the 1976 amendment as falling within the category of cases usually referred to as involving 'vested rights,' which cannot be terminated by the amendment."); *see also Commonwealth Edison Co. v. Will Cty. Collector*, 196 Ill. 2d 27, 47 (2001) (adopting the vested rights rationale from the concurrence in *Moore*).

[9] The prohibition against applying amendments where they would have a retroactive impact is based, in part, on the due process clause of the Illinois Constitution. *Commonwealth Edison Co.*, 196 Ill. 2d at 47; *see also* Ill. Const. art. 1, § 2. Accordingly, when in doubt, this Court should err on the

This case law is further supported by section 4 of the Illinois Statute on Statutes (i.e. Illinois' statutory presumption against retroactivity), which explicitly protects "any right accrued, or claim arising under the former law" from being impacted by a new statute. 5 ILCS 70/4. Applying Section 4-24 to this case not only effectively abolishes IJ's cause of action, it does so by imposing a period of retroactivity of over one year. *See Lazenby*, 236 Ill. 2d at 99 (finding persuasive that the period of retroactivity at issue was almost two years). In sum, applying Section 4-24 to the pending litigation would impair IJ's statutory right.

3. Applying Section 4-24 Retroactively Would Undermine IJ's Valid And Settled Expectations Regarding The Law At The Time Of The Request.

In addition to IJ's accrued cause of action, IJ possessed a vested right to the disclosure of the requested documents based on its settled expectations regarding the current state of the law. This Court has recognized that a party can develop a vested right in the current law where the party has settled expectations:

> The question of the validity of the application of a statute rests on subtle judgments concerning the fairness or unfairness of applying the new statutory rule to affect interests which accrued out of events which transpired when a different prior rule of law

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side of interpreting a law such that it would have the least retroactive impact in compliance with constitutional avoidance. *See Innovative Modular Sols. v. Hazel Crest Sch. Dist. 152.5*, 2012 IL 112052, ¶ 38 ("It is settled that courts should avoid constitutional questions when a case can be decided on other grounds.") (citing *People v. Alcozer*, 241 Ill. 2d 248, 253 (Ill. 2011).

> was in force. One fundamental consideration of fairness is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated.

Commonwealth Edison Co. v. Will Cty. Collector, 196 Ill. 2d 27, 47 (2001) (citation omitted) (explaining that applying a new amendment to prior events can violate the due process clause if it disturbs "settled expectations"); *Lazenby v. Mark's Const., Inc.*, 236 Ill. 2d 83, 96 (2010) ("Under the fairness considerations of *Commonwealth Edison*, applying section 9f retroactively would disturb Mark's Construction's 'settled expectations.'").

Here, there is no question that IJ had an honest and indeed correct "expectation" of the law at the time of its request. This is best shown by its effort to vindicate these expectations through an administrative appeal and then litigation. Beyond that, the record is clear that IJ commenced a research project based on its reasonable (and correct) expectation that it would receive the requested information from Illinois:

- IJ's FOIA request to the Department is "part of a project examining the regulation of these industries in all fifty states."
- "These FOIA responses are necessary to complete this research, and capture the potential risks for hair braiding."
- "IJ relies on the availability of complaints against hair braiders and cosmetologists through state FOIA requests to perform its research."

(C136 (Affidavit of E. Smith, ¶¶ 4–6); C294–95; *see also* C118) Accordingly, as the Chancery Court resolved this case at summary judgment, it is undisputed that IJ "relie[d]" on the FOIA information and such information was "necessary" to its larger research project.

Further, this Court should not ignore the collateral rights that would be impacted by inserting Section 4-24 retroactively into the pending litigation. The Illinois FOIA grants attorneys' fees to a prevailing requestor, and IJ filed this lawsuit under the legally correct belief that the Department had no legitimate defense to its FOIA request and therefore it would recover its attorneys' fees. *See* 5 ILCS 140/11(i). Applying Section 4-24 retroactively to the pending litigation would not just upset IJ's right to the requested documents, it would upset IJ's settled expectations regarding how it would pay for the subsequent litigation.

In sum, IJ had reasonable expectations that the law allowed it access to the requested information from the Department in order to commence its research project, it had settled expectations in its accrued cause of action when it filed this litigation, and it would be unfair to IJ to apply Section 4-24 in a way that would defeat those settled expectations.

B. Applying Section 4-24 To This Case Would Result In Inequitable Consequences.

The Illinois Supreme Court requires every court that considers whether to apply a new law to a pending lawsuit to evaluate whether doing so would be equitable. This Court in *J.T. Einoder* wrote that a new law cannot apply retrospectively—that is, to a pending lawsuit—where it would "have a retroactive impact or ***result in inequitable consequences***." 2015 IL 117193, ¶ 30 (emphasis added); *see also People v. Evans*, 2017 IL App (3d) 160019, ¶ 18 (evaluating the potential "inequitable consequences" of applying a "statutory

amendment" retroactively). Here, IJ spent considerable resources and effort pursuing the requested documents as part of a larger research endeavor. (C118; C136; C294–95) To allow a change in the law during the pending lawsuit that upends IJ's effort and expectations would be an "inequitable consequence."

IJ raised this equitable backstop to the Appellate Court in both its Appellee Brief and its Petition for Rehearing. Justice Delort raised this issue in his dissent. Order ¶ 39 (Delort, J., dissenting) ("[A]pplying section 4-24 of the Act retroactively would, indeed, have 'inequitable consequences.'") (A21). Despite a clear directive from this Court, and a dissenting justice, the two majority justices neither cite nor address this issue. The Appellate Court's majority ruling wholly ignores this Court's mandate that applying a new law to a pending case cannot "result in inequitable consequences." *J.T. Einoder*, 2015 IL 117193.

Applying Section 4-24 to this case would be inequitable. IJ correctly interpreted Illinois law and sent a targeted FOIA request to the Department. The only reason that IJ did not receive its requested information is that the Department unlawfully denied the request on grounds so weak that it has not even chosen to appeal them.[10] Unlike the average FOIA requester, IJ had the resources and stamina to pursue the wrongful denial in court. IJ found an

[10] *See* Order ¶ 6 (A9) ("[T]he Department has abandoned its claim that the requested documents were exempt from disclosure pursuant to the six enumerated FOIA exemptions upon which it originally relied.").

attorney who agreed to take the case, in part, based on the likelihood of attorney's fees for being the prevailing party. Up to this point, IJ had done everything correctly in the face of improper stonewalling from the Department. But then, in the middle of the litigation, Section 4-24 was enacted. By applying Section 4-24 to this case, all of the bad actions by the Department are absolved and all the effort by IJ is extinguished. This Court should reverse the Appellate Court's ruling on these inequitable consequences alone. *J.T. Einoder*, 2015 IL 117193, ¶ 30.

III. THE APPELLATE COURT'S DECISION RUNS AFOUL OF THIS COURT'S RETROACTIVITY FRAMEWORK AND PRECEDENT.

The Appellate Court's Order deviates from this Court's straightforward retroactivity framework. Rather than analyzing the legislative intent of Section 4-24 or whether the application of the law to this case impairs IJ's rights or otherwise is inequitable, the Appellate Court manufactures an entirely separate retroactivity analysis for injunctive claims. This approach appears to misunderstand what it means for a law to act retroactively, it misinterprets this Court's case law on injunctive relief, and it misunderstands this Court's opinion in *Wisniewski*.

A. Applying A New Law To Pending Litigation Is, By Definition, A Retroactive Application Of The Law.

There is some ambiguity in the Appellate Court's ruling regarding whether applying a new statute to pending litigation is a retroactive application or not. This Court has recently clarified any such confusion. In *People v. Hunter*, this Court wrote that a procedural amendment "would

apply retroactively" when it applies "to a pending case, *i.e.*, a case in which the trial court proceedings had begun under the old statute but had not yet been concluded." 2017 IL 121306, ¶ 30; *J.T. Einoder*, 2015 IL 117193, ¶ 37 ("We find that amended section 42(e) may not be applied retroactively to this case."). Accordingly, applying a new law to pending litigation is applying the law retroactively.[11] There are narrow exceptions where such a retroactive application to "pending cases" is permissible, such as when the amendment is "purely a matter of procedure." *Hunter,* 2017 IL 121306, ¶ 23. But the Appellate Court does not attempt to fit Section 4-24 into the exception for statutes that are procedural, and instead attempts to craft a broad exception for injunctive relief generally. This is not appropriate and contrary to this Court's precedent.

B. The Appellate Court's Injunction Rule Violates This Court's Precedent.

At the core of the Appellate Court's Order is the creation of a legal shortcut that states that this Court's retroactivity jurisprudence does not apply to claims for injunctive relief:

> [T]he Institute sought injunctive relief, which is a prospective form of relief for which the circuit court must apply the law in effect at the time of its

[11] This general rule is consistent with Illinois' statutory presumption against retroactivity that protects new laws from impacting any "claim arising under the former law." 5 ILCS 70/4.

> decision, i.e., section 4-24. *Kalven*, 2014 IL App. (1st) 121846, ¶ 10.

Order ¶ 24 (A16). In other words, the Appellate Court articulates a kind of "Injunction Rule"—that is, if a plaintiff seeks injunctive relief then the court "must apply the law in effect at the time of its decision." *Id*. This "Injunction Rule" does not allow for any consideration of the legislative intent or substantive impact of the new law through a thorough retroactivity analysis.

The Appellate Court bases its Injunction Rule on a single paragraph of a single case: *Kalven v. City of Chicago*, 2014 IL App (1st) 121846. In Paragraph 10 of that decision, the Appellate Court concluded that an appeal from a FOIA denial seeks prospective relief, and that "[w]hen claims [for relief] are prospective, a court must apply the law that is in effect at the time of its decision." *Id.* ¶ 10. As an initial matter, Paragraph 10 is nothing more than dicta, as the Appellate Court also concluded that the new FOIA statute "does not seem to be a substantive change" from the old FOIA statute. *Id.* ¶¶ 15–17; *see also id.* ¶ 37 (Delort, J., concurring) ("[T]here is hardly a perceptible difference between the old and new versions of FOIA as they apply to this case, and . . . the change is basically stylistic rather than substantive."). Paragraph 10 also received a sharp rebuke from Justice Delort, who would have instead found "that the plaintiff's rights to the records vested when he made the request and could not later be rescinded by legislative action." *Id.* ¶ 36 (Delort, J., concurring).

The Appellate Court's conclusion in Paragraph 10 of *Kalven* is also not supported by the three cases it cites. None of them are FOIA cases, and two of them do not even involve the possibility of applying an amended statute retroactively. The relevant portion of *PHL, Inc. v. Pullman Bank & Trust Company*, for example, discusses only whether the doctrine of sovereign immunity bars a claim to enjoin a public official "from taking future actions in excess of his delegated authority" (it does not). 216 Ill.2d 250, 267 (2005). Never does *PHL* state that injunctive relief cannot be retrospective to enforce an existing obligation or remedy a past harm. And in *Forest Preserve District of Kane County v. City of Aurora*, this Court concluded that there was no longer any "controversy between the parties" regarding the constitutionality of a particular statute because the legislature had already "amended the potentially unconstitutional language." 151 Ill.2d 90, 95 (1992).

That leaves *Bartlow v. Costigan*, 2014 IL 115152 (2014). In that case, the plaintiffs sought a declaration that a statute was unconstitutional and to enjoin the Illinois Department of Labor from enforcing that statute against them. *See id.* ¶¶ 1, 30–31. During the pendency of the appeal to this Court, the legislature amended the statute, and the question was whether the amended statute rendered the plaintiffs' constitutional challenge moot. *See id.* ¶¶ 27, 30–31. The plaintiffs argued that the amended statute should not be applied "retroactively," but the Court disagreed, reasoning that there was never a "final determination regarding plaintiffs' violation of the Act and no

penalties assessed" and that the Department of Labor's "ability to enforce the Act against plaintiffs depends on [the Department of Labor's] future compliance" with the amended statute. *Id.* ¶¶ 30–31. Nowhere in *Bartlow* did this Court articulate a general rule that "[w]hen claims are prospective, a court must apply the law that is in effect at the time of its decision." *Kalven*, 7 N.E.3d at 744 (citing *Bartlow*, 2014 IL 115152, ¶¶ 30–31). Indeed, the fact that the plaintiffs in *Bartlow* sought declaratory and injunctive relief had no impact at all on this Court's decision to examine the constitutionality of the amended statute, and not the original statute. The flaws in the Appellate Court's *Kalven* decision have now bled into its decision in this case.

The Appellate Court's Injunction Rule is also contrary to recent precedent from this Court. In *J.T. Einoder*, the Illinois Attorney General sought to enjoin the defendants from disposing certain waste in violation of the Illinois Environmental Protection Act (the "IEPA"). *See* 2015 IL 117193, ¶¶ 12–17. During the pendency of the case, the IEPA was amended to permit the Attorney General to seek mandatory injunctions (in addition to prohibitory injunctions), and the Attorney General amended its complaint to seek an order requiring the defendants to affirmatively remove certain waste. *Id.* ¶¶ 15–17. To determine whether the original or amended version of the IEPA applied to the defendants' alleged conduct, this Court engaged in a full retroactivity analysis looking at legislative intent and applying Illinois' statutory presumption against retroactivity. *Id.* ¶¶ 22–37. The Court found that the

appellate court erred by failing to consider "whether retroactive application of [the amended statute] would have a retroactive impact, . . . [to] apply section 4's presumption of prospective applicability or [to] consider whether the amendment is procedural in nature." *Id.* ¶ 33. The Court concluded that adding mandatory injunctive relief to the Attorney General's repertoire of possible remedies was a "substantive change in the law" and therefore that the amended version of the IEPA could not "be applied retroactively" to the defendants' conduct. *Id.* ¶ 36.

The problem with the Appellate Court's ruling is most obvious if one were to apply the Injunction Rule to the facts of *J.T. Einoder*. Because the plaintiff in *J.T. Einoder* sought injunctive relief, the Appellate Court would automatically apply the amended law pursuant to the Injunction Rule. But that is the exact opposite of the holding in *J.T. Einoder*. Accordingly, the Appellate Court erred when it ruled that if a plaintiff seeks injunctive relief then the court "must apply the law in effect at the time of its decision." Order ¶ 24 (A16).

C. In Any Event, IJ Seeks Retrospective Relief, Not Prospective Relief.

In addition, contrary to the Appellate Court's Order, injunctive relief is not always a prospective form of relief. Instead, injunctive relief can be categorized as being either prospective *or* retrospective, depending upon whether the injunction affects the parties' future relationship or serves to cure a past wrong committed by the defendant. *See, e.g.*, *Machete Prods., L.L.C. v.*

Page, 809 F.3d 281, 286 (5th Cir. 2015) ("Machete sought prospective injunctive relief enjoining the Commission from enforcing the Incentive Program in the future, as well as retrospective injunctive relief ordering the Commission to provide Machete with an Incentive Program grant."); *Edelman v. Jordan,* 415 U.S. 651, 668–69 (1974) (articulating the distinction between retroactive and prospective injunctive relief); Erin L. Sheley & Theodore H. Frank, Prospective Injunctive Relief and Class Settlements, 39 Harv. J.L. & Pub. Pol'y 769, 773 (2016) ("Injunctive relief can be broadly categorized as being either retrospective or prospective depending upon whether the injunction serves to cure a wrong in past transactions, or affects future relationships between a defendant and its customers."); *see also id.* ("[P]rospective relief does nothing to directly benefit actual plaintiffs or to redress their alleged injuries.").

Historically, the prospective/retrospective dichotomy featured most prominently in sovereign immunity cases, which hold that states are immune from claims seeking a retrospective remedy, but not a prospective remedy. *See, e.g.*, *Lewis v. Bd. of Educ. of Talbot Cty.*, 262 F. Supp. 2d 608, 612 (D. Md. 2003) ("[T]he law is clear that individuals sued in their official capacity as state agents cannot be held liable for damages or retrospective injunctive relief. They may, however, be sued for prospective injunctive relief to end violations of federal law and remedy the situation for the future.") (citing *Edelman*, 415 U.S. 651, 668–69); *Machete*, 809 F.3d at 288 ("As a result, Machete's claims

against Page in her official capacity seeking economic damages and retrospective injunctive relief for an Incentive Program grant are barred."). Here, while sovereign immunity is not at issue, the distinction is relevant because IJ seeks a retrospective injunction, which is at odds with the Appellate Court's conclusory pronouncement that IJ seeks prospective relief. *See* Order ¶ 24 (A16).

The injunctive relief sought in this case is retrospective, not prospective. By receiving a valid FOIA request from IJ, the Illinois FOIA imposed an obligation on the Department to disclose the requested information. The Department harmed IJ by refusing to comply with this obligation for over a year. Accordingly, IJ filed this lawsuit to enforce its statutory right and to rectify this harm. The statute itself confirms that this is true:

> The circuit court shall have the jurisdiction . . . to order the production of any public records ***improperly withheld*** from the person seeking access.

5 ILCS 140/11(d) (emphasis added). By utilizing the past tense—wrongfully withheld—in the statute, the legislature intended that the court look backwards and determine whether it needs to rectify a past wrong. As discussed earlier, the backwards looking nature of IJ's FOIA lawsuit is also evident from the retroactive impact that applying Section 4-24 to this case has on IJ's rights—whether its right to the information generally or its right to this accrued claim. It is true that the Department will turn over the requested documents in the future (just like the Department would only pay civil

penalties or attorneys' fees in the future after the litigation concluded). But this does not make the injunctive relief sought prospective because the purpose of IJ's litigation is to remedy the Department's past wrongful conduct.

D. The Appellate Court Misinterprets This Court's Ruling In *Wisniewski*, Which Implicitly Supports IJ's Position That Changes To Confidentiality Statutes Are Substantive.

The Appellate Court announces that its holding is compelled, in part, by *Wisniewski v. Kownacki*, 221 Ill. 2d 453 (2006). Order ¶ 22 (A15). The Appellate Court interprets *Wisniewski* to mean that the statutory amendments to confidentiality statutes governing the "present or future disclosure of information" do not have a retroactive effect and therefore may be applied retroactively. Order ¶ 22 (A15). *Wisniewski*, however, is at best inapposite to IJ's situation. There, the confidentiality statutes at issue were applied to treatment records created prior to its enactment, but requested after its enactment. *Wisniewski*, 221 Ill. 2d at 455–56, 462–63. The *Wisniewski* plaintiff made his request for documents more than a decade ***after*** the most recent confidentiality statute at issue was enacted. *Id.* at 455–56, 458–59. In contrast, IJ made its document request in September 2013—more than one year ***before*** the effective date of Section 4-24. (C11); 225 ILCS 410/4-24 (effective Jan. 1, 2015). *Wisniewski* therefore concerned a situation fundamentally different than IJ's and, contrary to the Appellate Court's reasoning, does not compel the conclusion that Section 4-24 may be applied retroactively to IJ's request.

Notably, this Court in *Wisniewski* briefly addresses what would happen to requests made prior to the enactment of the confidentiality statute—*i.e.* the scenario presented by IJ in this case. *Wisniewski*, 221 Ill. 2d at 462–63. In justifying the holding, this Court was careful to note that "[n]either [confidentiality] statute impacts any actions that may have taken place in the past with regard to Kownacki's records." *Id.* at 463. In other words, this Court recognizes that there would be a problem with a new confidentiality statute "impact[ing]" a "past" request for the documents. *Id.* That same logic can apply here where the Department is asking this Court to allow Section 4-24 to "impact" IJ's "past" request for documents. This is confirmed by this Court's ruling in *Hayashi* where it summarized *Wisniewski* by saying that the statute there "does not have a retroactive impact on the parties." *Hayashi v. Illinois Dep't of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶ 26. Consequently, the narrow holding in *Wisniewski* is inapposite, and the reasoning supports IJ's position that new laws prohibiting disclosure of documents cannot "impact" a "past" request for disclosure. *See Wisniewski*, 221 Ill. 2d at 455–56, 63.

IV. THE APPELLATE COURT RELIES ON INAPPOSITE FEDERAL CASE LAW THAT APPLIES A DIFFERENT RETROACTIVITY TEST BASED ON A DIFFERENT FOIA STATUTE.

The Appellate Court's ruling is particularly problematic because it relies heavily on an inapplicable Ninth Circuit opinion. *See* Order ¶¶ 18–19 (A13–14) (citing *Sw. Ctr. for Biological Diversity v. United States Dep't of Agric.*, 314 F.3d 1060, 1061 (9th Cir. 2002)). On a superficial level, the Ninth Circuit opinion in *Southwest Center* appears similar to this case because it involves

applying a new law to pending FOIA litigation. But its relevance is limited because Illinois applies a different retroactivity framework than the federal courts and the Illinois FOIA has important differences compared to the federal version.

A. The Illinois FOIA Is Different From The Federal FOIA.

The Illinois FOIA is distinct and different from the federal FOIA. This difference is well established in Illinois jurisprudence: "Illinois courts have repeatedly noted that the Illinois version of the FOIA is different from the federal version and is, therefore, subject to a different interpretation." *Rockford Police Benev. & Protective Ass'n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 153 (2d Dist. 2010). Similarly, in *American Federation of State, County & Municipal Employees (AFSCME), AFL-CIO v. County of Cook*, this Court stated: "[W]e decline to interpret the Illinois [FOIA] Act as narrowly as [the Court of Appeals for the District of Columbia Circuit] interpreted the Federal Freedom of Information Act." 136 Ill. 2d 334, 345 (1990).

The differences are important. *Compare* 5 U.S.C. § 552 *et seq.*, *with* 5 ILCS 140/1 *et seq*. In particular, the federal version lacks the Illinois public policy statement, which states that "the people of this State have a ***right*** to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity" 5 ILCS 140/1

(emphasis added).[12] The Illinois FOIA explicitly references a "right" to information from the public bodies. No such statement appears in the federal FOIA.

B. Illinois Courts Apply A Different Retroactivity Framework And A Different Vested Rights Analysis Than The Federal Courts.

Illinois courts apply a different retroactivity framework and a different vested rights analysis than the federal courts, including the Ninth Circuit. The Ninth Circuit applied the standard two-part *Landgraf* retroactivity test. *Sw. Ctr. for Biological Diversity v. U.S. Dep't of Agric.*, 314 F.3d 1060, 1061–62 (9th Cir. 2002). This Court originally adopted the two-part *Landgraf* test. *See Commonwealth Edison Co. v. Will Cty. Collector*, 196 Ill. 2d 27, 39 (2001) ("[W]e hereby adopt the approach to retroactivity set forth in *Landgraf*."). But that soon changed. This Court effectively dropped the second part of the test because the "legislature ***always*** will have clearly indicated the temporal reach of an amended statute, either expressly in the new legislative enactment or by default in section 4 of the Statute on Statutes." *Caveney v. Bower*, 207 Ill. 2d 82, 95 (2003); *see also id.* at 94 ("[I]t is ***virtually inconceivable*** that an Illinois Court will ever go beyond step one of the *Landgraf* approach."). This Court recalibrated the retroactivity test to accommodate the Illinois statutory presumption against retroactivity. *See* 5 ILCS 70/4; *J.T. Einoder, Inc.*, 2015

[12] *See also* 5 ILCS 140/1.2 ("All records in the custody or possessions of a public body are presumed to be open to inspection or copying.").

IL 117193, ¶¶ 31–33. Based on incorporating this statutory presumption, Illinois courts are less likely than federal courts to allow a statute to apply retroactively.

This difference would change the outcome in *Southwest Center*. In reviewing the statute in *Southwest Center*, the Ninth Circuit analyzed prong one of the *Landgraf* test and found that there is no express legislative intent. *Sw. Ctr. for Biological Diversity*, 314 F.3d at 1061. At this point, if this were proceeding under this Court's jurisprudence (rather than federal case law), an Illinois court would conclude that the new statute would not apply to the pending case due to "section 4 of the Statute on Statutes." *Caveney*, 207 Ill. 2d at 95; *see also id.* at 94 ("[I]t is ***virtually inconceivable*** that an Illinois Court will ever go beyond step one of the *Landgraf* approach."). That is the end of the inquiry under Illinois case law. But the Ninth Circuit actually went to the second prong of the *Landgraf* test and found that there was "no such impermissible retroactive effect" and that the statute can then apply retroactively to the pending litigation. *Sw. Ctr. for Biological Diversity*, 314 F.3d. at 1062. In other words, the Ninth Circuit reaches the opposite conclusion that an Illinois court would have reached under its retroactivity jurisprudence.

In addition, Illinois courts take a broader view of vested rights than federal courts, especially when it comes to accrued causes of action and defenses. Under this Court's jurisprudence, an accrued "cause of an action"

represents a "vested" right that is "protected from being cut off or destroyed by an act of the legislature." *Henrich*, 186 Ill. 2d at 404–05; *see also Harraz v. Snyder*, 283 Ill. App. 3d 254, 263 (2d Dist. 1996) (citation omitted) ("[P]laintiff's accrued cause of action became a vested right and the statute cannot be applied retroactively to impair that right."). The federal courts, including the Ninth Circuit, take the view that there is no right until there is a "final unreviewable judgment." *Illeto v. Glock*, 565 F.3d 1126, 1141 (9th Cir. 2009) ("[A]lthough a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained."). The same distinction exists with accrued defenses to causes of action. *Compare Wilson v. All-Steel, Inc.*, 87 Ill. 2d 28, 42 (1981) ("a limitations defense which has fully accrued vests a property right in the defendant entitled to due process protection") *with Campbell v. Holt*, 115 U.S. 620, 628 (1885) ("We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right[.]"). Accordingly, Illinois protects accrued causes of action from new laws, while the federal courts do not. For these reasons, the Appellate Court's reliance on *Southwest Center* is mistaken.[13]

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[13] The Appellate Court does not appear to have fully apprehended the differences between the Ninth Circuit case law and Illinois case law. Notably, the Appellate Court held that "the application of the amendment [Section 4-24] has ***no impermissible retroactive effect***." Order ¶¶ 22, 28 (emphasis added) (A15, A17). Nowhere in this Court's retroactivity framework does the phrase "impermissible retroactive effect" appear. This language does appear in the Ninth Circuit's retroactivity framework. *Sw.*

V. THE APPELLATE COURT'S RULING FRUSTRATES THE PURPOSE OF THE ILLINOIS FREEDOM OF INFORMATION ACT.

Broadly speaking, the Appellate Court's ruling will alter the landscape of the Illinois FOIA. This Court should consider these consequences when it evaluates the legal issue in the context of the larger retroactivity and vested rights jurisprudence. At its core, the Appellate Court's ruling creates a loophole in this Court's retroactivity framework that undermines the purpose and functioning of the Illinois FOIA. *See In re Marriage of Earlywine*, 2013 IL 114779, ¶ 27 (refusing to interpret a statute in a manner that would "directly undermine" the policies underlying it and "strip the statute of its power"); *Ryan v. Bd. of Trs. of Gen. Assembly Ret. Sys.*, 236 Ill. 2d 315, 323 (2010) (refusing to interpret a statute in a way that "would undermine the public policy underlying that statute").

First, the Appellate Court's ruling incentivizes public bodies to deny FOIA requests or delay responses whenever possible. With this ruling, public bodies have a new weapon in their defense of FOIA requests. When they receive an unwelcome (or politically embarrassing) FOIA request, the public body has the option to lobby the Illinois General Assembly to protect documents from disclosure. Justice Delort noted this exact problem, reasoning that the Appellate Court's ruling would "encourage governmental bodies to

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Ctr. for Biological Diversity, 314 F.3d. at 1061 ("no impermissible retroactive effect"). Accordingly, in the language it uses the Appellate Court conflates the Ninth Circuit's test with this Court's test.

stall FOIA responses" and "actively lobby for an amendment which shields particular embarrassing records from disclosure." Order ¶ 38 (A21) (Delort, J., dissenting) (citation omitted). This ruling could create a "Deny Now—Lobby Later" mentality. The public body can deny any request with impunity, knowing that it can lobby to change the law if the FOIA requester has the resources and stamina to pursue litigation. This approach may be particularly appealing to frustrate requests by unpopular or politically adverse groups.[14]

Second, the Appellate Court's ruling will have a chilling effect on FOIA requesters and the attorneys who represent them. Take this case as an example. IJ followed the rules: it retained counsel, filed a lawsuit, and attempted to enforce its original right to these documents. The Appellate Court, however, has allowed the Department to change the rules in the middle of the game. Future FOIA requesters may reconsider whether litigation is worth the expense when one well-connected lobbyist can nullify their right to the information after months (or years) of litigation.

This point is particularly problematic for attorneys. Many attorneys take FOIA litigation because there is a fee-shifting provision in the statute.

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[14] Legislatures are often "tempted to use retroactive legislation as a means of retribution against unpopular groups." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("[R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

5 ILCS 140/11(i) (If a FOIA requester "prevails," then "the court shall award such person reasonable attorney's fees and costs."). For example, when IJ prevailed at the Chancery Court, it was granted $35,000 in attorneys' fees and costs. Order ¶ 5 (A8–9). This award was stripped from IJ when the Appellate Court ruled that Section 4-24 should apply retroactively to this case. *Id.* ¶ 23 (A15–16). The circumstances of that reversal are concerning. At the time of filing the Complaint, IJ and its counsel had correctly evaluated the law. Under the law at the time of filing, it is undisputed that IJ should have prevailed and been awarded its fees. But the law changed after filing. Unlike FOIA requesters who may need specific information, attorneys have a choice in which cases to take. The Appellate Court's ruling weakens the fee-shifting promise in the Illinois FOIA, and it is reasonable to conclude that future attorneys will be wary of taking such cases.

Finally, the Appellate Court's ruling turns FOIA litigation into a race. Until final judgment, the public body has the option to lobby and change the applicable law. Accordingly, FOIA requesters and their attorneys will likely demand that courts resolve their cases on a super-expedited schedule. The goal will be to move to final judgment before the public body can successfully lobby the Illinois General Assembly. Any delay could change the outcome of the case. The difference between winning and losing—including thousands of dollars in attorneys' fees—could hinge on the Chancery Court judge's vacation schedule. Attorneys could potentially prejudice their client if they consent to

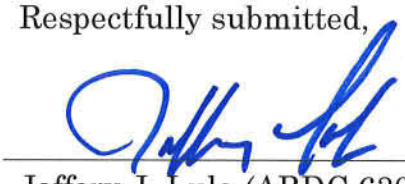
the defendant's routine request for an extension of the appellate briefing schedule. This race to and through the courthouse is unfair to litigants and will place a burden on judges to resolve cases faster than the Illinois General Assembly can pass a bill.

Simply put, the Appellate Court's rulings in this case and in *Perry* create a loophole whereby public bodies can extinguish FOIA requests and FOIA litigation years after the fact. This is the inevitable result from the Appellate Court's attempt to stitch together unique aspects of the FOIA process and narrow exceptions to this Court's retroactivity jurisprudence (including due process protections) without considering whether the ruling serves the underlying purpose of either. *See* 5 ILCS 140/1 ("[I]t is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them."). This Court should not allow its retroactivity jurisprudence to be contorted in a way that undermines the purpose and administration of the Illinois Freedom of Information Act. Accordingly, this Court should reverse the Appellate Court.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Institute for Justice respectfully requests that this Court reverse the Appellate Court's Order and reinstate the Chancery Court's grant of summary judgment.

Dated: December 6, 2017 Respectfully submitted,

By: 

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

Attorney

CERTIFICATE OF FILING/SERVICE

I, Jeffery Lula, an attorney, certify that on December 6, 2017, I caused the **BRIEF OF PLAINTIFF-APPELLANT INSTITUTE FOR JUSTICE** to be filed with the Supreme Court of Illinois through its e-filing system.

I, Jeffery Lula, further certify that on December 6, 2017, I caused the **BRIEF OF PLAINTIFF-APPELLANT INSTITUTE FOR JUSTICE** to be served on the parties through Illinois' e-filing system. In addition, I further certify that I caused the foregoing to be emailed to all primary and secondary email addresses by the persons named below on December 6, 2017 before 5:00 p.m.

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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.

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No. 122349 (consolidated with No. 122411)

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 Illinois Appellate Court, First Judicial District, Case 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 Hon. J. Rodolfo Garcia, *Judge Presiding*

NOTICE OF FILING BRIEF OF PLAINTIFF-APPELLANT INSTITUTE FOR JUSTICE

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PLEASE TAKE NOTICE that on December 6, 2017 Institute for Justice filed in the Supreme Court of Illinois, through its e-filing system, a Notice of Filing, copies of which are hereby served upon you.

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CERTIFICATE OF FILING/SERVICE

I, Jeffery Lula, an attorney, certify that on December 6, 2017, I caused the NOTICE OF FILING BRIEF OF PLAINTIFF-APPELLANT INSTITUTE FOR JUSTICE to be filed with the Supreme Court of Illinois through its e-filing system.

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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.

Jeffery Lula

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2017 IL App (1st) 162141
Order filed: April 14, 2017

SIXTH DIVISION

Nos. 1-16-2141 and 1-16-2294 cons.

INSTITUTE FOR JUSTICE, Plaintiff-Appellee, v. THE DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 14 CR 19381 Honorable Rodolfo Garcia, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Delort dissented.

ORDER

¶ 1 *Held*: We reversed the grant of summary judgment in favor of plaintiff on its FOIA request where the applicable law in effect at the time of the court's ruling exempted the disclosure of the requested information.

¶ 2 On September 12, 2013, plaintiff Institute for Justice (Institute) filed a request pursuant to the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2012)) (FOIA) with the defendant Department of Financial and Professional Regulation (Department). The request sought disclosure of "[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." On September 30, 2013, the Department denied the request, claiming that the responsive records were exempt from disclosure under the FOIA pursuant to six separate

statutory exceptions. On November 22, 2013, the Institute filed a request for review of that denial with the Public Access Counselor of the Illinois Attorney General's office. See 5 ILCS 140/9.5 (West 2012). The Institute's request remained pending with the Public Access Counselor for over a year without resolution. Having received no relief through any other mechanism, the Institute filed a complaint in the circuit court pursuant to the FOIA, seeking to compel the Department to release the requested records, and asking for certain other relief. See 5 ILCS 140/11 (West 2012).

¶ 3 On January 1, 2015, while this lawsuit was pending in the circuit court, Public Act 98-911 became effective. The law comprehensively amended the Barber, Cosmetology, Esthetics, Hair Braiding, and Nail Technology Act of 1985 (225 ILCS 410/1-1 *et seq.* (West Supp. 2015)) (Barber Act). As is relevant here, the law added a new section to the Barber Act. The new section provides that complaints against licensees on file with the Department are "for the confidential use of the Department and shall not be disclosed" except to law enforcement officials, other regulatory agencies, or pursuant to subpoena. Pub. Act. 98-911 (eff. Jan. 1, 2015) (amending 225 ILCS 410/4-24). However, formal complaints filed against licensees by the Department itself were to be public records. *Id.*

¶ 4 On March 23, 2015, the Department answered the Institute's complaint. The answer generally tracked the reasons asserted by the Department in its 2013 denial of the Institute's FOIA request, but also included an affirmative defense claiming that the recent enactment of section 4-24 of the Barber Act rendered the requested documents exempt from disclosure under FOIA.

¶ 5 The Institute and the Department filed cross motions for summary judgment. On November 12, 2015, the circuit court granted the Institute's motion for summary judgment,

denied the Department's cross motion for summary judgment, and continued the matter for presentation of a formal order and to resolve miscellaneous issues. On December 16, 2015, the court issued an opinion explaining its rationale for granting summary judgment to the Institute. The court reviewed each of the six FOIA exemptions claimed by the Department and found that none of them applied to the subject records. The court also held that section 4-24 did not apply to the Institute's request because it was enacted after the Institute made its FOIA request and was not retroactive so as to affect FOIA requests made before its enactment. On June 30, 2016, the court ordered the Department to produce the subject records by December 23, 2016 and awarded the Institute $35,000 in attorney fees pursuant to section 11(i) of the FOIA. Section 11(i) provides that "[i]f a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorney's fees and costs." 5 ILCS 140/11(i) (West 2012). In a separate order entered the same day, the court denied the Department's motion for a stay of the production order. The Department filed timely, but separate, appeals from the various orders. This court consolidated the appeals and granted the Department's motion for a stay of the production order pending appeal.

¶ 6 On appeal, the Department has abandoned its claim that the requested documents were exempt from disclosure pursuant to the six enumerated FOIA exemptions upon which it originally relied. Instead, it raises a single issue—whether section 4-24 of the Barber Act applies retroactively to requests made before its enactment but which were not fulfilled. This raises an issue of statutory construction that we review *de novo*. *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16.

¶ 7 Both parties cite the test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), for determining whether an amended statute may be applied retroactively. Under the *Landgraf* test, "if the legislature has clearly indicated the temporal reach of the amended statute, that expression of legislative intent must be given effect, absent a constitutional prohibition. If, however, the amended statute contains no express provision regarding its temporal reach, the court must go on to determine whether applying the statute would have a retroactive impact, 'keeping in mind the general principle that prospectivity is the appropriate default rule.'" *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29 (quoting *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330-31 (2006)).

¶ 8 Under *Landgraf*, "[a]n amended statute will be deemed to have retroactive impact if application of the new statute would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. [Citations.] If the court finds that retrospective application of the new law would have a retroactive impact or result in inequitable consequences, 'the court must presume that the legislature did not intend that it be so applied.' " *Id.* ¶ 30 (quoting *Caveney v. Bower*, 207 Ill. 2d 82, 91 (2003)).

¶ 9 However, Illinois courts rarely look beyond the first step of the *Landgraf* analysis. *Bower*, 207 Ill. 2d at 94. "This is because an amendatory act which does not, itself, contain a clear indication of legislative intent regarding its temporal reach, will be presumed to have been framed in view of the provisions of section 4 of our Statute on Statutes (5 ILCS 70/4 (West 2000)." *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 31. Section 4 is a general savings clause which the supreme court has interpreted as meaning that "procedural changes to statutes will be applied

retroactively, while substantive changes are prospective only." *People ex rel. Alvarez v. Howard*, 2016 IL 120729, ¶ 20.

¶ 10 In the present case, the Institute argues that section 4-24 of the Barber Act (which contains no express provision regarding its temporal reach) is a substantive amendment that "re-defines confidentiality protections and information availability" and would have a retroactive impact on the Institute by impairing its vested right to view the requested complaints and to recover attorney fees as a prevailing requestor.

¶ 11 We disagree with the Institute's argument, finding *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, *Center For Biological Diversity v. United States Department of Agriculture*, 626 F. 3d 1113 (9th Cir. 2010), and *Wisniewski v. Kownacki*, 221 Ill. 2d 453 (2006), to be controlling.

¶ 12 In *Kalven*, the plaintiff submitted FOIA requests to the Chicago police department (CPD), seeking disclosure of two types of documents related to complaints of police misconduct. CPD denied the requests, and the plaintiff filed suit seeking an injunction requiring CPD to produce the documents. *Kalven*, 2014 IL App (1st) 121846, ¶ 2.

¶ 13 The parties filed cross-motions for summary judgment. *Id.* ¶ 7. The circuit court found that one type of documents was exempt from disclosure under the FOIA, but that the other type was not exempt. *Id.* Both parties appealed. *Id.*

¶ 14 The appellate court noted that the threshold question to be resolved is which version of the FOIA applies to this case. *Id.* ¶ 8. The plaintiff requested the documents from the CPD in November 2009 and after CPD denied the request, the plaintiff filed suit on December 22, 2009. *Id.* While the case was pending in the circuit court, an amended version of the FOIA went into effect on January 1, 2010. *Id.* The plaintiff argued on appeal that the appellate court should

apply the 2009 version of the FOIA because it was in effect when the FOIA request was denied by the CPD; however, defendants argued that the 2010 version of the statute should be applied. *Id.*

¶ 15 The appellate court held:

> "Injunctive and declaratory relief are prospective forms of relief because they are concerned with restraining or requiring future actions rather than remedying past harms. See, *e.g.*, *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 267-68 (2005) (discussing the difference between an injunction and present claims for damages in the context of sovereign immunity). When claims are prospective, a court must apply the law that is in effect at the time of its decision. See, *e.g.*, *Bartlow v. Costigan*, 2014 IL 115152, ¶¶ 30-31 (in the context of a suit seeking a declaration that a statute is unconstitutional and an injunction prohibiting its enforcement, amended version of the statute must be examined in order to determine whether the plaintiff is entitled to relief); see also *Forest Preserve District of Kane County v. City of Aurora*, 151 Ill. 2d 90, 94-95 (1992) (same). In this case, although the 2009 FOIA statute was in effect when plaintiff filed suit, the statute has since been amended. In order to determine whether plaintiff is entitled to production of the documents, we must therefore apply the version of the statute that is currently in effect." *Kalven*, 2014 IL App (1st) 121846, ¶ 10.

¶ 16 In *Center for Biological Diversity*, the Center for Biological Diversity submitted a FOIA request to the Animal and Plant Health Inspection Service (APHIS) for the specific GPS coordinates of certain wolf attacks. *Center for Biological Diversity*, 626 F. 3d at 1115. APHIS refused to provide the GPS coordinates, and the Center brought suit against APHIS and the United States Department of Agriculture (collectively, the USDA). *Id.*

¶ 17 The district court granted the Center's motion for summary judgment and denied that of the USDA, finding that the GPS coordinates must be disclosed. *Id.* The district court held that section 8791 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. §8791 (Supp. II 2009)), which exempted the disclosure of the GPS coordinates, did not apply because it was enacted after the USDA withheld the GPS coordinates. *Center for Biological Diversity*, 626 F. 3d at 1115. The USDA appealed. *Id.* at 1116.

¶ 18 The Ninth Circuit Court of Appeals (Ninth Circuit) reversed. *Id.* at 1118-19. The Ninth Circuit noted the two-step test set forth in *Landgraf* for determining the applicability of legislation enacted after the acts that gave rise to the suit, and found under the first step that Congress had not expressly prescribed section 8791's temporal reach. *Id.* at 1117. As to the second step, whether section 8791 would have retroactive effect, the Ninth Circuit cited an earlier case in which a conservation group brought a FOIA action to compel the Forest Service to release location data about an endangered bird. *Southwest Center for Biological Diversity v. United States Department of Agriculture*, 314 F.3d 1060, 1061 (9th Cir. 2002). While the action was pending in the district court, Congress passed new legislation permitting the withholding of such information from the public. *Id.* In determining whether the new legislation applied in that case, the appellate court concluded there was no impermissible retroactive effect because "the 'action' of the [conservation group] was merely to request or sue for information; it was not to take a position in reliance upon existing law that would prejudice the [conservation group] when that law was changed." *Id.* at 1062. As a result, the new legislation applied. *Id.*

¶ 19 The Ninth Circuit held that "*Southwest* requires the conclusion that there is no impermissible retroactive effect in applying Section 8791 to the Center's pending FOIA action. As in *Southwest*, the only action the Center took was to request information and file suit. It

engaged in no other action in reliance on then-existing law. We have already explicitly rejected the theory that there is an impermissible retroactive effect just because 'the Center had a right to the information when it filed its suit *** and it loses that right by application of the new exemption.' [Citation.] *** [W]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.' [Citation.] Here, the Center seeks the prospective relief of an injunction directing the USDA to provide it with certain information. Section 8791 merely affects the propriety of this prospective relief and is therefore not impermissibly retroactive when applied in this case." *Center for Biological Diversity*, 626 F. 3d at 1118.

¶ 20 In *Wisniewski*, the plaintiff filed a lawsuit alleging that defendant Kownacki, a priest, had sexually abused him. *Wisniewski*, 221 Ill. 2d at 455. The plaintiff sought discovery of the records of Kownacki's mental health treatment and alcohol-abuse counseling. *Id.* The defendants objected to the disclosure of the records, asserting that the records were privileged under the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act) (740 ILCS 110/1 *et seq.* (West 2002)), and the Alcoholism and Other Drug Abuse and Dependency Act (Dependency Act) (20 ILCS 301/30-5 *et seq.* (West 2002)). *Wisniewski*, 221 Ill. 2d at 455-56. The circuit court concluded that neither statute applied to records created prior to the effective dates of the statutes and ordered that the records be turned over. *Id.* at 456. Defendants refused to turn over the records, and the circuit court held defendants in contempt. *Id.* Defendants ultimately appealed to the supreme court. *Id.*

¶ 21 In pertinent part, our supreme court stated:

> "Plaintiff argues that applying the nondisclosure provisions of the Confidentiality Act and the Dependency Act to Kownacki's preenactment treatment records would have

> a retroactive impact because it would impose new duties with respect to documents and transactions completed years before the statutes' enactment. We reject this argument and conclude that the applicability of the Confidentiality Act and the Dependency Act to Kownacki's treatment records does not hinge upon a retroactivity analysis. Disclosure, which is the act regulated by both statutes, takes place only in the present or the future. Thus, any new duties regarding disclosure or nondisclosure would likewise be imposed only in the present or the future, not in the past. In other words, applying the nondisclosure provisions of the Confidentiality Act and the Dependency Act to preenactment treatment records and communications would not impair anyone's rights with respect to past transactions. Neither statute impacts any actions that may have taken place in the past with regard to Kownacki's records. For these reasons, we conclude that the Confidentiality Act and the Dependency Act are applicable to treatment records and communications that were created pursuant to treatment given prior to the effective dates of those statutes." *Id.* at 462-63.

¶ 22 *Kalven*, *Center for Biological Diversity*, and *Wisniewski* compel the conclusion that when, as here, a statutory amendment only affects the present or future disclosure of information (either by allowing for its disclosure or exempting it from disclosure), and does not otherwise impair anyone's rights with respect to completed transactions made in reliance on the prior law, the application of the amendment has no impermissible retroactive effect and therefore the amendment must be applied by the court if it is in effect at the time of the court's decision.

¶ 23 In the present case, as section 4-24 of the Barber Act only exempts the requested records from disclosure, and does not otherwise impair the Institute's rights with respect to any completed transaction made in reliance on any prior law, its application has no impermissible

retroactive effect. Therefore, the circuit court should have applied section 4-24, which was in effect at the time of its ruling, and exempted the requested records from disclosure. Accordingly, we reverse the November 12, 2015, order granting the Institute's motion for summary judgment, and the June 30, 2016, order requiring the Department to produce the subject records and awarding the Institute $35,000 in attorney fees as a prevailing requestor.

¶ 24 Our holding is further bolstered because the Institute sought injunctive relief, which is a prospective form of relief for which the circuit court must apply the law in effect at the time of its decision, *i.e.*, section 4-24. *Kalven*, 2014 IL App (1st) 121846, ¶ 10.

¶ 25 Finally, our holding here is in accord with the recent case, *Christopher J. Perry and Perry & Associates, LLC v. Illinois Department of Financial and Professional Regulation*, No. 2017 IL App (1st) 161870. In *Perry*, we held that a statutory amendment not in effect when plaintiffs made their FOIA request applied to exempt the disclosure of the requested information, where the amendment was in effect at the time the circuit court issued its final ruling on the FOIA request, and where the amendment only affected the present or future disclosure of information and did not otherwise impair the parties' rights with respect to completed transactions made in reliance on the prior law.

¶ 26 The Institute argues that *J.T. Einoder, Inc.*, 2015 IL 117193, compels a different result. In *J.T. Einoder, Inc.*, the Attorney General for the State of Illinois filed a complaint against the defendants alleging they were violating the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq*. (West 2000)), by engaging in open dumping and by permitting the deposit of construction and demolition debris waste above grade without a permit. *J.T. Einoder, Inc.*, 2015 IL 117193, ¶¶1-2. In addition to monetary penalties, the State sought a mandatory injunction pursuant to section 42(e) of the Act requiring the defendants to remove the above-grade waste pile. *Id.* ¶ 17.

The defendants argued that the version of section 42(e) of the Act in effect at the time of the violations did not allow for mandatory injunctive relief. *Id.* The State responded that the amended version of section 42(e), which permits courts to issue mandatory injunctions, applied in this case. *Id.* The circuit court ruled that amended section 42(e) applied, and accordingly the court granted the State's request for a mandatory injunction. *Id.* ¶ 19. The appellate court affirmed. *Id.* ¶ 20.

¶ 27 Our supreme court reversed the appellate court's finding that amended section 42(e) of the Act may be applied retroactively, noting that the amended section "creates an entirely new type of liability—a mandatory injunction—which was not available under the prior statute. Applying it retroactively here would impose a new liability on defendants' past conduct. For that reason, it is a substantive change in the law and cannot be applied retroactively." *Id.* ¶ 36.

¶ 28 In contrast to *J.T. Einoder, Inc.*, the present case involves section 4-24 of the Barber Act, which only affects present or future disclosure of information and which does *not* impose any new liability on past conduct. As such, section 4-24 has no impermissible retroactive effect. Accord *Perry*, 2017 IL App (1st) 161870 (distinguishing *J.T. Einoder, Inc.* on the same basis as here).

¶ 29 For all the foregoing reasons, we reverse the November 12, 2015, order granting the Institute's motion for summary judgment, and the June 30, 2016, order requiring the Department to produce the subject records and awarding the Institute $35,000 in attorney fees.

¶ 30 Reversed.

¶ 31 JUSTICE DELORT, dissenting:

¶ 32 Our supreme court has explained that the retroactive application of a statute is determined under the test set forth in *Landgraf*. Under the first part of the test, "if the legislature has clearly

prescribed the temporal reach of the statute, the legislative intent must be given effect absent a constitutional prohibition." *Hayashi*, 2014 IL 116023, ¶ 23. The second part of the test provides that if the new law contains no "express provision regarding the temporal reach, the court must determine whether applying the statute would have a 'retroactive' or 'retrospective' impact; that is, 'whether it would *impair rights a party possessed* when he acted.' " (Emphasis added.) *Id.* (quoting *Landgraf*, 511 U.S. at 280). If "applying the statute would have a retroactive impact, then the court must presume that the legislature did not intend that it be so applied." *Id.* (citing *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 38 (2001)); see also *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30 (applying same analysis).

¶ 33 As the majority notes, "Illinois courts will rarely, if ever, need to go beyond step one of the *Landgraf* analysis. This is because an amendatory act which does not, itself, contain a clear indication of legislative intent regarding its temporal reach, will be presumed to have been framed in view of the provisions of section 4 of our Statute on Statutes." *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 31. Section 4 of the Statute on Statutes, in turn, provides that "[n]o new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to *** *any right accrued*, or claim arising under the former law." (Emphasis added.) 5 ILCS 70/4 (West 2014). The law at issue here, section 4-24 of the Barber Act (225 ILCS 410/4-24 (West 2016)), contains no language suggesting that its temporal reach was intended to be retroactive so that it would abrogate record requests validly made before its enactment. Accordingly, section 4 of the Statute on Statutes suggests the plaintiffs are entitled to consideration of their FOIA request on the merits regardless of the later enactment of section 4-24 of the Barber Act.

¶ 34 In considering whether section 4-24 should be construed to be retroactive, we should also be guided by section 1 of FOIA itself, which states:

> "The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2012).

¶ 35 Public bodies are required to fulfill valid FOIA requests within a few weeks, at most. 5 ILCS 140/3 (West 2012). Additionally, FOIA requires courts to prioritize FOIA litigation over other types of cases. 5 ILCS 140/11(h) (West 2012) ("Except as to causes the court considers to be of greater importance, proceedings arising under this Section shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way."). When, as here, public bodies fail to fulfill FOIA requests "expediently" and require requestors to seek judicial relief to vindicate their rights, the public policy enunciated in FOIA demands that those rights not be thwarted by an unduly strained interpretation of our state's retroactivity jurisprudence.

¶ 36 To avoid this result, the majority cites several authorities, none of which are persuasive. *Wisniewski*, concerned the release of medical records *created* before the enactment of statutes shielding them from disclosure. The request for the records was first made as part of discovery in the underlying lawsuit. The lawsuit itself was not filed until years after the statutes had been enacted. Our supreme court held that the records need not be released, reasoning that:

> "Disclosure, which is the act regulated by both statutes, takes place only in the present or the future. Thus, any new duties regarding disclosure or nondisclosure would likewise be imposed only in the present or the future, not in the past. In

> other words, applying the nondisclosure provisions of the [statutes] to preenactment treatment records and communications would not impair anyone's rights with respect to past transactions. Neither statute impacts any actions that may have taken place in the past with regard to Kownacki's records." *Wisniewski v. Kownacki*, 221 Ill. 2d at 463.

Here, in contrast, the plaintiffs' request was filed and denied before section 4-24 of the Act was enacted. *Wisniewski* is therefore distinguishable.

¶ 37 The majority also relies on a case interpreting the federal Freedom of Information Act, *Center for Biological Diversity*. There, the court held that amendments to the federal version of FOIA enacted while the lawsuit was pending barred disclosure of documents requested before the amendment's enactment. This case is distinguishable for several reasons. First, the federal version of FOIA does not include the strong statement of public policy and the specific declaration of citizens' "right[s]" contained in the Illinois FOIA. Compare 5 U.S.C. § 552 (2012), with 5 ILCS 140/1 (West 2012). Second, while cases interpreting the federal version of FOIA are often helpful in interpreting identical provisions in the Illinois FOIA, "Illinois courts have repeatedly noted that the Illinois version of the FOIA is different from the federal version and is, therefore, subject to a different interpretation." *Rockford Police Benevolent & Protective Association, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 153 (2010). Similarly, in *American Federation of State, County & Municipal Employees (AFSCME), AFL-CIO v. County of Cook*, 136 Ill. 2d 334, 345 (1990), our supreme court stated: "we decline to interpret the Illinois [FOIA] Act as narrowly as [the Court of Appeals for the District of Columbia Circuit] interpreted the Federal Freedom of Information Act."

¶ 38 The majority also relies on *Kalven*, in which the court held that a court hearing an appeal from a FOIA denial should apply the version of FOIA in existence at the time of its ruling. *Kalven*, 2014 IL App (1st) 121846, ¶ 10. I was on the panel that decided *Kalven* but did not join that part of the opinion. Instead, I specially concurred, stating:

> "I would instead find that the plaintiff's rights to the records vested when he made the request and could not later be rescinded by legislative action. To hold otherwise would encourage governmental bodies to stall FOIA responses until some future time when the legislature might amend the statute in a favorable manner, or to actively lobby for an amendment which shields particular embarrassing records from disclosure." *Id.* ¶ 36 (Delort, J., specially concurring).

Those concerns apply equally to the case now before us. The *Kalven* opinion does not discuss the key—and highly relevant—declaration in section 4 of the Statute on Statutes that "[n]o new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to *** *any right accrued*, or claim arising under the former law." (Emphasis added.) 5 ILCS 70/4 (West 2014).

¶ 39 The *Kalven* court did not have the benefit of the more recent Illinois Supreme court case of *J.T. Einoder, Inc.*, in which the court found that a new law cannot apply retrospectively where it would "have a retroactive impact or result in inequitable consequences." *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30. Here, the Department eventually denied the plaintiffs' request, requiring the plaintiffs to seek judicial relief to vindicate their rights under FOIA. Under these facts, applying section 4-24 of the Act retroactively would, indeed, have "inequitable consequences." And, for the reasons expressed in my dissent in *Perry*, 2017 IL App (1st) 161780, ¶ __ (Delort, J., dissenting), I do not find the analysis in *Perry* to be persuasive.

¶ 40 As the majority notes, the Department has abandoned its claim that the requested documents were exempt from disclosure pursuant to the six enumerated FOIA exemptions upon which it originally relied. Instead, the appeal before us raises a single issue—whether section 4-24 of the Barber Act applies retroactively to requests made before its enactment but which were not fulfilled. The Institute's right to the subject records, having vested when it made its FOIA request, did not abate when section 4-24 of the Barber Act became effective. I must, therefore, respectfully dissent from the majority's disposition of this appeal. Instead, I would affirm the judgment below and allow the Institute to obtain the records which it sought.

Nos. 1-16-2141 and 1-16-2294 cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INSTITUTE FOR JUSTICE, Plaintiff-Appellee, v. THE DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 14 CR 19381 Honorable Rodolfo Garcia, Judge Presiding.

ORDER

This cause coming to be heard upon the petition for rehearing of plaintiff-appellee, INSTITUTE FOR JUSTICE, which includes a request to grant a certification of importance pursuant to Ill. S. Ct. R. 316 (eff. Dec. 6, 2006, as amended), all parties having been notified, and this court being fully advised in the premises;

IT IS HEREBY ORDERED that the petition for rehearing and the request to grant a certification of importance are DENIED.

ORDER ENTERED

MAY 18 2017

APPELLATE COURT, FIRST DISTRICT

JUSTICE

JUSTICE

JUSTICE

I would grant rehearing but agree to deny the request for a certificate of importance.

SUPREME COURT OF ILLINOIS

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September 27, 2017

In re: Institute for Justice, Appellant, v. The Department of Financial and Professional Regulation, Appellee. Appeal, Appellate Court, First District.
122349

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

The Court also ordered that this cause be consolidated with:

122411 Perry v. Department of Financial and Professional Regulation

A list of all counsel on these appeals is enclosed.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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