No. 130288

IN THE
SUPREME COURT OF ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-22-0387
Plaintiffs-Appellees,	)	There Heard on Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, No. 12 CH 5275
v.	)	
ANDREA LYNN CHASTEEN, *et al.*,	)	The Honorable JOHN C. ANDERSON,
Defendants-Appellants.	)	Judge Presiding.

(Full Caption on Next Page)

REPLY BRIEF OF DEFENDANTS-APPELLANTS 18 CLERKS

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-3000

Attorneys for Defendants-Appellants
18 Clerks

ALEXANDRINA SHROVE
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-2193 (office)
(773) 590-7061 (cell)
CivilAppeals@ilag.gov (primary)
Alexandrina.Shrove@ilag.gov (secondary)

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REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,

Plaintiffs-Appellees,

v.

ANDREA LYNN CHASTEEN, Clerk of the Circuit Court of Will County; CANDICE ADAMS, Clerk of the Circuit Court of DuPage County; ERIN CARTWRIGHT WEINSTEIN, Clerk of the Circuit Court of Lake County; THOMAS A. KLEIN, Clerk of the Circuit Court of Winnebago County; MATTHEW PROCHASKA, Clerk of the Circuit Court of Kendall County; THERESA E. BARREIRO, Clerk of the Circuit Court of Kane County; LORI GESCHWANDNER, Clerk of the Circuit Court of Adams; PATTY HIHER, Clerk of the Circuit Court of Carroll County; SUSAN W. McGRATH, Clerk of the Circuit Court of Champagne County; AMI L. SHAW, Clerk of the Circuit Court of Clark County; ANGELA REINOEHL, Clerk of the Circuit Court of Crawford County; JOHN NIEMERG, Clerk of the Circuit Court of Effingham County; KAMALEN JOHNSON ANDERSON, Clerk of the Circuit Court of Ford County; LEANN DIXON, Clerk of the Circuit Court of Livingston County; KELLY ELIAS, Clerk of the Circuit Court of Logan County LISA FALLON, Clerk of the Circuit Court of Monroe County;

Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-22-0387

There Heard on Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois, No. 12 CH 5275

CHRISTA S. HELMUTH, Clerk of the Circuit Court of Moultrie County; KIMBERLY A. STAHL, Clerk of the Circuit Court of Ogle County; and SETH E. FLOYD, Clerk of the Circuit Court of Piatt County,	)	
Defendants-Appellants.	)	The Honorable JOHN C. ANDERSON, Judge Presiding.

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INTRODUCTION

In 2021, this Court held that a statutory provision imposing a filing fee on mortgage foreclosure actions was unconstitutional under the Free Access Clause of the Illinois Constitution. *Walker v. Chasteen*, 2021 IL 126086. On remand, Plaintiffs-Appellees Reuben D. Walker and M. Steven Diamond, individually and as class representatives, pursued their only remaining claim — a refund of the fees that were paid — against the 102 circuit court clerks of Illinois, including the 18 Clerks. The circuit court correctly concluded that it lacked subject matter jurisdiction over that claim under the State Lawsuit Immunity Act ("Immunity Act"), 745 ILCS 5/0.01 *et seq.* (2022).

Plaintiffs' refund claim, which sought a direct monetary payment from the State to remedy a past wrong, was barred by sovereign immunity. The claim did not fall within the officer suit exception to that doctrine whether plaintiffs labeled their requested relief as restitution or damages because, either way, they sought retrospective, monetary relief, as opposed to prospective, injunctive relief. Well-established principles of sovereign immunity prohibit parties from bringing claims for retrospective monetary relief against the State in circuit court, and plaintiffs' arguments against applying those principles are irreconcilable with this Court's precedent. Specifically, plaintiffs' refund claim was foreclosed by *Parmar v. Madigan*, 2018 IL 122265, where this Court held that the officer suit exception applies only to claims that seek to enjoin future unlawful conduct. And plaintiffs'

assertions about the Court of Claims' jurisdiction over their refund claim are both immaterial and incorrect. Accordingly, this Court should affirm the circuit court, thus reversing the appellate court, and hold that plaintiffs' refund claim is barred by sovereign immunity.

ARGUMENT

I. Plaintiffs forfeited any argument that sovereign immunity was waived and, in any event, their waiver argument is incorrect.

As an initial matter, plaintiffs criticize the 18 Clerks for having "never raised [sovereign immunity] as a defense" prior to raising it in the circuit court on remand. AE Br. 3; *see also id.* at 28-29 (describing sovereign immunity argument as a "newly-raised argument[ ]."[1] To the extent plaintiffs suggest that the clerks waived sovereign immunity as a defense, they have forfeited any such argument by failing to directly assert that sovereign immunity has been waived, cite relevant authority on the waiver of sovereign immunity, or explain how those standards are met here. *See id.* at 2-46; Ill. Sup. Ct. R. 341(h)(7) (providing that brief must contain argument "with citation of the authorities . . . relied on," and that "[p]oints not argued are forfeited"); *Lake Cnty. Grading Co., LLC v. Vill. of Antioch*, 2014 IL 115805, ¶ 36 ("Both argument and citation to relevant authority are required.").

[1] This reply brief cites the common law record filed in the appellate court as "C__," the one volume report of proceedings as "R__," and the appendix to the 18 Clerks' opening brief as "A__." The 18 Clerks' opening brief is cited as "AT Br. __" and plaintiffs' response brief is cited as "AE Br. __."

Forfeiture aside, as the 18 Clerks explained in the appellate court, A93-94, 96, only the General Assembly — not the clerks of the circuit court or their counsel — may waive sovereign immunity. *See Twp. of Jubilee v. State*, 2011 IL 111447, ¶ 25 (State's efforts in defending against an action will not result in a waiver of sovereign immunity "because only the legislature itself can determine where and when claims against the State will be allowed"); *see also Parmar*, 2018 IL 122265, ¶ 31 ("The General Assembly may, by statute, consent to liability of the State, but such consent must be clear and unequivocal."). And no statutory waiver occurred here because plaintiffs' refund claim does not fall into any of the exceptions listed in the Immunity Act. *See* 745 ILCS 5/1, 1.5 (2022); *see also* A93-94 (addressing plaintiffs' waiver argument in the appellate court).

Plaintiffs also describe the 18 Clerks' sovereign immunity argument as "a theory of law they had never raised as a defense to the claims in either of the two prior appeals to this Court," suggesting that this Court "can consider whether it wants to deny the [clerks] the right to at this time raise this belated argument." AE Br. 28. This statement, however, ignores the well-established principle that sovereign immunity restricts a circuit court's subject matter jurisdiction and thus may be raised at any time. *See In re M.W.*, 232 Ill. 2d 408, 414 (2009) (when a court lacks subject matter jurisdiction, "any order entered in the matter is void *ab initio* and, thus, may be attacked at any time"). In fact, plaintiffs acknowledge that "an issue relating to jurisdiction

can be raised at any time," AE Br. 30, further undercutting their timeliness argument.

In addition, and contrary to plaintiffs' position, *id*. at 29, there was good reason not to raise sovereign immunity before this Court remanded this matter following its *Walker* decision. Until that point, the litigation was focused on the constitutionality of the filing fee and plaintiffs' entitlement to prospective, injunctive relief. *See Walker*, 2021 IL 126086, ¶¶ 9-10; C1935 V1, C3016-17 V2. Had this Court upheld the constitutionality of the filing fee, any issues regarding the refund claim would have become moot. Indeed, the circuit court elected to resolve the merits of the constitutional issues before addressing plaintiffs' request for monetary relief because it believed that doing so "would streamline the case." R263. And the circuit court then followed "the unambiguous language of this Court's mandate," AE Br. 28-29, on remand by conducting further proceedings to determine whether sovereign immunity barred plaintiffs' remaining claim for a direct monetary payment from the State. While plaintiffs disagree with the circuit court's resolution of that claim, there is nothing in the circuit court's ruling that conflicts with this Court's decision in *Walker*, 2021 IL 126086. *Cf.* AE Br. 28 (arguing that this Court's mandate in *Walker* precluded circuit court's dismissal based on sovereign immunity).

Plaintiffs further contend that the 18 Clerks should have waited for the circuit court "to enter an order providing for the return of monies" and then,

on appeal, attacked the jurisdiction of the circuit court to enter such an order. *Id*. at 29. Plaintiffs cite no authority for this proposal, so this Court should disregard it. *See* Ill. Sup. Ct. R. 341(h)(7). Regardless, plaintiffs' argument is internally inconsistent. On the one hand, they argue that the clerks waited too long to raise sovereign immunity, AE Br. 28-29, and on the other hand, they argue that the clerks should have waited even longer — until on appeal — to address the circuit court's jurisdiction, *id*. at 29. Not only would it have been unnecessary to wait to challenge the circuit court's jurisdiction, *see In re M.W.*, 232 Ill. 2d at 414, but doing so would have wasted both the parties' and judicial resources.

Accordingly, plaintiffs have forfeited any argument that the 18 Clerks waived their sovereign immunity defense, and, regardless, because the defense restricts the circuit court's jurisdiction, the clerks properly raised it before the circuit court on remand.

II. Sovereign immunity bars plaintiffs' refund claim, which seeks retrospective, monetary relief for the past collection of filing fees.

Plaintiffs' refund claim — a request for retrospective, monetary relief from the State — is barred by sovereign immunity. And the officer suit exception, which allows a plaintiff to seek to prospectively enjoin a state officer from taking future actions that violate constitutional or statutory law, does not apply because plaintiffs' refund request, whether framed as restitution or damages, sought retrospective relief in the form of a direct monetary payment

from the State. Plaintiffs' arguments to the contrary, many of which were not adopted by the appellate court, do not change that conclusion.

A. Plaintiffs' refund claim is barred by sovereign immunity because plaintiffs are seeking relief that a circuit court lacks jurisdiction to award.

On remand, plaintiffs sought a refund of filing fees via a direct monetary payment from the State, a type of relief that is disallowed by sovereign immunity. *See* R255, 257 (clarifying that plaintiffs were seeking "all fees that had been taken," including those held by "the Treasurer," even though those funds "ha[d] been used" by the State). Plaintiffs' claim is thus barred by sovereign immunity, and it is not covered by the officer suit exception to that doctrine.

As discussed in the 18 Clerks' opening brief, AT Br. 13-15, the circuit court lacks subject matter jurisdiction over a claim when sovereign immunity applies. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992). The formal designation of a party's capacity is not dispositive for sovereign immunity purposes. *Parmar*, 2018 IL 122265, ¶ 22. Instead, whether an action is against the State depends on "the issues involved and *the relief sought*." *Id*. (emphasis added). If a claim against a state official in their official capacity, as here, would result in a monetary judgment against the State, sovereign immunity bars the action from being brought in circuit court. *See Twp. of Jubilee*, 2011 IL 111447, ¶ 22. Under the officer suit exception to sovereign immunity, however, a plaintiff may pursue a claim against a state officer in the circuit court if the plaintiff

seeks to prospectively enjoin the officer from taking future actions that would violate constitutional or statutory law. *Parmar*, 2018 IL 122265, ¶¶ 22, 26.

It is undisputed that the clerks were acting in their official capacity as state officers when they collected the filing fees. AT Br. 15; AE Br. 33; *see Drury v. McLean Cnty.*, 89 Ill. 2d 417, 424-27 (1982) (clerks of circuit courts are state, not county, officials). As the 18 Clerks pointed out in their opening brief, a refund of the filing fees would necessarily draw from state funds because the clerks were statutorily obligated to deposit 98% of the collected money with the State Treasurer, while retaining 2% to cover the administrative costs of collecting the fees. AT Br. 15; *see* 735 ILCS 5/15-1504.1(a) (2022) (2% of fees were not deposited in local county's circuit clerk fund; rather they were deposited into the "Clerk Operation and Administrative Fund" for the purpose of defraying "administrative expenses related to the implementation" of the statutes requiring the collection of the fees). In fact, plaintiffs acknowledged before the circuit court that the monetary award they sought would, in essence, come from the State because "the State of Illinois took 100[%]" of the fees, R256, and they did not challenge that point in their response brief. *See* AE Br. 8-12. As a result, plaintiffs' refund claim seeking a direct monetary payment from the State is barred by sovereign immunity unless the officer suit exception applies, which it does not.

This Court reiterated in *Parmar* that the officer suit exception applies only to claims for injunctive or declaratory relief to compel a state official to

comply with the law. 2018 IL 122265, ¶ 22. The exception allows plaintiffs to seek to "enjoin future conduct" by state officials that is contrary to law, but it does not allow a plaintiff to seek damages "for a past wrong." *Id*. at ¶ 26. Here, plaintiffs' refund claim did not seek injunctive or declaratory relief. Instead, they sought a direct monetary payment from the State Treasury, *see* C973; R255, 257, and so the officer suit exception to sovereign immunity does not apply.

B. Plaintiffs' sovereign immunity argument rests on a misreading of this Court's precedent and provides no basis for affirmance.

In their response brief, plaintiffs rely on *City of Springfield v. Allphin*, 74 Ill. 2d 117 (1978) ("*Allphin I*"), and *City of Springfield v. Allphin*, 82 Ill. 2d 571 (1980) ("*Allphin II*"), AE Br. 9-12, to suggest that sovereign immunity does not bar a monetary refund, contending that this Court has already allowed that type of relief. But plaintiffs misread both cases, which support rather than undermine the 18 Clerks' position that sovereign immunity applies here.

In *Allphin I*, this Court held that sovereign immunity did not bar an action seeking to withhold funds from the State Treasury because the relief sought — the withholding of future tax payments to the State until an earlier over-withholding had been negated — did not render the case a suit against the State. 74 Ill. 2d at 126. In that case, the Illinois Department of Revenue's Director collected two municipal taxes for distribution to the plaintiff-

municipalities and was statutorily obligated to withhold a percentage of those taxes to pay the State as compensation for collecting the tax. *Id*. at 121. This Court concluded that the Director wrongfully over-withheld the State's share for a six-month period, *id*. at 128-31, and stated that the municipalities' action did not implicate sovereign immunity because they sought injunctive relief — "the withholding of certain funds from the State treasury," *id*. at 126. In other words, the Director could be required to withhold future payments to the Treasury that he was otherwise statutorily obligated to send, even if "the relief requested necessarily [would] have an impact on the State's General Revenue Fund." *Id*. Because the "net effect of such relief should be to reduce the amount of such taxes withheld by the State until the earlier overwithholding [was] compensated for," as opposed to relief seeking a direct payment from the Treasury, sovereign immunity did not bar the claim. *Id*. at 131.

When this Court reviewed the matter again in *Allphin II*, it clarified that the claim was not a case against the State because of the specific relief implemented: "Our decision remanding that cause directed the circuit court to fashion *injunctive relief* designed to halt the withholding of any collection fee until the amount overwithheld had been compensated for." 82 Ill. 2d at 574 (emphasis added). Relatedly, the Court explained that, while sovereign immunity did not prohibit the circuit court from fashioning an appropriate form of injunctive relief restraining a public official "from doing acts not

authorized by the statute," it did not allow for a separate payment of interest from the State. *Id*. at 579-80.

Allphin I and *II* therefore each support the 18 Clerks' position: sovereign immunity bars plaintiffs' refund claim because it seeks monetary relief from the State and the officer suit exception, which allows claims for prospective injunctive relief, does not apply. Plaintiffs misconstrue the holdings of both cases by intimating that this Court ordered "a return of the funds taken improperly." AE Br. 9. But this Court never ordered "a refund of the litigant's own funds," as plaintiffs imply. *Id*. at 10. Rather, it "directed the circuit court to fashion injunctive relief designed" to halt future payments to the State, with the net effect of eliminating the overcompensation to the State. *Allphin II*, 74 Ill. 2d at 131. And, consistent with the Court's direction, the circuit court did not order a monetary payment of state funds to the municipalities, as plaintiffs seek here. Therefore, the type of relief requested by plaintiffs — "[a]n order to return all fees collected," C973, in the form of a direct monetary payment from the State — is fundamentally distinct from the injunctive relief that was provided in *Allphin I* and *II*.

Moreover, *Allphin II*'s additional holding — that the municipalities could not seek interest from the State for the amount that was over-withheld — falls squarely in line with this Court's subsequent decision in *Parmar*, 2018 IL 122265 (plaintiff could not recover "a refund of all moneys paid . . . , together with interest and loss of use [ ] for a past wrong"). It also aligns with

the 18 Clerks' argument because ordering the direct monetary payment that plaintiffs seek here would, in effect, enter a money judgment against the State, which is a form of relief prohibited by sovereign immunity.

Plaintiffs further attempt to distinguish *Parmar* by arguing that the plaintiff in *Parmar* could have sought a tax refund in the circuit court under the State Officers and Employees Money Disposition Act ("Protest Moneys Act"), 30 ILCS 230/1 *et seq.* (2022), whereas "plaintiffs here had no [other] forum," AE Br. 40-43. But this Court never suggested that the Immunity Act's application in *Parmar* depended on the taxpayer being able to initiate proceedings in the circuit court under the Protest Moneys Act, or any other statute; on the contrary, this Court made no mention of that statute in its sovereign immunity analysis. 2018 IL 122265, ¶¶ 18-35. Thus, whether the plaintiff in *Parmar* had other procedural avenues to pursue his tax refund in the circuit court had no bearing on this Court's conclusion that sovereign immunity applied, *see id.*, and it should have no impact now.

Unable to distinguish this case from *Parmar*, plaintiffs next contend that *Crocker v. Finley*, 99 Ill. 2d 444 (1984), supports their requested relief. AE Br. 43-45. *Crocker*, however, did not involve sovereign immunity. *See* 99 Ill. 2d at 449-57. Indeed, this Court addressed only the constitutional issues before it, making no comment on the appropriateness of the circuit court's appointment of a trustee to plan a refund to the class members. *See id.*; *see also In re N.G.*, 2018 IL 121939, ¶ 67 (prior opinion containing "no analysis" of

an issue "cannot be read as expressing any view by this court" on that issue because opinion "is authority only for what is actually decided in the case"). Because *Crocker* did not decide any issues regarding sovereign immunity, it is more akin to *Walker*, 2021 IL 126086, where this Court decided the constitutionality of the fees without reaching sovereign immunity.

And plaintiffs' argument that this Court must have concluded in *Crocker* that the circuit court had jurisdiction to entertain the "return of the fees to the plaintiffs," AE Br. 44-45, is incorrect. The Court did not address sovereign immunity in *Crocker* because the issues before it did not implicate the doctrine. Specifically, the plaintiff there sought only prospective, injunctive relief: a declaratory judgment that the fee was invalid, an injunction prohibiting the "collection of the fee," and an injunction "to restrain the clerk [of the circuit court] from transferring [fees] to the county treasurer." 99 Ill. 2d at 448.

Plaintiffs' refund claim, by contrast, did not seek prospective, injunctive relief prohibiting the future collection of the fees and their transfer to the Treasury because plaintiffs had already obtained that relief. *See Walker*, 2021 IL 126086, ¶¶ 46-49. And plaintiffs do not argue in their response brief that their refund request would require the circuit court to order additional prospective, injunctive relief. *See* AE Br. 5-46. In sum, plaintiffs have misconstrued this Court's precedent delineating the bounds of sovereign immunity and the officer suit exception, and neither the cases plaintiffs cite

nor their arguments provide grounds for the Court to affirm the appellate court's decision.

C. Sovereign immunity bars claims for retrospective, monetary relief even if the challenged action was taken under a statute that was later held unconstitutional.

Plaintiffs, citing *Leetaru v. Bd. of Trs. of Univ. of Ill.*, 2015 IL 117485, also propose that sovereign immunity affords no protection to the clerks against their refund claim because the clerks acted pursuant to a statute that this Court later held was unconstitutional. AE Br. 30-33. According to plaintiffs, if a state officer acts unconstitutionally, then the officer suit exception always applies because the officer's conduct is not considered to be that of the State, regardless of the relief sought. *Id*. at 31-32 (citing *Leetaru*, 2015 IL 117485, ¶ 46).

But plaintiffs' argument is foreclosed by this Court's precedent. Most recently, in *Parmar*, this Court held that the officer suit exception applies only to claims for a constitutional or statutory violation that seek prospective, injunctive relief. *See* 2018 IL 122265, ¶ 22. In so holding, *Parmar* addressed *Leetaru* and explained that sovereign immunity did not apply there because the plaintiff "sought only to prohibit future conduct" and "did not seek redress for some past wrong." *Id*. at ¶ 24 (citing *Leetaru*, 2015 IL 117485, ¶ 51) (cleaned up). Thus, where a plaintiff alleges that a state officer violated the constitution, a claim "seeking to prospectively enjoin such unlawful conduct" may proceed in the circuit court under the officer suit exception, so long as the

plaintiff seeks only prospective, injunctive relief. *Id*. at ¶ 22; *see also Ellis v. Bd. of Governors of State Colls. & Univs.*, 102 Ill. 2d 387, 395 (1984) (exception applies to claims "to enjoin a State officer from taking future actions in excess of his delegated authority") (citing *Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 548 (1977)). But when, as here, the plaintiff seeks a monetary judgment against the State, sovereign immunity applies regardless of whether the plaintiff alleges a constitutional or statutory violation. *See Parmar*, 2018 IL 122265, ¶ 26 (barring claim seeking "a refund of all moneys paid" "for a past wrong").

D. The differences between restitution and damages are immaterial to the sovereign immunity analysis because both are retrospective relief.

Plaintiffs argue that their refund claim may proceed in the circuit court because they are seeking "restitution," not damages. AE Br. 36-40. This argument fails because the differences between restitution and damages are immaterial to the sovereign immunity analysis, as both are retrospective in nature.

As the 18 Clerks explained in their opening brief, it is well settled that restitution is a retrospective remedy. AT Br. 23-27. Plaintiffs, however, rely on *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill. 2d 248 (2004), to argue that restitution and damages are inherently distinct forms of relief. AE Br. 36-37. They describe money damages as "a substituted relief for a past loss or wrong," while describing restitution as a means to "return[ ]" "the parties to

their previous state of being." *Id*. at 37. Yet plaintiffs' own definition of restitution recognizes its backward-looking nature as a remedy for a past wrong that *returns* a plaintiff to their previous state. *Id.*; *see* Restatement (Third) of Restitution § 1 cmt. E (describing restitution as act to "restore[ ] something to someone, or restore[ ] someone to a previous position," presupposing past event for which party must be compensated). Because restitution, like damages, provides retrospective relief, it makes no difference as to sovereign immunity whether plaintiffs' refund claim is framed as one or the other.

Moreover, *Raintree* undermines plaintiffs' argument. In *Raintree*, this Court held that the plaintiff could seek restitution, in the form of a refund of fees, from a municipality because section 2-101 of the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-101 (2022), provided that nothing in that statute "affects the right to obtain relief other than damages against a local public entity," 209 Ill. 2d at 259 (cleaned up). The statute providing immunity was thus limited to damages claims. By contrast, no similar language appears in the Immunity Act. *See* 745 ILCS 5/1, 1.5 (2022). *Raintree* therefore demonstrates that if the General Assembly had intended to limit sovereign immunity to damages claims only, it would have expressly done so in the Immunity Act.

Plaintiffs' reliance on *Barrow v. Vill. of New Miami*, 104 N.E.3d 814 (Ohio App. 12 Dist. 2018), *see* AE Br. 39-40, is similarly misplaced, as Ohio's

sovereign immunity statute carves out an exception for liability other than in damages, *see* R.C. § 2744.02 ("a political subdivision is not liable in damages in a civil action"). Because the General Assembly did not include a similar exception in the Immunity Act, the differences between damages and restitution have no relevance to the application of sovereign immunity here.

Plaintiffs also maintain that ordering restitution would not control the actions of the State or expose it to direct liability, AE Br. 33-35, citing *Bianchi v. McQueen*, 2016 IL App (2d) 150646, *Loman v. Freeman*, 229 Ill. 2d 104 (2008), and *Jinkins v. Lee*, 209 Ill. 2d 320 (2004). First, as an appellate court case, *Bianchi* is not binding authority on this Court. *See O'Casek v. Child's Home & Aid Soc'y of Ill.*, 229 Ill. 2d 421, 440 (2008). Moreover, *Bianchi* is inapposite because it was based on an incorrect reading of *Leetaru* — that any claims alleging a constitutional or statutory violation survived sovereign immunity regardless of the relief sought — which this Court expressly disclaimed in *Parmar*. *See* 2016 IL App (2d) 150646, ¶¶ 36-41.

Second, *Loman* is factually distinct from this case. There, this Court held that the plaintiffs' claims did not implicate sovereign immunity because they arose from the state officer's independent, professional duty, and not from a duty imposed by virtue of the officer's state employment. 229 Ill. 2d at 114-20. Because the claims were not barred by sovereign immunity, the Court did not reach the officer suit exception. Third, *Jinkins* is inapplicable for the

same reason, as it addressed the state officers' duty as mental health professionals, rather than their state employment. 209 Ill. 2d at 334.

Accordingly, plaintiffs' attempt to characterize their refund claim as restitution, as opposed to damages, is irrelevant to the sovereign immunity analysis.

E. The Court of Claims' jurisdiction does not define the scope of the Immunity Act and, regardless, plaintiffs' assertion that they could not have pursued their refund claim in the Court of Claims is incorrect.

The 18 Clerks' opening brief explained that the Court of Claims would have had jurisdiction over plaintiffs' refund claim because no constitutional questions remain. AT Br. 29-30. And the Court of Claims does not lack authority to grant equitable relief. AT Br. 30 (citing *Mgmt. Ass'n of Ill., Inc. v. Bd. of Regents of N. Ill. Univ.*, 248 Ill. App. 3d 599, 610 (1st Dist. 1993)). For their part, plaintiffs argue that the Court of Claims lacks jurisdiction because it cannot provide a monetary remedy when the circuit court declares a statute unconstitutional. AE Br. 15-20.

As a threshold matter, this Court need not determine whether the Court of Claims would have jurisdiction over plaintiffs' refund claim because the circuit court's jurisdiction, which is the only question before this Court, is governed by the Immunity Act, 745 ILCS 5/1, 1.5 (2022), not the Court of Claims Act, 705 ILCS 505/1 *et seq.* (2022). *See* AT Br. 28-29. Given that the Immunity Act alone governs whether a claim is barred by sovereign immunity, this Court need not assess the scope of the Court of Claims' jurisdiction.

Regardless, plaintiffs' argument that the Court of Claims lacks jurisdiction over their refund claim because the Court of Claims cannot decide constitutional issues, AE Br. 12-15, is incorrect. Whether the Court of Claims has jurisdiction to decide constitutional issues is irrelevant because plaintiffs' refund claim does not present any constitutional questions — those matters were already decided by this Court. *See Walker*, 2021 IL 126086. Indeed, plaintiffs do not (and cannot) identify any constitutional issue that the Court of Claims could be asked to decide while resolving their refund request. *See* AE Br. 5-8, 12-18. Instead, plaintiffs insist — without citing any authority — that the Court of Claims lacks jurisdiction to enforce their refund request because "that remedy is an integral part of this Court's power to hear and determine constitutional challenges to conduct or legislation." *Id*. at 18. But plaintiffs' assertion that the Court of Claims lacks jurisdiction over a claim any time the matter previously presented a constitutional question has no legal basis.

Moreover, plaintiffs' argument leads to absurd results. Under plaintiffs' theory, a litigant could evade sovereign immunity by adding a constitutional claim to its complaint because, according to plaintiffs, all of the claims would become inextricably intertwined with the constitutional question. *See id.* If that were the case, the doctrine of sovereign immunity would be all but eliminated. And plaintiffs' theory also conflicts with this Court's precedents, including *Parmar*, where the Court confirmed that a claim alleging that a state

"officer's conduct violates statutory or constitutional law or is in excess of his or her authority" may proceed only if it seeks "to prospectively enjoin such unlawful conduct." 2018 IL 122265, ¶ 22. Conversely, a claim seeking a monetary judgment against the State based on allegedly unconstitutional conduct, such as plaintiffs', is barred by sovereign immunity and does not fall within the officer suit exception.

Plaintiffs further challenge the 18 Clerks' argument, *see* AT Br. 31, that under *Parmar*, the availability of injunctive relief is constitutionally sufficient even if the Court of Claims were to determine that it lacked jurisdiction over the refund claim, AE Br. 19-20. But the plaintiff in *Parmar* made the same argument that plaintiffs raise here: "Plaintiff's argument appears to be that unless his complaint is allowed to proceed in the circuit court, he will be without a remedy." 2018 IL 122265, ¶¶ 50-52. This Court rejected that argument, explaining that the Illinois Constitution does not require that "a certain remedy be provided in any specific forum," and that "limiting plaintiff's available remedies does not run afoul of [ ] constitutional provision[s]." *Id*. at ¶ 51. Consequently, as in *Parmar*, the sovereign immunity analysis would not change even if the Court of Claims did not have jurisdiction. *See id*. at ¶ 52.

In addition, whether the refund claim is time-barred is a separate and distinct jurisdictional question for the Court of Claims, *see* 705 ILCS 505/22(h) (2022) (generally, "claim[ ] must be filed within [two] years after it first

accrues), *see* AE Br. 18-20, and one that this Court need not, and should not, engage in to answer the sovereign immunity question at hand. That aside, the Court of Claims' procedural rules direct that a complaint that is filed or pending before that body "shall be continued generally . . . until the final disposition of all other claims or proceedings arising from the same occurrence or transaction." 74 Ill. Admin. Code 790.60(a); *see Lowery v. Illinois*, 72 Ill. Ct. Cl. 102, 104 (2020) (stating that claimant "could have filed his claim in this Court and then sought a general continuance, as allowed by Court of Claims Rules," during arbitration); *Erving v. Bd. of Trs. of Univ. of Ill.*, 67 Ill. Ct. Cl. 122, 124 (2014) (noting that Court of Claims action "was placed on general continuance pursuant to [section] 790.60(a)" while circuit court action was pending). So, plaintiffs could have filed an action seeking their refund in the Court of Claims and sought a stay of the matter until the resolution of the constitutional question.

In sum, this Court need not consider the jurisdiction of the Court of Claims to determine the jurisdiction of the circuit court. And, regardless, the Court of Claims' authority to adjudicate constitutional matters is irrelevant because there is no remaining constitutional question for the Court of Claims to address.

F. Plaintiffs forfeited their Takings Clause argument by failing to raise it before the circuit or appellate courts, and it is wrong in any event.

In their response brief, plaintiffs suggest for the first time in this litigation that if they are unable to recover the filing fees in the circuit court, then the State's retention of that money would violate the Takings Clause of the United States and Illinois Constitutions. *See* AE Br. 21-25. This argument provides no grounds for affirmance.

To begin, plaintiffs have forfeited this argument because they failed to include it in the operative second amended complaint, *see* C970-73 V1, or raise it in response to the sovereign immunity defense before the circuit or appellate court, *see* C2375-96, 2653-65, 2817-30, 2858-71 V2; A15-63, 138-69; *Kopf v. Kelly*, 2024 IL 127464, ¶ 77 ("[P]laintiff did not include this allegation in his second amended complaint, and he cannot raise it for the first time on appeal."); *1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Tr. Co.*, 2015 IL 118372, ¶ 14 ("Issues not raised in either the trial court or the appellate court are forfeited.").

Although the rule of forfeiture "serves as a limitation on the parties and not on the court," *Vill. of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004), this Court should not consider plaintiffs' Taking Clause claim because it was not "fully briefed and argued by the parties" in the lower courts, *cf. Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 73 (2002) (declining to apply forfeiture doctrine where issue was fully briefed in motions to strike portions

of the petition for leave to appeal and opening brief). The Court has explained that "the theory upon which a case is tried in the lower court cannot be changed on review," and allowing plaintiffs to change their theory on appeal would "weaken the adversarial process and our system of appellate jurisdiction." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). Here, plaintiffs had the opportunity to raise an argument invoking the Takings Clause in the circuit and appellate courts but chose not to. Thus, plaintiffs' forfeiture of this argument should be enforced.

That aside, plaintiffs' argument is incorrect on the merits. This Court has long held that the Takings Clause of both the United States and Illinois Constitution does not apply "to the state's power of taxation." *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 81 (2008) (finding no taking because surcharge fee imposed on casino riverboats implicated only the State's authority to tax, not the exercise of its eminent domain powers); *see also Cnty. of Mobile v. Kimball*, 102 U.S. 691, 703 (1880) ("But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution."). The Takings Clause instead applies only to the State's exercise of eminent domain. *Empress Casino*, 231 Ill. 2d at 81. And, this Court has explained, the imposition of a circuit court filing fee falls under the umbrella of the State's taxation power and not its eminent domain power. *Id.* at 82 (citing *Mlade v. Finley*, 112 Ill. App. 3d 914, 924 (1st Dist. 1983)).

Indeed, here, the Court expressly stated that the challenged fee was "a litigation tax." *Walker*, 2021 IL 126086, ¶ 43. As such, it does not implicate the Takings Clause. *See Empress Casino*, 231 Ill. 2d at 80-85. Plaintiffs' citations to *Hampton v. Metro. Water Reclamation Dist. of Greater Chi.*, 2016 IL 119861, ¶ 33 (Illinois Takings Clause allows for just compensation to owner of damaged property), and *Tyler v. Hennepin Cnty., Minn*, 598 U.S. 631, 637, 647 (2023) (recognizing property taxes "are not themselves a taking," but government cannot retain value of taken property beyond the taxes owed), AE Br. 23-24, do not alter that conclusion, as both cases involved the eminent domain power. And plaintiffs' reliance on *Arlington Heights Police Pension Fund v. Pritzker*, 2024 IL 129471, ¶¶ 36-37, is equally misplaced because that case did not involve a circuit court filing fee and, in any event, this Court found no taking. Accordingly, plaintiffs' Takings Clause argument is without merit.

Finally, the argument fails because, as explained, *see supra* pp. 17-20, the Court of Claims would have jurisdiction to consider their refund claim, as no constitutional question remains, leaving them with an avenue to seek the return of those filing fees. Plaintiffs' argument thus rests on an incorrect premise, and this Court should not consider that argument based on a hypothetical set of facts when plaintiffs did not raise this argument in the circuit or appellate court and did not file an action in the Court of Claims.

CONCLUSION

For these reasons, Defendants-Appellants 18 Clerks ask this Court to vacate the appellate court's decision and affirm the circuit court judgment.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-3000

Attorneys for Defendants-Appellants
18 Clerks

ALEXANDRINA SHROVE
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-2193 (office)
(773) 590-7061 (cell)
CivilAppeals@ilag.gov (primary)
Alexandrina.Shrove@ilag.gov (secondary)

October 2, 2024

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this brief, excluding the pages contained in the Ill. Sup. Ct. R. 341(d) cover, the Ill. Sup. Ct. R. 341(h)(1) table of contents and statement of points and authorities, the Ill. Sup. Ct. R. 341(c) certificate of compliance, the certificate of service, and those matters appended to the brief under Ill. Sup. Ct. R. 342(a), is 5,885 words.

/s/ Alexandrina Shrove
ALEXANDRINA SHROVE
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-2193 (office)
(773) 590-7061 (cell)
CivilAppeals@ilag.gov (primary)
Alexandrina.Shrove@ilag.gov (secondary)

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 2, 2024, I electronically filed the foregoing Reply Brief of Defendants-Appellants 18 Clerks with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Daniel Cray
dkc@crayhuber.com

Laird M. Ozmon
injury@ozmonlaw.com

Melissa Dakich
mhd@crayhuber.com

Michael Reagan
mreagan@reagan-law.com

Scott Pyles
spyles@willcountyillinois.com

Patrick E. Dwyer III
Patrick.dwyer2@cookcountyil.gov

Carrie L. Haas
clh@dunnlaw.com

Timothy Hudspeth
thudspeth@marionco.illinois.gov

Douglas E. Dyhrkopp
ddgallatinsa@gmail.com

Michael D. Schag
mschag@heylroyster.com

Theresa Goudie
tgoudie@k3county.net

Christopher Allendorf
callendorf@jodaviess.org

Paul Fangman
Paul.fangman@cookcountyil.gov

Sandra Connell
sconnell@dunnlaw.com

Lori Wood
lori@crayhuber.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this

instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Alexandrina Shrove
ALEXANDRINA SHROVE
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(312) 814-2193 (office)
(773) 590-7061 (cell)
CivilAppeals@ilag.gov (primary)
Alexandrina.Shrove@ilag.gov (secondary)