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No. 130288

In the
Supreme Court of Illinois

REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois, Plaintiffs-Appellees, v. ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a Representative of all Clerks of the Circuit Courts of All Counties within the State of Illinois, Defendants-Appellants, and PEOPLE OF THE STATE OF ILLINOIS *Ex rel.* KWAME RAOUL, Attorney General of the State of Illinois, and DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County, Intervenors-Appellants.	On 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 The Honorable John C. Anderson, Judge Presiding

PLAINTIFFS-APPELLEES' SUR REPLY TO THE REPLY BRIEF OF APPELLANTS 18 CLERKS

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ARGUMENT

THE PLAINTIFFS' ARGUMENT INVOKING THE TAKINGS CLAUSE IS PROPERLY BEFORE THIS COURT AND PRECLUDES DEFENDANTS' CLAIMS THAT THE COURTS LACK JURISDICTION TO ORDER THE RETURN OF FUNDS COLLECTED UNDER UNCONSTITUTIONAL LEGISLATION.

In their appellees brief before this Court, plaintiffs presented various arguments including one addressing the impact of the Takings Clause of the Constitution of the State of Illinois and the Constitution of the United States, which this Court has held are to be considered in lockstep and which require the courts of Illinois to adhere to the decisions of the Supreme Court of the United States as controlling over any theoretical contrary Illinois authority. In support of that principle of law, plaintiffs cited the decision of the United States Supreme Court in *Tyler v. Hennepin County*, 598 U.S. 631 (2023).

At page 21 of the Reply Brief of the intervening appellants, 18 Clerks, they present a section of their argument entitled:

"**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**."

At this same page the 18 Clerks explain the basis for this argument by stating that "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". Acknowledging that the rule of forfeiture "serves as a limitation on the parties and not on the court," the 18 Clerks argue that "this Court should not consider plaintiffs' Taking Clause claim because it was not 'fully briefed and argued by the parties' in the lower courts." (18 Clerks Reply Brief, p. 21).

This argument falls before the documents within the record on appeal (ROA). The

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decision in *Tyler v. Hennepin County*, 598 U.S. 631 (2023) was published May 25, 2023, after the Plaintiffs' Reply Brief was filed in the Appellate Court. (A138-A169). After Plaintiffs became aware of that decision and evaluated its potential impact on the then pending appeal, they concluded the *Tyler* decision constituted an additional and controlling basis rebutting defendants' arguments that the court system lack jurisdiction to order a refund of fees collected under unconstitutional legislation as well as their claim that the Illinois Court of Claims had exclusive jurisdiction to order the refund.

Plaintiffs then filed their motion before the appellate court seeking leave to submit the *Tyler* decision and its application of the Takings Clause as additional authority.[1] (SA77-SA100). Before ruling on plaintiffs' motion, the appellate court allowed the defendants the opportunity to address the proposed citation of *Tyler*. Defendants did so. On August 28, 2023, all defendants including the 18 Clerks filed a "Joint Response" (SSA1-SSA7) in which they offered their analysis of *Tyler* for the appellate court. The Joint Response argued that the appellate court should disregard *Tyler solely* because defendants claimed the decision failed to address or resolve the impact of the application of sovereign immunity in Illinois. Thus, while the Third District Appellate Court thereafter correctly reversed the circuit court's dismissal on other grounds without needing to address *Tyler* or the Takings Clause (just as this Court may choose to do in the present appeal by affirming the appellate court's decision without citation to *Tyler)*, defendants' claim that

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[1] See footnote 2 at page 3 of the Motion for Leave to Cite Additional Authority, where Plaintiffs pointed out that "[a]ll nine members of the Supreme Court agreed that the judicial system had the power to order the government to return to its citizens monies collected in excess of its lawful authority under the 'Takings Clause' and the 14th amendment while two members concurred with the result but stated that the Court should have also addressed the excessive fees/penalties prohibition under the 8th amendment." (SA 79).

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plaintiffs failed to raise the takings clause prohibitions below or that they were not accorded the opportunity to prepare and present argument addressing this matter is clearly false and should be rejected.

In addition, the 18 Clerks now ask this Court to disregard the *Tyler* decision as it is limited to "eminent domain" cases. (18 Clerks Reply Brief, p. 23). This argument is not only a misstatement of the basis of the *Tyler* decision but also an argument defendants never raised before the appellate court. When addressing the *Tyler* decision before the appellate court, defendants limited their objections to application of that decision as well as the Takings Clause *solely* to the argument that neither the *Tyler* case nor the constitutional protections noted in *Tyler* controlled over defendants' formulation of the doctrine of sovereign immunity in Illinois.

Defendants' argument that the Takings Clause in Illinois is limited to eminent domain cases is without merit but rather than lengthen this brief with any further discussion of those decisions, and as already pointed out in the brief plaintiffs earlier submitted to this Court, this new argument as presented by the 18 Clerks is definitively rebutted by the *Tyler* decision. *Tyler* was not an "eminent domain" case nor was the scope of the Takings Clause limited in the manner now claimed by the 18 Clerks. In *Tyler,* the United States Supreme Court reviewed and reversed a decision by the Minnesota Supreme Court which authorized a local governmental entity to retain monies derived from the sale of property following a foreclosure for unpaid taxes. The Supreme Court held that while the government could collect taxes legitimately assessed but unpaid, any additional monies could not be retained as in violation of the Takings Clause of the Constitution of the United States. To permit the government to retain those additional funds would permit it to keep more than what "the taxpayer must render unto Caesar…". *Tyler v. Hennepin County., Minnesota*, 598

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U.S. 631, 647 (2023)

Nowhere in the *Tyler* decision does the United States Supreme Court address the concept of eminent domain nor does it base its ruling on the principle of eminent domain. Eminent Domain is a separate and distinct principle of law that addresses the right of the government to take property for the use of such property for public purposes, not a situation where property is seized for the purpose of satisfying an existing and unrelated monetary debt. Further, Eminent Domain is a principle of law which has been reviewed by this Court on numerous occasions and a right which this Court has stated is a power "great as it is ** [remains] subject to constitutional limitations, and the courts may interpose their authority to prevent a clear abuse of the exercise of that right." *Deerfield Park District v. Progress Development Corporation,* 22 Ill. 2d 132, 137 (1961).

The Court in *Tyler* did not address eminent domain. Instead, the Supreme Court cited to the Takings Clause as a limitation on the right of the government to retain money taken beyond its lawful authority, the precise situation in the present case. In its 2021 decision in this case, this Court held that the fees the state took from plaintiffs were obtained through unconstitutional legislation, thereby treating the enactments as *void ab initio*. The *Tyler* decision is then directly applicable to the instant case.

Moreover, even if defendants' arguments regarding the limitation on the Takings Clause under Illinois law were correct, and they are not, those decisions would not overrule the application of the Takings Clause of the United States Constitution as set out in *Tyler* in the instant case. (See, for example, *Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 37, discussing the binding effect of the Supremacy Clause.)

The last matter plaintiffs address in this additional Sur Reply is the repeated misstatement of law and fact relating to the 2% of the fees collected under this legislation

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which, pursuant to Illinois statute as well as case authority, were never state funds and therefore not subject to possible refund by the Court of Claims. Those misstatements mirror those which were presented by the 102 clerks in the Will County Clerks'(Chasteen) Reply Brief. This Court gave plaintiffs the right to file their initial Sur Reply to address these same misstatements. Plaintiffs will not burden the court with reciting the same argument, but will rely upon the statutes, case authorities, and argument cited in their short Sur Reply to Defendant-Appellant Chasteen's Reply Brief as sufficient rebuttal.[2]

Respectfully submitted,

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& Van AUSDAL LLC

/s/ *Daniel K. Cray*

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[2] Along these same lines, the 18 Clerks in their Reply Brief ignore that plaintiffs established that approximately three quarters of $1 million was retained by two different counties and kept in funds separate and apart from funds being held by the Illinois State Treasurer. (*See* footnote 1 of Sur Reply to Defendants-Appellants Chasteen's Reply Brief, p.1.). Plaintiffs rely upon the argument contained in their Sur Reply to Defendant Chasteen's Reply Brief as a basis of response to this omission by the 18 Clerks.

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AFFIDAVIT OF DANIEL K. CRAY

NOW COMES Your Affiant, Daniel K. Cray, an adult person over the age of 18 years, provides this Affidavit under oath and states:

1. I am Daniel K. Cray and am one of the counsel for the Plaintiffs-Appellees in the above-captioned matter. My business address is 303 W. Madison Street, Suite 2200, Chicago, Illinois 60606.

2. Statements made in my Affidavit are true and correct and made under personal knowledge obtained as lead counsel for plaintiffs.

FURTHER AFFIANT SAYETH NOT.

/s/ Daniel K. Cray
Daniel K. Cray

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VERIFICATION BY CERTIFICATION

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 affidavit and in this motion for leave to file are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Daniel K. Cray — October 8, 2024

Daniel K. Cray — Date

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CERTIFICATE OF COMPLIANCE

I certify that this Sur Reply conforms to the requirements of Supreme Court Rule 341. The length of this Sur Reply, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to this Sur Reply are 5 pages.

/s/ *Daniel K. Cray*

Daniel K. Cray
One of the Attorneys for Plaintiffs

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SECOND SUPPLEMENTAL APPENDIX (SSA)

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SECOND SUPPLEMENTAL APPENDIX

No. 3-22-0387

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

REUBEN D. WALKER and M. STEVEN DIAMOND, individually and on behalf of themselves, and for the benefit of taxpayers and on behalf of all other individuals or institutions who pay foreclosure fees in the State of Illinois,	)	Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois
Plaintiffs-Appellants,	)	
v.	)	No. 12 CH 5275
ANDREA LYNN CHASTEEN, in her official capacity as the Clerk of the Circuit Court of Will County, and as a representative of all Clerks of the Circuit Courts of all counties within the State of Illinois,	)	The Honorable JOHN C. ANDERSON,
Defendant-Appellee.	)	Judge Presiding.

DEFENDANTS-APPELLEES' JOINT RESPONSE TO PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY

Defendants-Appellees-Class Members Candice Adams, Clerk of the Circuit Court of DuPage County; Erin Weinstein, Clerk of the Circuit Court of Lake County; Thomas Klein, Clerk of the Circuit Court of Winnebago County; Matthew Prochaska, Clerk of the Circuit Court of Kendall County; Theresa Barreiro, Clerk of the Circuit Court of Kane County; Lori Geschwandner, Clerk of the Circuit Court of Adams County; Patty Hiher, Clerk of the Circuit Court of Carroll County; Susan McGrath, Clerk of the Circuit Court of Champaign County; Ami 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 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; Christa Helmuth, Clerk of the Circuit Court of Moultrie County; Kimberly Stahl, Clerk of the Circuit Court of Ogle County; and Seth Floyd, Clerk of the Circuit Court of Piatt County ("18 Clerks"); Defendant-Appellee Andrea Lynn Chasteen, Clerk of the Circuit Court of Will County; and Defendant-Appellee-Class Member Iris Y. Martinez, Clerk of the Circuit Court of Cook County, submit this joint response under Ill. Sup. Ct. R. 361(b)(3) to Plaintiffs-Appellants Reuben Walker and Steven Diamond's Motion for Leave to Cite Additional Authority:

BACKGROUND

1. This is an appeal from the circuit court's dismissal of this action on the basis that the State Lawsuit Immunity Act ("Immunity Act"), 745 ILCS 5/0.01 *et seq*. (2020), deprived it of subject matter jurisdiction to consider plaintiffs' claims for monetary relief for the past collection of a mortgage foreclosure filing fee that was held unconstitutional in *Walker v. Chasteen*, 2021 IL 126086. AE Br. 1-2.*

2. Plaintiffs filed their opening brief in this appeal on February 8, 2023. Defendants filed their response briefs on April 18 and 19, 2023. Plaintiffs filed their

* This response cites the two-volume common law record as "C___," 18 Clerks' response brief on appeal as "AE Br. __" and plaintiffs' motion for leave to cite additional authority as "Mot. ___."

reply brief on May 17, 2023. Oral argument is scheduled to be held on September 11, 2023.

3. On May 25, 2023, the United States Supreme Court issued its opinion in *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369 (2023), which held that a Minnesota county violated the Takings Clause of the Fifth Amendment to the United States Constitution by selling a private party's home for failure to pay property taxes and keeping the sale proceeds that exceeded the amount of taxes owed.

4. On August 25, 2023, plaintiffs filed a motion with this court to cite *Tyler* as supplemental authority, claiming that it "rejects Defendants' claim that . . . the court system lacks jurisdiction to order the State to return funds." Mot. 2.

DISCUSSION

5. This court should deny plaintiffs' motion for leave to cite additional authority because *Tyler* has no bearing on the issues presented in this appeal.

6. First, *Tyler* interpreted the Takings Clause of the United States Constitution, 143 S. Ct. at 1374, but plaintiffs did not bring a federal takings claim. Plaintiffs' operative complaint only alleged violations of the Illinois Constitution's Separation of Powers, Equal Protection, Due Process, Uniformity, and Free Access Clauses. C970-73.

7. Second, even if a takings claim had been brought in this case, nothing in *Tyler* suggested that such a claim would have to be litigated in circuit court rather than the Court of Claims — nor could it, as no questions of Illinois law were before the Court. And the Illinois Supreme Court has held that the Immunity Act requires

a takings claim that does not involve a physical taking of property to be brought in the Court of Claims. *See Parmar v. Madigan*, 2018 IL 122265, ¶ 8 (claim that a tax violated the "takings clauses of the Illinois and United States Constitutions" must be brought in Court of Claims); *Patzner v. Baise*, 133 Ill. 2d 540, 545 (1990) ("Court of Claims Act provides a remedy for the property owner whose property is damaged but not taken" and "[m]aking the plaintiff's exclusive remedy lie in the Court of Claims is fully appropriate"). Plaintiffs' paying a $50 fee to file a mortgage foreclosure action was not a physical taking, so their claims for monetary relief should have been brought, if anywhere, in the Court of Claims.

8. Third, nothing in *Tyler* could be construed as interpreting the scope of sovereign immunity under either federal or Illinois law. Indeed, the plaintiff's claims in *Tyler* were brought against a local government in Minnesota, *see* 143 S. Ct. at 1374, which was not protected by sovereign immunity, *see N. Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 193 (2006) ("[T]his Court has repeatedly refused to extend sovereign immunity to counties."); *see also* 745 ILCS 5/1 (2020) ("[T]he State of Illinois shall not be made a defendant or party in any court."); 745 ILCS 10/1-101.1(a) (2020) (Local Governmental and Governmental Employees Tort Immunity Act sets forth immunities for "local public entities"). This court should not read into *Tyler* an issue that was not before the Court. *See also 74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 (2d Cir. 2023) ("overwhelming weight of authority" among federal courts has "consistently held that sovereign immunity trumps the Takings Clause" when State provides remedy for taking); *see also id.* 570 n.7 (collecting cases).

9. Allowing plaintiffs to cite *Tyler*, therefore, will offer no assistance to this court in resolving this appeal and only confuse the issues before it.

CONCLUSION

For those reasons, Defendants-Appellees-Class Members 18 Clerks, Defendant-Appellee Andrea Lynn Chasteen, Clerk of the Circuit Court of Will County, and Defendant-Appellee-Class Member Iris Y. Martinez, Clerk of the Circuit Court of Cook County, request that this court deny Plaintiffs-Appellants' Motion for Leave to Cite Additional Authority.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 28, 2023, I electronically filed the foregoing Defendants-Appellees Joint Response to Plaintiffs-Appellants' Motion for Leave to Cite Additional Authority with the Clerk of the Court for the Appellate Court of Illinois, Third Judicial District, 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.

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APPELLATE COURT 3RD DISTRICT

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 8, 2024, I electronically filed the foregoing Plaintiffs-Appellees' Sur Reply to the Reply Brief of Appellants 18 Clerks by using the Odyssey eFileIL system.

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

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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.

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