Nos. 126086, 126087, 126088 (consol.)

IN THE
SUPREME COURT OF ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, individually 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 within the State of Illinois, Defendant-Appellant, 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-Defendants-Appellants.	)	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois No. 12 CH 5275 The Honorable JOHN C. ANDERSON, Judge Presiding.

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REPLY BRIEF OF INTERVENOR-DEFENDANT-APPELLANT PEOPLE OF THE STATE OF ILLINOIS *ex rel.* KWAME RAOUL

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KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Intervenor-Defendant-Appellant People of the State of Illinois *ex rel.* Kwame Raoul

CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
cgriffis@atg.state.il.us

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ARGUMENT

I. This Court may take judicial notice of background facts regarding the State's mortgage foreclosure crisis.

The foreclosure crisis burdened Illinois courts and increased the number of abandoned properties in the State. *See* State Br. 5-6.[1] Against that backdrop, the Illinois General Assembly passed the Save Our Neighborhoods Act of 2010, Pub. Act 96-1419, § 1 (eff. Oct. 1, 2010), creating the Foreclosure Prevention Program Fund ("Foreclosure Prevention Program") and the Abandoned Residential Property Municipality Relief Fund ("Abandoned Property Fund") to help current and prospective homeowners avoid foreclosure and help local governments cope with the deleterious effects of property abandonment. C1123, C1195-97, C1206-07.

In the "Statement of Facts" section of their response brief, plaintiffs contend that this Court should disregard the portion of the State's opening brief discussing the scope of the mortgage foreclosure crisis because it was drawn from secondary sources outside the record in this case. AE Br. 3. But plaintiffs do not dispute that these background facts are the type of "commonly known" or "readily verifiable" information of which this Court may take judicial notice. *People v. Henderson*, 171 Ill. 2d 124, 134 (1996); *see also Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 69 (1939) (taking judicial notice of "economic conditions" during Great Depression); *Mohammad*

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[1] This reply brief cites the State's opening brief as "State Br. ___," and plaintiffs' response brief as "AE Br. ___."

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v. Dep't of Fin. & Pro. Regul., 2013 IL App (1st) 122151, ¶ 11 (citing secondary sources regarding "national subprime mortgage problem"). Because this information provides context for the General Assembly's reasons for creating the Foreclosure Prevention Program and the Abandoned Property Fund, this Court should take judicial notice of it.

II. Plaintiffs' facial challenge required them to establish that there were no circumstances in which the foreclosure fee was constitutional.

Plaintiffs do not dispute that they brought only facial challenges to the constitutionality of the foreclosure filing fee. *See* State Br. 15; AE Br. 12. Accordingly, plaintiffs had to meet the "particularly heavy" burden of showing that there were no circumstances in which the fee may be constitutionally applied. *Barlow v. Costigan*, 2014 IL 115152, ¶ 18; *see also People v. Rizzo*, 2016 IL 118599, ¶ 24. As detailed in the State's opening brief and below, they failed to carry this burden. *See* State Br. 15-28.

III. The fee satisfies the Free Access and Due Process Clauses because it was reasonably designed to reduce foreclosures and their attendant social problems.

A. The rational basis test should be applied here.

As explained in the State's opening brief, well-established Free Access and Due Process precedent instructs that this Court should analyze the constitutionality of the foreclosure fee under the rational basis test. *See* State Br. 16-18. Plaintiffs have not meaningfully contested the State's presentation of that precedent. *See* AE Br. 14-17.

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Instead, plaintiffs contend that strict scrutiny would be appropriate because the foreclosure fee burdens their "fundamental right to access the courts." AE Br. 14. But this Court has made clear that "'[t]he constitution does not guarantee to the citizen the right to litigate without expense.'" *Crocker v. Finley*, 99 Ill. 2d 444, 455 (1984) (quoting *Ali v. Danaher*, 47 Ill. 2d 231, 236 (1970)); *see also Mellon v. Coffelt*, 313 Ill. App. 3d 619, 624-25 (2d Dist. 2000) (rejecting argument that strict scrutiny applied to fee on guardianship proceedings because it did not burden fundamental right). A litigant is deprived of his or her right to access the courts only when "state fees . . . have made it impossible for litigants seeking to vindicate fundamental rights to utilize the court system," *Rose v. Pucinski*, 321 Ill. App. 3d 92, 102-03 (1st Dist. 2001) (citing *Boddie v. Connecticut*, 401 U.S. 371, 380-81 (1971)), and here, plaintiffs successfully accessed the courts after paying the foreclosure fee, *see* C12, C129, C726, R130-35; *see also Rose*, 321 Ill. App. 3d at 102-03 (rejecting argument that heightened scrutiny was necessary because court filing fee infringed on right to access courts because plaintiff "alleged that he paid the fee"). Because the foreclosure fee did not infringe on any fundamental right, heightened scrutiny is unwarranted. *See Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 307-08 (2008) (rational basis test is default standard for evaluating constitutionality of any statute unless it impairs a fundamental right or implicates a suspect class).

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In arguing that heightened scrutiny is appropriate, plaintiffs rely on *Crocker* and *Boynton v. Kusper*, 112 Ill. 2d 356 (1986), *see* AE Br. 15-17, but neither case supports that position. Indeed, plaintiffs correctly concede that *Crocker* applied "the rational basis test." AE Br. 17. Nothing in *Crocker* suggests that the Free Access Clause requires some form of heightened scrutiny — it simply clarified that, in analyzing a free access challenge, the rational basis test should be modified to require a rational relationship between a filing fee and court operations or maintenance. *See* 99 Ill. 2d at 454-55 (concluding that, while there is no constitutional right "to litigate without expense," fees must be levied "for purposes relating to the operation and maintenance of the courts") (internal quotation marks omitted); *see also Zamarron v. Pucinski*, 282 Ill. App. 3d 354, 358 (1st Dist. 1996) (citing *Crocker* for proposition that "[t]he free access clause of the Illinois Constitution qualifies the due process standard by imposing the further requirement that court filing fees relate to the operation and maintenance of the court system"). And since *Crocker*, every appellate court decision analyzing the constitutionality of filing fees under the Free Access Clause has applied the rational basis test. *See Lipe v. O'Connor*, 2014 IL App (3d) 130345, ¶ 10; *Smith-Silk v. Prenzler*, 2013 IL App (5th) 120456, ¶ 17; *Rose*, 321 Ill. App. 3d at 102-03; *Mellon*, 313 Ill. App. 3d at 625; *Zamarron*, 282 Ill. App. 3d at 358.

As for *Boynton*, that case, unlike plaintiffs', did not involve a court filing fee. Instead, it involved a fee on marriage licenses that "singled out marriage

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as a special object of taxation," thus "impos[ing] a *direct* impediment to the exercise of the fundamental right to marry." 112 Ill. 2d at 369 (emphasis in original). By contrast, plaintiffs have identified no fundamental right impeded by the foreclosure fee, as they have no fundamental right to initiate foreclosure litigation without expense. *See Crocker*, 99 Ill. 2d at 455; *Ali*, 47 Ill. 2d at 236. Thus, this Court should reverse the circuit court's holding that the foreclosure fee violates the Free Access and Due Process Clauses if there is any conceivable, reasonable relationship between the foreclosure fee and court operations or maintenance. *See Cutinello v. Whitley*, 161 Ill. 2d 409, 420 (1994). As explained below, there is.

B. Plaintiffs did not, and cannot, show that there are no circumstances in which the foreclosure fee is rationally related to court operations or maintenance.

The General Assembly could have reasonably found that mortgage foreclosure litigation was burdening the court system, that foreclosures increased the number of abandoned properties in Illinois, and that this increase in the number of abandoned properties could give rise to even more litigation. *See* State Br. 18-20. It also could have reasonably found that the Foreclosure Prevention Program and the Abandoned Property Fund — funded by the foreclosure fee — would mitigate those effects and thus ease courts' caseloads. *Id.*

Indeed, the General Assembly expressly made such findings when amending the enabling statutes for the Foreclosure Prevention Program and

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the Abandoned Property Fund in 2013. *See* Pub. Act 97-1164, § 15 (adding 735 ILCS 5/15-1108) (eff. June 1, 2013). The General Assembly found that the average Illinois residential mortgage foreclosure case took two years to resolve and that "housing counseling has proven to be an effective way to help many homeowners find alternatives to foreclosure." *Id.* Accordingly, it reasoned that such counseling — provided by the Foreclosure Prevention Program — would "reduce[ ] the volume of matters which burden the court system in this State and allow[ ] the courts to more efficiently handle the burden of foreclosure cases." *Id.* Similarly, the General Assembly found that "residential mortgage foreclosures and the abandoned properties that sometimes follow create enormous challenges for . . . the courts" by "reducing neighboring property values, reducing the tax base, increasing crime, [and] placing neighbors at greater risk of foreclosure." *Id.* Thus, it concluded that "maintaining and securing abandoned properties" through the Abandoned Property Fund would reduce these negative effects and "mak[e] a substantial contribution to the operation and maintenance of the courts of this State by reducing the volume of matters which burden the court system." *Id.* These rational relationships between the programs funded by the foreclosure fee, on the one hand, and court operations and maintenance, on the other, are all that is required to uphold the fee under the Free Access and Due Process Clauses. *See Zamarron*, 282 Ill. App. 3d at 358 (fee that passes muster under Free Access Clause "necessarily satisfie[s]" the "broader concept of due process").

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Plaintiffs do not dispute the existence of these rational connections between foreclosure fee and court operations and maintenance. Instead, plaintiffs argue that those connections are too remote, principally relying on *Crocker*. AE Br. 28-30. But as discussed, *see* State Br. 23, *Crocker* involved a filing fee on dissolution of marriage cases that was used "to fund shelters and other services for victims of domestic violence in Illinois," 99 Ill. 2d at 447-48. In defense of the fee, the defendants argued that the "moral and emotional support" offered by domestic violence shelters could allow domestic violence victims to "use the court system more efficiently" by encouraging some "to obtain relief in the courts, while preventing others from filing cases that they are not yet ready to pursue." *Id.* at 455. This Court held that such a connection was "too remote" to the court system to pass muster under the Free Access Clause, stressing that "[d]issolution-of-marriage petitioners should not be required, as a condition to their filing, to support a general welfare program that *relates neither to their litigation* nor to the court system." *Id.* (emphasis added).

Unlike the dissolution of marriage fee in *Crocker*, the foreclosure fee does not merely fund programs offering moral or emotional support to individuals, which might help them become more efficient or informed litigants. Rather, the foreclosure fee funds programs directly related to plaintiffs' foreclosure litigation and the court system: these programs provide counseling to assist homeowners in avoiding foreclosure and funds to mitigate

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the negative effects of property abandonment caused by foreclosures. *See* State Br. 18-20. As explained, both programs can be reasonably viewed as means of reducing future litigation, easing courts' caseloads. *Id.*; *see Rose*, 321 Ill. App. 3d at 98 (fee used to fund arbitration program was reasonably related to court operations because it could "eas[e] the backlog of cases in the circuit courts"). Because there is a much more direct relationship between plaintiffs' foreclosure litigation, its impact on Illinois courts, and the programs funded by the foreclosure fee than between the dissolution of marriage fee and either the *Crocker* plaintiffs' litigation or the court system, that case does not support plaintiffs' argument that the foreclosure fee violates the Free Access Clause.

In further arguing that the connection between the foreclosure fee and court operations is too remote, plaintiffs repeat the circuit court's reasoning that the Foreclosure Prevention Program might help individuals who do not have mortgages, *see* AE Br. 29, ignoring that the circuit court also recognized that the fee "might benefit the court system," C1732, which alone should doom plaintiffs' facial challenge, *see* State Br. 21-22. Likewise, plaintiffs contend that the Abandoned Property Fund is unrelated to foreclosure litigation because "[p]roperty that is in foreclosure has not been abandoned," AE Br. at 30, ignoring the fact that widespread foreclosures lead to property abandonment because homeowners and mortgage servicers walk away from properties in foreclosure. *See* C1123, C1207, State Br. 19-20; *see also* 735 ILCS

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5/15-1108 (stating that residential mortgage foreclosures caused property abandonment).

Plaintiffs next hypothesize that, if the foreclosure fee is upheld, the legislature would be free to use court fees to fund "general welfare programs" such as "road improvements" or "public transportation" because they "may provide easier access to the courts." AE Br. 31. But these hypotheticals are not comparable to the Foreclosure Prevention Program and the Abandoned Property Fund. Any benefits that the judicial system might derive from general, public infrastructure projects would be no different than those enjoyed by any member of the public. By contrast, the legislature could have reasonably concluded that the Foreclosure Prevention Program and the Abandoned Property Fund would reduce courts' caseloads, providing the judicial system and parties to foreclosure actions with a direct benefit that is unique from any benefits to the general public. And in any event, the fact that the Foreclosure Prevention Program or the Abandoned Property Fund might also benefit individuals who are not parties to foreclosure proceedings would not be enough to sustain plaintiffs' facial free access challenge. *See Ali*, 47 Ill. 2d at 237 (upholding fee used to fund county law libraries even though "all persons paying the library fee might not actually use the library facilities in the particular litigation"); *see also Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 33 ("The fact that the statute might operate unconstitutionally

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under some conceivable set of circumstances is insufficient to render it [facially] invalid.").

Finally, plaintiffs contend that the executive branch's administration of the Foreclosure Prevention Program and the Abandoned Property Fund shows that the foreclosure fee is unrelated to court operations or maintenance, *see* AE Br. 28-29, 34, contrasting these programs with "court programs" like this Court's foreclosure mediation program, *id.* 31-33, *see* Ill. Sup. Ct. R. 99.1;. But as the State demonstrated in its opening brief, *see* State Br. 20-21, the judiciary need not directly receive the fee to satisfy the Free Access Clause, *see*, *e.g.*, *Ali*, 47 Ill. 2d at 233, 237; *Lipe*, 2014 IL App (3d) 130345, ¶ 15; *Smith-Silk*, 2013 IL App (5th) 120456, ¶¶ 3, 17, 20.

Nor does the Free Access Clause require the judiciary to administer the programs funded by a filing fee. For example, the neutral site custody exchange centers upheld in *Lipe* and *Smith-Silk* are run by private, nonprofit entities, much like the groups providing foreclosure counseling under the Foreclosure Prevention Program. *Compare* 20 ILCS 3805/7.30(a) (requiring funds in Foreclosure Prevention Program to be distributed to "approved counseling agencies . . . and . . . community-based organizations") *with* 55 ILCS 82/20(a) ("The county board in a county that has established a neutral site custody exchange fund shall annually make grant disbursements from the fund to one or more qualified not-for-profit organizations for the purpose of implementing a neutral site custody exchange program, provided that the

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expenditure is approved by the chief judge of the judicial circuit in which the county is located."). And in *Ali*, this Court upheld a fee to fund law libraries even though the Cook County library was administered by a commission appointed by the county board, *see* 47 Ill. 2d at 234, which resembles municipalities' administration of the grants awarded to them from the Abandoned Property Fund, *see* 20 ILCS 3805/7.31(a).

In light of this relevant Illinois precedent, this Court need not consider the Oklahoma decision cited by plaintiffs. *See* AE Br. 34; *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 249 (2010) (noting that other States' precedent may be viewed as persuasive when "precedent from Illinois is lacking"). Even if it does, that case involved a filing fee on adoption cases used to fund programs establishing a directory to help individuals locate adult biological relatives, helping child welfare agencies coordinate abuse and neglect cases, and establishing a unit in the Oklahoma Attorney General's office to provide services to victims of domestic abuse. *Fent v. State ex rel. Dep't of Human Servs.*, 236 P.3d 61, 68-70 (Okla. 2010). Unlike the foreclosure fee, which is rationally related to the increased caseloads caused by foreclosure litigation, the Oklahoma Supreme Court held that the adoption fee paid for "programs that [had] no relation to the services being provided or to the maintenance of the courts." *Id.* at 70. Thus, *Fent* is both not precedent and unpersuasive.

As for plaintiffs' due process challenge, they do not dispute that, if the foreclosure fee passes muster under Free Access Clause, it "necessarily

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satisfie[s]" the "broader concept of due process." *Zamarron*, 282 Ill. App. 3d at 358; *see* AE Br. 35-38. Instead, plaintiffs point once more to *Crocker* and *Boynton*, *see* AE Br. 35-38, which, again, are inapposite. Consequently, this Court also should reverse the circuit court's conclusion that the foreclosure fee violates the Due Process Clause.

IV. The foreclosure fee satisfies the Uniformity and Equal Protection Clauses because it reasonably places a portion of the costs of residential mortgage foreclosures on the plaintiffs who initiate them.

To withstand a uniformity or equal protection challenge, a tax classification must simply "(1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy." *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003); *see also Marks v. Vanderventer*, 2015 IL 116226, ¶ 29 (if a tax is constitutional under the Uniformity Clause, it also satisfies the Equal Protection Clause). As explained, foreclosure plaintiffs are different from other litigants because they initiate judicial proceedings that impose unique burdens on society. State Br. 26. And the foreclosure fee is reasonably related to the State's interests in reducing foreclosures and the ills associated with abandoned properties. *Id.* at 27.

Rather than addressing either of these arguments, plaintiffs take issue with the fact that a plaintiff filing a foreclosure action in "downstate Illinois" pays a fee that is in part distributed to the City of Chicago. AE Br. 37, 40-41. As the State explained, *see* State Br. at 28, the geographic division of the fees

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collected is irrelevant to a uniformity or equal protection challenge, which only looks at the reasonableness of distinctions between "people taxed and those not taxed." *Arangold Corp.*, 204 Ill. 2d at 153. Here, the people taxed and those not taxed are foreclosure plaintiffs and other plaintiffs, not foreclosure plaintiffs and Chicago residents.

Even if this geographic distinction were relevant, plaintiffs' argument still would fail, for three reasons. First, assuming that it is unconstitutional for a portion of a foreclosure fee paid by a "downstate Illinois" foreclosure plaintiff to be distributed to Chicago, *see* AE Br. 40, plaintiffs failed to meet their burden of demonstrating that there were no circumstances in which the foreclosure fee could be constitutionally imposed. *See Hope Clinic for Women*, 2013 IL 112673, ¶ 33. All Illinois foreclosure plaintiffs pay the filing fee, *see* 735 ILCS 5/15-1504.1(a), (a-5), and even under plaintiffs' rationale, a Chicago resident filing a foreclosure action would have no basis to complain that a portion of his or her fee was distributed to Chicago. And because "there exists a situation in which the statute could be validly applied, [plaintiffs'] facial challenge must fail." *Rizzo*, 2016 IL 118599, ¶ 24.

Second, "this court has repeatedly held that a tax may be imposed upon a class even though the class enjoys no benefit from the tax." *Marks*, 2015 IL 116226, ¶ 22 (internal quotation marks omitted). Thus, even if a plaintiff residing outside Chicago derived no benefit from the programs funded by the

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foreclosure fee — which is not so, *see* 20 ILCS 3805/7.30(b), 7.31(b) — that would not give rise to a valid uniformity or equal protection claim.

Third, plaintiffs' complaints about the specific percentage of funds distributed to Chicago is not enough to sustain a uniformity or equal protection challenge. Under a uniformity or equal protection analysis, this Court affords "broad latitude" to the legislature in making tax classifications and will uphold a classification "if a state of facts can reasonably be conceived that would sustain the classification." *Allegro Servs., Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill. 2d 243, 250-51 (1996). Here, it was reasonable for the legislature to conclude that the City of Chicago should receive more fees than any other municipality because it is the most populous municipality in the State, and thus had the most foreclosures and abandoned properties. *See N. Ill. Home Builders Ass'n v. Cnty. of Du Page*, 165 Ill. 2d 25, 40 (1995) (rejecting special legislation challenge to law authorizing counties with over 400,000 people to impose fees because "the legislature could rationally conclude that a greater need for impact fees existed in counties with populations over 400,000"); *Sanko v. Carlson*, 69 Ill. 2d 246, 251 (1977) (upholding filing fee imposed on tax objections filed outside Cook County over equal protection challenge because of "rational connection between the populations of different counties and the size of the fees for filing tax objections"); *People v. Lovelace*, 2018 IL App (4th) 170401, ¶¶ 66-70 (upholding classification based on population over uniformity challenge). No further

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justification is necessary to satisfy the Uniformity and Equal Protection Clauses, and the details of how best to divide the fees collected is a question for the legislature rather than courts. *See Arangold Corp.*, 204 Ill. 2d at 155 (under Uniformity Clause "[a] minimum standard of reasonableness is all that is required" and "perfect rationality is not required as to each taxpayer").

Finally, plaintiffs' citation to Chicago's municipal ordinances regulating the maintenance of abandoned properties is irrelevant. *See* AE Br. 41. Regardless of that city's attempts to cope with the blight caused by abandoned properties, the legislature was free to address the same problem. At most, the existence of an effective municipal program for dealing with abandoned properties would show that the Abandoned Property Fund might have been unnecessary, but under rational basis review, "[w]hether a statute is wise or whether it is the best means to achieve the desired result are matters left to the legislature, and not the courts." *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 124 (1998). Because it is rational for the legislature to require foreclosure plaintiffs to bear a small portion of the costs their actions imposed on the courts, local goverments, and the general public, the foreclosure fee passes muster under the Uniformity and Equal Protection Clauses.

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CONCLUSION

For these reasons, Intervenor-Defendant-Appellant People of the State of Illinois *ex rel.* Kwame Raoul requests that this Court reverse the circuit court's March 2, 2020 order and remand with instructions to enter summary judgment for defendants.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Intervenor-Defendant-Appellant People of the State of Illinois *ex rel.* Kwame Raoul

CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
cgriffis@atg.state.il.us

March 1, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 16 pages.

/s/ Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
cgriffis@atg.state.il.us

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 1, 2021, I electronically filed the foregoing Reply Brief of Intervenor-Defendant-Appellant with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

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

Daniel Cray, Melissa Dakich, and Laird M. Ozmon (attorneys for Plaintiffs-Appellees Reuben D. Walker and M. Steven Diamond)
dkc@crayhuber.com
mhd@crayhuber.com
injury@ozmonlaw.com

Assistant State's Attorneys Philip Mock and Marie Q. Czech (attorneys for Defendant-Appellant Will County Circuit Court Clerk Andrea Lynn Chasteen)
mczech@willcountyillinois.com
pmock@willcountyillinois.com

Executive Assistant State's Attorney Paul Castiglione and Assistant State's Attorney Paul Fangman (attorneys for Intervenor-Defendant-Appellant Cook County Circuit Court Clerk Dorothy Brown)
paul.castiglione@cookcountyil.gov
paul.fangman@cookcountyil.gov

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/ Carson R. Griffis
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2575
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
cgriffis@atg.state.il.us

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