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

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NATURE OF THE ACTION

Plaintiffs-Appellees Reuben Walker and Steven Diamond filed a class action complaint challenging the constitutionality of the $50 fee for filing residential mortgage foreclosure complaints in circuit courts. *See* 735 ILCS 5/15-1504.1(a) (2018). On cross-motions for summary judgment, the circuit court held that the fee, as well as the programs funded by it, *see* 20 ILCS 3805/7.30, 7.31 (2018), were unconstitutional under the Free Access, Due Process, Uniformity, and Equal Protection Clauses of the Illinois Constitution. Defendant-Appellant Andrea Lynn Chasteen, in her official capacity as the Clerk of the Circuit Court of Will County, and Intervenors-Defendants-Appellants People of the State of Illinois *ex rel.* Kwame Raoul ("State") and Dorothy Brown, in her official capacity as Clerk of the Circuit Court of Cook County ("Cook County"), appealed the circuit court's order directly to this Court. No questions are raised on the pleadings.

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ISSUES PRESENTED FOR REVIEW

1. Whether the foreclosure court filing fee is reasonably related to court operations or maintenance, and therefore passes muster under the Free Access and Due Process Clauses of the Illinois Constitution.

2. Whether the Illinois General Assembly reasonably imposed a fee on plaintiffs filing foreclosure actions in circuit courts, rather than on all plaintiffs filing circuit court actions, such that there was no violation of the Uniformity and Equal Protection Clauses of the Illinois Constitution.

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JURISDICTION

This Court has jurisdiction over this direct appeal under Illinois Supreme Court Rule 302(a)(1). On March 2, 2020, the circuit court entered an order finding that the foreclosure fee was unconstitutional and permanently enjoining its collection, but reserved judgment on plaintiffs' claims for damages. C1736-37. On May 14, 2020, the circuit court entered an order finding that, "pursuant to [Illinois Supreme Court] Rule 304(a), regarding the March 2, 2020 order, the Court finds on its own motion . . . that there is no just reason for delaying either enforcement or appeal or both." C1928. On June 10, 2020, the State filed a notice of appeal from the circuit court's order to this Court, C1948, which was timely because it was filed within 30 days of the circuit court's Rule 304(a) finding, Ill. Sup. Ct. R. 303(a)(1), 304(a), giving rise to appeal No. 126086. On June 12, 2020, Cook County and Will County filed separate notices of appeal from the circuit court's order to this Court, C1976, C2004, which also were timely because they were filed within 30 days of the circuit court's Rule 304(a) finding, Ill. Sup. Ct. R. 303(a)(1), 304(a), giving rise to appeal Nos. 126087 and 126088. This Court later consolidated those three appeals.

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STATUTES INVOLVED

The full text of 20 ILCS 3805/7.30 (2018), 20 ILCS 3805/7.31 (2018), and 735 ILCS 5/15-1504.1 (2018), is included in the appendix to this brief.

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STATEMENT OF FACTS

The Foreclosure Crisis

More than 1 million Americans lost their homes to foreclosure in 2010.[1] By early 2010, Illinois had the third-highest number of foreclosures in the nation,[2] and by the first quarter of 2011, one in 160 Illinois homes was in foreclosure.[3]

As a result, foreclosure filings inundated Illinois circuit courts: in Cook County alone, mortgage foreclosure filings nearly tripled from 2005 to 2009.[4] To ease the burdens on their courts, some counties established mandatory foreclosure mediation programs.[5] In 2011, this Court created a Special

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[1] Corbett B. Daly, *Home Foreclosures in 2010 Top 1 Million for First Time*, Reuters (Jan. 12, 2011), https://reut.rs/3kl5B1l. This Court may take judicial notice of facts regarding the mortgage foreclosure crisis from secondary sources. *See Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 69 (1939) (taking judicial notice of "economic conditions" during Great Depression); *Mohammad v. Dep't of Fin. & Prof'l Regulation*, 2013 IL App (1st) 122151, ¶ 11 (citing secondary sources regarding "the national subprime mortgage problem").

[2] Tim Taliaferro, *Illinois Foreclosures Rank Third Nationally*, Huffington Post (Mar. 18, 2010), https://bit.ly/3moX27w.

[3] Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage & Housing Crisis*, 7 Nw. J.L. & Soc. Pol'y 455, 456 n.6 (2012).

[4] Cook Cty. Cir. Ct., Gen. Admin. Order 2010-01 (Apr. 8, 2010) *available at* https://bit.ly/2E6vMJT (noting that filings increased from 16,494 in 2005 to 47,049 in 2009).

[5] *See* Will Cty. Cir. Ct., Admin. Order 10-18 (July 22, 2010) *available at* https://bit.ly/35EWN2o; McLean Cty. Cir. Ct., Admin. Order 2012-25 (Oct. 9, 2012) *available at* https://bit.ly/3kmWbm3.

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Committee on Mortgage Foreclosures to analyze court procedures in light of "the unprecedented number of foreclosure filings."[6] Two years later, this Court authorized circuit courts to develop mortgage foreclosure mediation programs in response to "the drastic increase in mortgage foreclosure cases and the resultant burden on judicial circuits throughout the state." Ill. Sup. Ct. R. 99.1, Cmte. Cmt. (Mar. 1, 2013).

Foreclosures also increased the number of abandoned homes in Illinois, as mortgage servicers walked away from properties when the costs of pursuing their foreclosure actions outweighed the likely return from judicial sales.[7] These abandoned homes created new "risk[s] of vandalism and deterioration."[8] One estimate indicated that, between 2008 and 2010, foreclosure filings led to over 11,700 abandoned properties in Cook County and over 5,800 in the City of Chicago.[9]

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[6] Order, *In re: Special Sup. Ct. Cmte. on Mortgage Foreclosures*, M.R. 24548 (Apr. 11, 2011) *available at* https://bit.ly/2FMl4bJ.

[7] Spencer Cowan & Michael Aumiller, *Unresolved Foreclosures: Patterns of Zombie Properties in Cook County*, Woodstock Inst., at 3-4 (Jan. 2014), https://bit.ly/32v3HVY.

[8] Cowan & Aumiller, *supra* n.7, at 4.

[9] Cowen & Aumiller, *supra* n.7, at 10.

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The Foreclosure Prevention Program Fund and the Abandoned Residential Property Municipality Relief Fund

In the midst of that crisis, the General Assembly passed the Save Our Neighborhoods Act of 2010, Pub. Act 96-1419, § 1 (eff. Oct. 1, 2010), which created the Foreclosure Prevention Program Fund ("Foreclosure Prevention Program") and the Abandoned Residential Property Municipality Relief Fund ("Abandoned Property Fund"), *id.* § 5 (adding 20 ILCS 3805/7.30, 7.31). Under the Foreclosure Prevention Program, the Illinois Housing Development Authority ("Authority") may make grants to approved counseling agencies and community-based organizations to provide "foreclosure prevention outreach programs," 20 ILCS 3805/7.30(a) (2018), including "pre-purchase and post-purchase home ownership counseling" and "education about the foreclosure process," *id.* 3805/7.30(b-5).[10] Grants are apportioned by region, with 25% going to Chicago to distribute to counseling agencies, 25% going to Chicago-based community organizations, 25% going to counseling agencies providing services outside of Chicago (based on the number of foreclosure actions filed in the area), and 25% going to community organizations providing services outside of Chicago. *Id.* 3805/7.30(b).

During the debate concerning the Save Our Neighborhoods Act of 2010, legislators explained that the Foreclosure Prevention Program was designed to

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[10] As the circuit court noted, the statutory provisions at issue were amended several times while this litigation was pending, but those amendments are not material to the issues presented in this appeal. C1924. This brief, therefore, cites the current versions of those statutes.

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"help people . . . with their mortgage situations in our foreclosure-plagued society," C1196, pointing out that similar counseling programs had "a good success rate on helping some people stay current on their mortgages," C1197. As to the geographic division of funds, one of the bill's proponents observed that it was "more generous . . . to the municipalities outside of the City of Chicago" and that Chicago got "a little bit cheated out of this thing." C1210.

The Abandoned Property Fund provides grants to municipalities to defray their costs of coping with abandoned residential properties, including

> cutting of neglected weeds or grass, trimming of trees or bushes, and removal of nuisance bushes or trees; extermination of pests or prevention of the ingress of pests; removal of garbage, debris, and graffiti; boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public; surrounding part or all of an abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel residential property; and repair or rehabilitation of abandoned residential property, as approved by the Authority.

20 ILCS 3805/7.31(a) (2018). Municipalities outside of Chicago receive 75% of these grants and Chicago receives the remaining 25%. *Id.* § 3805/7.31(b). In debating this program, legislators noted that local governments were paying "thousands and thousands of dollars" to "secure . . . vacant properties" caused by foreclosures, C1123, and that the Abandoned Property Fund would help deal with the "problems" associated with "abandoned building[s]," C1207.

To pay for both programs, the General Assembly imposed a $50 filing fee on residential mortgage foreclosure actions. 735 ILCS 5/15-1504.1(a)

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(2018).[11] Ninety-eight percent of the fees are directed to the State Treasurer for use in the Foreclosure Prevention Program and Abandoned Property Fund, with the remaining 2% retained by circuit court clerks to cover their expenses in collecting the fees. *Id.* In debates, legislators stressed that, by imposing the fee on foreclosure plaintiffs, the programs would be funded by individuals and entities "who are involved in the [foreclosure] process" and "are putting the house[s] . . . in foreclosure" rather than the general public. C1196, C1206.

Initial Circuit Court Proceedings and Appeal to this Court

In 2012, Walker filed a foreclosure action in the Circuit Court of Will County and paid the $50 filing fee. C12. He then filed this class action claiming that the foreclosure fee violated various provisions of the Illinois Constitution, C11-12, C22, including the prohibition on the creation of "fee office[s]" in article VI, section 14, C26. In late 2012, the circuit court certified a class of plaintiffs including "all individuals or entities that paid the $50.00 fee at the time that [Walker] filed an action seeking to foreclose on property located in Illinois" and a class of defendants including "all Clerks of Court who reviewed these fees," with the Will County clerk serving as defendants' class representative. C129. A short time later, Walker moved for partial summary judgment on his fee office claim. C132.

[11] Initially, the Abandoned Property Fund was paid for by a fee on judicial sales, *see* Pub. Act 96-1419, § 15 (eff. Oct. 1, 2010) (adding 735 ILCS 5/15-1507.1), but in 2013, the General Assembly provided that it would be funded by the foreclosure fee, *see* Pub. Act 97-1164, § 5 (eff. June 1, 2013) (amending 20 ILCS 3805/7.31(b)), § 15 (amending 735 ILCS 5/15-1504.1).

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The circuit court granted the State leave to intervene in the case, respond to Walker's motion for partial summary judgment, and move to dismiss the class action. C170, C256, C337, C410. The circuit court later held that the requirement that circuit court clerks retain 2% of the foreclosure fee created an unconstitutional fee office, granted Walker's motion for partial summary judgment, and denied the State's motion to dismiss. C601, C607-08. The State appealed the circuit court's decision to this Court under Illinois Supreme Court Rule 302(a)(1), C616, and this Court reversed the circuit court's judgment and remanded for further proceedings on Walker's other claims, C680, C688, C691; *see also Walker v. McGuire*, 2015 IL 117138.

Proceedings on Remand

On remand, plaintiffs amended their complaint to add Diamond, who paid the $50 fee in Cook County in 2015, as a named plaintiff and class representative. C720, C725-26. Plaintiffs' second amended complaint, which is the operative one for purposes of this appeal, claimed that the foreclosure fee, the Foreclosure Prevention Program, and the Abandoned Property Fund violated the Illinois Constitution in three ways: (1) they violated the Separation of Powers Clause, Ill. Const., art. II, § 1, by requiring circuit court clerks to administer the Foreclosure Prevention Program (count I), C963-64; (2) they violated the Due Process, Equal Protection, and Uniformity Clauses, Ill. Const., art. I, § 2, art. IX, § 2, by requiring foreclosure plaintiffs, rather than all plaintiffs, to pay the fee (count II), C964-65; and (3) they were

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unrelated to court operations as prohibited by *Crocker v. Finley*, 99 Ill. 2d 444 (1984) (count III), C966. Count IV of the second amended complaint requested that the circuit court create a protest fund into which foreclosure fees could be deposited pending final judgment. C967. Plaintiffs later clarified that their claims were facial, not as-applied, constitutional challenges. C1581, R75.

Plaintiffs, along with the State and Cook County — which had been granted leave to intervene on remand, *see* R4-5 — filed cross-motions for summary judgment on plaintiffs' claims, C1023, C1058, C1133. Arguing that strict scrutiny should apply, C1028, plaintiffs contended that the foreclosure fee was unconstitutional under *Crocker* because it was used to fund "general welfare programs unrelated to the court system or its needs," C1034. They noted that, even if the fee initially served the purpose of reducing the burden of foreclosure cases on circuit courts, the mortgage foreclosure crisis was "long over," C1377, citing reports that national foreclosure filings had dropped in 2016 and 2017, C1382, C1385. Finally, plaintiffs argued that the fee violated the separation of powers by requiring circuit court clerks to administer a portion of the fees collected, which, plaintiffs argued, was the Executive Branch's duty. C1035.

The State argued that the foreclosure fee should be reviewed under the rational basis test because plaintiffs had no fundamental right to expense-free litigation. C1220. As to plaintiffs' *Crocker* claim, the State noted that it was properly contextualized as a claim that the foreclosure fee violated the Free

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Access Clause of the Illinois Constitution, Ill. Const., art. I, § 12, and argued that the fee satisfied that clause because it was reasonably related to reducing the burdens that foreclosures placed on the court system and assisting municipalities in dealing with the consequences of the foreclosure crisis, C1163-65. As to plaintiffs' uniformity and equal protection challenges, the State asserted that the General Assembly reasonably drew a line between plaintiffs who file foreclosures and those who do not. C1166-71. Finally, the State argued that plaintiffs' separation of powers claim failed because the Authority, not circuit court clerks, administered the Foreclosure Prevention Program and the Abandoned Property Fund. C1161-62. Cook County echoed the State's arguments regarding the statutes' constitutionality, C1140-50, and added that the voluntary payment doctrine barred plaintiffs' claims because they voluntarily paid the foreclosure fee, C1138-39. The circuit court later held an evidentiary hearing on Cook County's voluntary payment doctrine defense. R123-38.

On March 2, 2020, the circuit court entered an order on the parties' cross-motions for summary judgment. C1719. The court first rejected Cook County's voluntary payment doctrine defense. C1725-27. It next granted summary judgment to the State, Cook County, and defendants on count IV because the creation of a protest fund was not an independent cause of action, C1727-28, and on count I because the Authority, not circuit court clerks,

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administered the Foreclosure Prevention Program and Abandoned Property Fund, C1729-30.

The circuit court granted plaintiffs' motion for summary judgment on counts II and III, however, holding that the foreclosure fee violated the Illinois Constitution's Free Access, Due Process, Uniformity, and Equal Protection Clauses. C1719, C1736. The court noted that the Free Access Clause prohibits filing fees from being used for purposes unrelated to court operations, and found that, although the Foreclosure Prevention Program "might benefit the court system," its benefits were "indirect at best." C1732. Describing the Abandoned Property Fund as "a litigation-tax funded neighborhood beautification plan," the court also concluded that it was too remote from court operations. C1733. For the same reasons, the circuit court held that the fees violated due process and equal protection principles. C1733-34. As to the Uniformity Clause, the court ruled that there was "no real and substantial difference between plaintiffs seeking access to the court system in mortgage foreclosure cases, and those seeking access to the courts in non-foreclosure cases," and the foreclosure fee did not "bear a reasonable relationship to the purpose of the tax," offering no further explanation for those conclusions. C1735-36.

Finally, the circuit court found that the statute imposing the foreclosure fee, 735 ILCS 5/15-1504.1 (2018), was not severable from the provisions of the Illinois Housing Development Act establishing the Foreclosure Prevention

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Program and the Abandoned Property Fund, 20 ILCS 3805/7.30, 7.31 (2018), C1736; entered a permanent injunction prohibiting the collection of foreclosure fees throughout the State, C1736-37; and immediately stayed that permanent injunction to provide this Court with an opportunity to review its decision, C1737. The court declined to enter final judgment, however, because issues remained pending, "such as [p]laintiffs' request for the return of collected fees." *Id*.

On May 14, 2020, the circuit court found that there was "no just reason for delaying either enforcement or appeal" of its March 2, 2020 order under Illinois Supreme Court Rule 304(a). C1928. The State, Cook County, and Will County each appealed that order directly to this Court, C1948, C1976, C2004, and this Court consolidated all three appeals.

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ARGUMENT

I. This Court reviews the circuit court's grant of summary judgment and the constitutionality of the foreclosure fee *de novo* and should reverse if there were any circumstance in which the fee is constitutional.

The grant of summary judgment and the constitutionality of a statute are issues of law that this Court reviews *de novo*. *Barlow v. Costigan*, 2014 IL 115152, ¶ 17. Where, as here, the parties filed cross-motions for summary judgment, "they agree that the case involves only legal questions and ask the court to decide the issues on the existing record." *Dynak v. Bd. of Educ. of Wood Dale Sch. Dist. 7*, 2020 IL 125062, ¶ 15.

In reviewing the constitutionality of the foreclosure fee, this Court should presume that the fee is constitutional, and plaintiffs bear the burden of showing that it is unconstitutional. *Barlow*, 2014 IL 115152, ¶ 18. That burden "is particularly heavy when, as here, a facial constitutional challenge is presented." *Id.* Indeed, a facial challenge "is the most difficult challenge to mount successfully" because plaintiffs must establish that "under no circumstances would the challenged act be valid." *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 33. "The fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient" to meet that standard, *id.*, and "[s]o long as there exists a situation in which the statute could be validly applied, a facial challenge must fail," *People v. Rizzo*, 2016 IL 118599, ¶ 24. As detailed below, plaintiffs did not satisfy this particularly high standard.

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

Recognizing the strain that residential mortgage foreclosures had placed on Illinois's judicial system and local governments, the General Assembly reasonably decided that parties pursuing foreclosures should bear some of the costs associated with their actions. Plaintiffs attempted to use the Free Access and Due Process Clauses to avoid responsibility for those costs, but those clauses only prevent the legislature from imposing court fees that are wholly unrelated to the court system or the payor's litigation. By reducing foreclosure filings and the social problems caused by homes left abandoned during the foreclosure process, the foreclosure fee is reasonably related to court operations and maintenance. This Court should thus reverse the circuit court's grant of summary judgment to plaintiffs on their free access and due process claims. *See Zamarron v. Pucinski*, 282 Ill. App. 3d 354, 358 (1st Dist. 1996) (statute that satisfies the Free Access Clause "necessarily satisfie[s]" the "broader concept of due process").

The Illinois Constitution's Free Access Clause provides that "[e]very person . . . shall obtain justice by law, freely, completely, and promptly." Ill. Const., art. I, § 12. But it "'does not guarantee to the citizen the right to litigate without expense,'" *Crocker*, 99 Ill. 2d at 455 (quoting *Ali v. Danaher*, 47 Ill. 2d 231, 236 (1970)), so the General Assembly may impose "reasonable fees" on litigants, *Sanko v. Carlson*, 69 Ill. 2d 246, 250 (1977). To be

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reasonable, a fee must "relat[e] to the operation and maintenance of the courts," *Crocker*, 99 Ill. 2d at 454, but this Court will defer to the legislature's judgment as to "[w]hether the fees are desirable," *People ex rel. Flanagan v. McDonough*, 24 Ill. 2d 178, 181 (1962).

Although this Court has not explicitly defined the appropriate level of scrutiny for a free access challenge, it should apply the rational basis test for several reasons. First, by merely requiring that fees be reasonable and deferring to the legislature's judgment regarding a fee's desirability, *see Crocker*, 99 Ill. 2d at 454; *Flanagan*, 24 Ill. 2d at 181, this Court has strongly suggested that the rational basis test is appropriate in this context, *see Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003) (rational basis test asks whether State's interest and means of pursuing that interest are "reasonable," and is "highly deferential") (internal quotation marks omitted). Indeed, in applying this Court's free access precedent, the appellate court has uniformly applied the rational basis test. *See, e.g.*, *Lipe v. O'Connor*, 2014 IL App (3d) 130345, ¶ 10; *Smith-Silk v. Prenzler*, 2013 IL App (5th) 120456, ¶ 17; *Mellon v. Coffelt*, 313 Ill. App. 3d 619, 625 (2d Dist. 2000); *Zamarron*, 282 Ill. App. 3d at 358. Second, this Court has applied the rational basis test in analyzing the constitutionality of filing fees under the Due Process Clause. *See Crocker*, 99 Ill. 2d at 457. Because the Free Access Clause merely "qualifies the due process standard by imposing the further requirement that court filing fees relate to the operation and maintenance of the court system," *Zamarron*, 282

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Ill. App. 3d at 358, that test should apply equally to both clauses. Finally, the rational basis test is the default standard for evaluating the constitutionality of any statute unless it impairs a fundamental right or implicates a suspect class, *see Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 307-08 (2008), and neither of those limited circumstances is present here.

The rational basis test "requires only that there be a reasonable relationship between the challenged legislation and a conceivable, and perhaps unarticulated, governmental interest." *Cutinello v. Whitley*, 161 Ill. 2d 409, 420 (1994). The legislature need not "state its rational basis or make legislative findings" regarding that relationship. *Id.* Moreover, the question under this test is not "[w]hether a statute is wise or whether it is the best means to achieve the desired result," as those "are matters left to the legislature, not the courts." *Arangold Corp.*, 204 Ill. 2d at 147. And "[t]he judgments made by the legislature in crafting a statute are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* Accordingly, this Court should reverse the circuit court's holding that the foreclosure fee violated the Free Access and Due Process Clauses if there is any conceivable, reasonable relationship between the foreclosure fee and court operations or maintenance.

That relationship is conceivable and reasonable. The General Assembly imposed the fee to fund the Foreclosure Prevention Program's counseling programs, which had a strong track record of preventing foreclosures. *See*

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C1197. And by reducing the number of foreclosure actions, the Foreclosure Prevention Program is reasonably related to easing Illinois circuit courts' caseloads. *See Rose v. Pucinski*, 321 Ill. App. 3d 92, 98 (1st Dist. 2001) (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").

The Abandoned Property Fund is also reasonably related to reducing courts' caseloads because its grant program could mitigate the many ill effects of property abandonment that give rise to litigation. As emphasized during the debates on the Save Our Neighborhoods Act of 2010, *see* C1123, C1207, mass foreclosures increased the number of abandoned and vacant properties throughout Illinois. And the General Assembly could reasonably conclude that vacant and abandoned properties lead to a host of social problems, including crime, accidents, and even more foreclosures. *See* David P. Weber, *Taxing Zombies: Killing Zombie Mortgages with Differential Property Taxes*, 2017 U. of Ill. L. Rev. 1135, 1137 (2017) (explaining that property vacancies resulting from foreclosures "are common sources of vandalism, theft, crime, and accident" and "erode the tax base of the municipality and decrease the value of nearby properties"); Dustin A. Zacks, *The Grand Bargain: Pro-Borrower Responses to the Housing Crisis & Implications for Future Lending & Homeownership*, 57 Loy. L. Rev. 541, 546-49, 555-57 (2012) (examining how properties left vacant because of foreclosures increase crime and foreclosure rates); Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible*

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for the Rise in Foreclosures & Abandoned Properties, 2008 Utah L. Rev. 1169, 1182 (2008) ("Long-term vacancies in a neighborhood lead to higher rates of crimes such as drug dealing, prostitution, looting, arson, gang activity, and murder."). Those social problems in turn burden the court system by increasing the number of criminal prosecutions, tort actions, and foreclosure proceedings. By providing funds to maintain and secure vacant properties, the General Assembly could have reasonably concluded that the Abandoned Property Fund would limit these cascading effects and prevent further burdens on the already-strained court system.

Moreover, although the Abandoned Property Fund's grants could be viewed as providing indirect benefits to the judiciary, this Court has never held that the Free Access Clause prohibits the legislature from imposing court fees that indirectly benefit the courts. To the contrary, in *Ali*, *see* 47 Ill. 2d at 237, this Court upheld a filing 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." It was sufficient that the libraries were "conducive to a proper and even improved administration of justice." *Id.* Nor was it relevant that the fees went to county boards, *id.* at 233, rather than the judiciary itself, *id.* at 237. In other words, the law library fee was reasonably related to court operations even though it went to a governmental body independent of the judiciary and its benefits — a more informed body of litigants — were indirect.

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The appellate court has followed suit. For example, it has upheld fees used to fund neutral child custody exchange centers maintained and operated by county boards. *Lipe*, 2014 IL App (3d) 130345, ¶ 15; *Smith-Silk*, 2013 IL App (5th) 120456, ¶¶ 3, 17, 20. In finding those fees reasonably related to court operations, the appellate court emphasized that the legislature could have concluded that disputes arising during child custody exchanges would cause more litigation and, conversely, neutral sites would reduce such disputes. *Lipe*, 2014 IL App (3d) 130345, ¶ 15; *Smith-Silk*, 2013 IL App (5th) 120456, ¶¶ 17, 20. Like a neutral site custody exchange center, the Abandoned Property Fund was designed to reduce the social frictions caused by foreclosures that ultimately burden the judicial system. That those benefits might be construed as indirect or minimal does not render the foreclosure fee unconstitutional. *See Flanagan*, 24 Ill. 2d at 181 (deferring to legislature's judgment as to "[w]hether . . . fees are desirable").

The circuit court overlooked these benefits in striking down the foreclosure fee. Although it recognized that the Foreclosure Prevention Program "might benefit the court system," it held that the program was too remote from court operations because it offered counseling "to people who don't even have mortgages." C1732. For starters, the circuit court's reasoning ignored that people who are not currently mortgagors may take out mortgages in the future. Providing them counseling before they purchase a home is still reasonably related to the goal of preventing foreclosures because counseling

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might prevent individuals from taking on a mortgage that, when more fully examined, they cannot afford. *See* 20 ILCS 3805/7.30(b-5) (2018) (providing for "pre-purchase and post-purchase home ownership counseling").

And even if providing counseling to potential homeowners was too remote from court operations, it was not enough for plaintiffs to show that, in some circumstances, counseling would not reach a current mortgagor. Rather, plaintiffs had to show that there were *no circumstances* in which the foreclosure fee was constitutional to prevail on their facial challenge. *See Hope Clinic for Women*, 2013 IL 112673, ¶ 33 ("The fact that the statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid."). By recognizing that the Foreclosure Prevention Program "might benefit the court system," C1732, the circuit court effectively recognized that plaintiffs failed in that endeavor.

The circuit court also applied the incorrect level of scrutiny to the Foreclosure Prevention Program. In holding that program unconstitutional because it could potentially benefit someone other than a current mortgagor, the circuit court required it to be narrowly tailored to its purpose of helping only current homeowners avoid foreclosure. *See People v. Austin*, 2019 IL 123910, ¶ 59 (to survive intermediate scrutiny, statute may not extend further "than necessary to further [government] interest"); *In re R.C.*, 195 Ill. 2d 291, 303 (2001) (to survive strict scrutiny, statute "must use the least restrictive means" to achieve its goal). But as detailed, such heightened scrutiny is

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inappropriate in reviewing the reasonableness of a court fee under the Free Access Clause.

Moreover, the circuit court incorrectly concluded that the Abandoned Property Fund was unconstitutional under *Crocker*, *see* C1719, C1733, in which this Court struck down a fee on dissolution of marriage actions used to fund shelters for domestic violence victims, *see* 99 Ill. 2d at 455. *Crocker* emphasized 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). By contrast, addressing property abandonment and its attendant social problems directly relates to foreclosure litigation.

Nor was the circuit court justified in characterizing the Abandoned Property Fund as a mere "neighborhood beautification project." C1733. When that grant program was established, municipalities were spending "thousands and thousands of dollars" of taxpayer money to maintain and secure properties that were abandoned during the foreclosure process. C1207. The tasks for which grant funds may be used — cutting "neglected" grass and weeds, removing "nuisance" bushes and trees, exterminating pests, removing debris and graffiti, and closing off, demolishing, or rehabilitating "abandoned residential property," 20 ILCS 3805/7.31(a) (2018) — are directly related to combating the blight and severe negative effects caused by property

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abandonment. And as explained, remediating those effects reduces litigation and strains on the judicial system.

In short, the circuit court applied incorrect standards in evaluating plaintiffs' free access challenge. Rather than determining whether there is any conceivable, reasonable relationship between the foreclosure fee's uses and court operations or maintenance, the circuit court minimized the fee's benefits and examined it under heightened scrutiny. Reviewed under the appropriate standards, the foreclosure fee readily satisfies the Free Access Clause.

For the same reasons, the foreclosure fee satisfies the Due Process Clause. Indeed, as the appellate court has held, a statute that satisfies the Free Access Clause "necessarily satisfie[s]" the "broader concept of due process." *Zamarron*, 282 Ill. App. 3d at 358; *accord Gatz v. Brown*, 2017 IL App (1st) 160579, ¶ 21; *Lipe*, 2014 IL App (3d) 130345, ¶ 11. That aside, legislation — like the foreclosure fee — that "does not affect a fundamental constitutional right" is reviewed under the rational basis test. *See Rizzo*, 2016 IL 118599, ¶ 45; *see also Crocker*, 99 Ill. 2d at 455 (finding no fundamental right to fee-free litigation). Under that test, the foreclosure fee should be upheld if it was "reasonably designed to remedy the particular evil that the legislature was targeting" and "[i]f any state of facts can reasonably be conceived of to justify" it. *Rizzo*, 2016 IL 118599, ¶ 45 (internal quotation marks omitted). As explained, the foreclosure fee was reasonably designed to relieve the burdens of foreclosures on the judicial system and municipalities by

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preventing foreclosures and remediating their negative effects. The circuit court therefore should have rejected plaintiffs' due process challenge.

III. 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.

Because foreclosing plaintiffs initiate the litigation that ultimately leads to people losing and abandoning their homes, it was reasonable for the General Assembly to require such plaintiffs, rather than all plaintiffs, to share in the social costs of their litigation. In fact, the debates on the fee's enactment emphasized that "plaintiffs who are putting . . . house[s] . . . in foreclosure," rather than the general public, should pay for the Foreclosure Prevention Program. C1206. The Uniformity and Equal Protection Clauses did not preclude the legislature from making this reasonable distinction. This Court should thus reverse the circuit court's order as to plaintiffs' uniformity and equal protection claims as well.

The Uniformity Clause provides that, "[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly." Ill. Const., art. IX, § 2. "To survive scrutiny under the uniformity clause, a nonproperty tax classification must (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.*, 204 Ill. 2d at 153. "This is a narrow inquiry, and [this Court]

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will uphold a taxing classification as long as a set of facts can reasonably be conceived that would sustain it." *Marks v. Vanderventer*, 2015 IL 116226, ¶ 19 (internal quotation marks omitted).

Although the State must offer a reason for its classification, it "has no evidentiary burden and is not required to produce facts in support of its justification for the statute." *Id.* at ¶ 23. "Instead, once the governmental entity has offered a reason for its classification, the plaintiff has the burden to show that [its] explanation is insufficient as a matter of law or unsupported by the facts." *Id.* And if a tax is constitutional under the Uniformity Clause, it also satisfies the Equal Protection Clause. *Id.* at ¶ 29.

Here, there is a real and substantial difference between plaintiffs who file foreclosure actions and those who do not. As noted, foreclosures place significant burdens on society, including "increased crime, decreased property values, increased numbers of people willing to walk away from their homes, and increased strain on judicial resources." Zacks, *supra* p. 19, at 545. And because foreclosing plaintiffs initiate the litigation that gives rise to these problems, it is reasonable for the General Assembly to require them, rather than all plaintiffs, to pay a modest portion of the costs of coping with them. *See N. Ill. Home Builders Ass'n v. Cnty. of Du Page*, 165 Ill. 2d 25, 45 (1995) (fees on new real estate developments were based on real and substantial difference because new developments caused additional traffic while existing developments did not).

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A rational relationship also exists between the fee and the legislature's interests in preventing foreclosures and assisting municipalities in dealing with abandoned properties. The foreclosure fee acts as the "revenue stream" supporting the Foreclosure Prevention Program and Abandoned Property Fund, C1196, and those programs were designed to reduce foreclosures, *see* C1196-97, and help municipalities recoup the money spent maintaining and securing abandoned properties, *see* C1123, C1207. There is thus a direct relationship between the fee and the State's interests.

Ignoring this Court's admonition to "clearly state . . . the legal basis" for striking down a statute, *People v. Chairez*, 2018 IL 121417, ¶ 11 (internal quotation marks omitted), the circuit court offered no meaningful explanation for its conclusion that the foreclosure fee violated the Uniformity Clause, C1735-36. Nor did plaintiffs prove that the State's explanation for its classification was "arbitrary or unreasonable." *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 73 (2008). Although they noted that nationwide foreclosures had fallen as of 2016 and 2017, *see* C1382-88, C1535, they offered no evidence of foreclosure rates in Illinois, foreclosure cases pending in Illinois courts, or the number of Illinois properties left abandoned by foreclosures at that time. And even if they had, the fact that Illinois was experiencing fewer foreclosures would suggest that the fee accomplished its goal of reducing foreclosure filings, not that it was unrelated to its purpose.

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Plaintiffs also took issue with the General Assembly's division of grants between Chicago and the rest of the State, *see* C1027-28, but that geographic classification is irrelevant. In a uniformity challenge, the relevant classification is between the *taxed and untaxed* parties — here, foreclosure plaintiffs and other plaintiffs — not between the beneficiaries of government funds. *See Arangold Corp.*, 204 Ill. 2d at 153 (uniformity clause applies to distinctions between "people taxed and those not taxed"). But in any event, the legislature could have reasonably found that the division was appropriate because of Chicago's larger population and volume of foreclosures — indeed, one legislator noted that the programs could have been even "more generous" to Chicago to account for the difference in population. C1210.

In response to the burdens that foreclosures place on homeowners, Illinois courts, and local governments, the General Assembly reasonably imposed a modest fee on foreclosing plaintiffs, requiring them to share in the costs of their litigation. In this action, plaintiffs failed to show that there were no circumstances in which that fee could be reasonably related to benefitting the court system or serving legitimate state interests. This Court should thus reverse the circuit court's grant of summary judgment for plaintiffs and direct the circuit court to enter judgment for defendants.

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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,

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December 9, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 29 pages.

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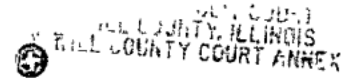
IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS



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WILL COUNTY, ILLINOIS
WILL COUNTY COURT ANNEX

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,	)	Case No. 12-CH-5275
Plaintiffs,	)	
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,	)	John C. Anderson Circuit Judge
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Under Illinois law, mortgage foreclosure cases include an "add on" filing fee. The amount of the fee varies depending on how many foreclosure cases the plaintiff has filed. Some of these collected fees are used for mortgage counseling services. Another portion of the fees are distributed as grants to various governmental entities, and those entities may use the grant money for beautification and maintenance projects such as tree trimming, grass cutting, garbage removal, installing fencing, and demolition.

This case involves the constitutionality of the three statutes that, collectively, impose the fee and govern how it is used. The case is before the Court on cross-motions for summary judgment. Having reviewed the parties' briefs, the applicable statutes, and the cases cited, the Court agrees that the statutes violate the Free Access, Equal Protection, Due Process, and Uniformity Clauses of the Illinois Constitution of 1970. (Ill. Const. 1970).[1]

---

[1] All references herein to the "Constitution" are to the Illinois Constitution of 1970 (Ill Const 1970) unless otherwise specified. In their briefs, Plaintiffs also claim violations of the United States Constitution, but they fail to present arguments and authorities in support of federal claims. Further, they did not adequately plead federal constitutional claims Regardless, the Court's decision today makes it unnecessary to reach federal constitutional questions

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I. BACKGROUND

A. The Statutes

Plaintiffs challenge the constitutionality of section 15-1504.1 of the Code of Civil Procedure (735 ILCS 5/15-1504.1), and also sections 7.30 and 7.31 of the Illinois Housing Development Act (20 ILCS 3805/7.30 and 20 ILCS 3805/7.31). These statutes are part of a package of laws called the "Save Our Neighborhoods Act" enacted in response to the mortgage foreclosure crisis that gripped Illinois, and the United States, roughly a decade ago. The General Assembly enacted these statutes to "create[] additional programs for people in foreclosure problems" and "help people who need help with their mortgage situations and in our foreclosure-plagued society." (See General Assembly, House Civil Judiciary Comm. Transcripts (May 7, 2010) at 10:11-16, 4:16 to 6:1; 6:19-21.)

1. 735 ILCS 5/15-1504.1

Section 15-1504.1 (735 ILCS 5/15-1504.1) requires mortgage foreclosure plaintiffs to pay to the Clerk of the Circuit Court an additional fee for the Foreclosure Prevention Program Fund ("FPP"). Further, section 15-1504.1(a-5) (735 ILCS 15-1504.1(a-5)), requires a portion of fees to be deposited into the Abandoned Residential Property Municipality Relief Fund ("APF") The Clerk of the Court retains 2% and remits the remainder to the State Treasurer for the FPP and APF, which are both administered by the Illinois Housing Development Authority (the "Housing Authority"). 20 ILCS 3805/7.30; 735 ILCS 5/1504.1(a-5)(2).

2. 20 ILCS 3805/7.30

Under 20 ILCS 3805/7.30 of the Housing Development Act, the Housing Authority must grant 25% of the FPP to approved housing counseling agencies outside Chicago, based in part upon the number of foreclosures; 25% to approved counseling agencies inside Chicago for housing counseling or foreclosure prevention services; 25% to approved community-based organizations outside Chicago for approved foreclosure prevention outreach; and 25% for such programs inside Chicago. See 20 ILCS 3805/7.30(b).

Section 7.30(a) directs the Housing Authority to award grants of FPP funds to "approved counseling agencies for approved housing counseling" and to "approved community-based organizations for approved foreclosure prevention outreach programs." 20 ILCS 3805/7 30(a)(i) and (ii). An "approved community-based organization" means a "not-for-profit entity that provides educational and financial information to residents of a community through in-person contact" but excludes organizations providing legal services. 20 ILCS 3805/7.30(b-5). An "approved foreclosure prevention outreach program" includes pre-purchase and post-purchase home counseling, and education regarding the foreclosure process. 20 ILCS 3805/7.30(b-5).

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3. 20 ILCS 3805/7.31

Section 7.31 of the Housing Development Act (20 ILCS 3805/7.31), requires the Housing Authority to distribute proceeds from the APF in the following manner: (1) 30% of monies in the Fund shall be used to make grants to municipalities other than the City of Chicago in Cook County and to Cook County; (2) 25% of the monies in the Fund shall be used to make grants to the City of Chicago; (3) 30% of the monies in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry, and Will Counties, and to those counties; and (4) 15% of the monies in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will. 20 ILCS 3805/7.31(b).

Under section 7.31(a) (20 ILCS 3805/7.31), the monetary grants may be used for things such as cutting the grass at abandoned properties; trimming trees and bushes; extermination of pests; removing garbage and graffiti; installing fencing; and demolition. Further, section 7.31(a) has a "catchall" provision which further widens permissible expenditures to include general "repair or rehabilitation of abandoned residential property."

B. PROCEDURAL HISTORY

The case involves two underlying mortgage foreclosure lawsuits. On April 18, 2012, Plaintiff Reuben Walker filed a complaint in Will County Case No. 12-CH-2010. On August 11, 2015, Plaintiff M. Steven Diamond filed a complaint in Cook County Case No. 15-CH-12027. In filing those cases, they each paid $50 fees they now claim were unlawful.

Mr. Walker originally filed this case on October 2, 2012. On November 9, 2012, Judge Bobbi Petrungaro certified a class consisting of "all plaintiffs who paid the 735 ILCS 5/1504.1 fee." On November 8, 2013, Judge Petrungaro (a) granted partial summary judgment in favor of Mr. Walker; (b) found that circuit court clerks fall within the judicial fee officer prohibition in Article VI, section 14, of the Illinois Constitution, and that the provision in section 15–1504.1 authorizing 2% of the filing fee to be retained by the clerk for administrative expenses creates an impermissible fee office; and (c) found section 15-1504.1 unconstitutional on its face. The scope of her ruling was limited to the version of section 15-1504.1 that existed on the date this case was filed.

On September 24, 2015, the Illinois Supreme Court reversed and remanded, holding that circuit court clerks did not fall within state constitutional provision prohibiting fee officers in judicial system. *See Walker v. McGuire*, 2015 IL 117138. The Illinois Supreme Court did not address the other constitutional claims raised by Plaintiffs.

On June 9, 2016, following remand, Plaintiffs' counsel amended their complaint to add Mr. Diamond as an additional named party. On December 4, 2018, Plaintiffs filed

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their Second Amended Complaint. Also, the parties agreed to substitute Andrea Lynn Chasteen as the named representative defendant instead of Pamela McGuire, given that Ms. Chasteen succeeded Ms. McGuire as the Will County Circuit Clerk in December 2016. Plaintiffs filed a summary judgment motion which was fully briefed.

In 2018, even though the parties previously gave notice to the Illinois Attorney General and all the circuit clerks in the State of Illinois, the Court was somewhat puzzled that only the Will County State's Attorney was defending the case. For example, the Illinois Attorney General had been involved in the litigation in its early phases and before the Illinois Supreme Court, but was no longer actively involved in the case following remand. In an abundance of caution, the Court directed the parties to give additional notice to entities such as the Illinois Attorney General and the Cook County State's Attorney. Eventually, the Court permitted the Illinois Attorney General and the Cook County Circuit Clerk, Dorothy Brown, to participate in the case. They both filed additional summary judgment briefs.

Following oral argument, the Court took the case under advisement. The Court eventually determined that one issue (application of the voluntary payment doctrine) required an evidentiary hearing. Following that evidentiary hearing, the Court again took the case under advisement.

C. Allegations and Claims in the Second Amended Complaint

In general terms, the Second Amended Complaint asserts a putative class action against the clerks of circuit court in the State of Illinois. Plaintiffs seek, among other things, a permanent injunction prohibiting the enforcement of the statutes at issue. Plaintiffs also seek return of monies collected. The State[2] contends that the statutes are constitutional.

Plaintiffs' Second Amended Complaint contains four counts, the first three being based on the Illinois Constitution: Count I – violation of separation of powers under Article II, section 1; Count II – violation of due process and equal protection guarantees in Article I, section 2, as well as violation of the "Uniformity Clause" in Article I, section 2; Count III – violation of the right to obtain justice freely (often called the "Free Access" Clause) under Article I, section 12; and Count IV – creation of a protest fund.

[2] The Will County and Cook County State's Attorneys represent Ms Chasteen and Ms Brown, respectively The Court references these individual clerks, their respective attorneys, and the Illinois Attorney General, collectively as "the State" where possible.

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II. ANALYSIS

A. Standards for a Summary Judgment Motion

Summary judgment is proper where the pleadings, depositions, admissions, and affidavits, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007); *see also* 735 ILCS 5/2–1005(c). Summary judgment should be granted only if the movant's right to judgment is clear and free from doubt. *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 993 (2007). When parties file cross-motions for summary judgment, they mutually concede that there are no genuine issues of material fact and that only questions of law exist. *See Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 432 (2010).

B. Statute Version and Standing

These statutes have been amended several times over the years, and the Court has sought to identify the specific versions of the statutes which Plaintiffs claim, and actually have, standing to attack. This was an issue in the earlier stages of the litigation too, where Judge Petrungaro ordered additional briefing on this issue and ultimately limited her findings to the version of the statutes that existed when Mr. Walker filed his initial complaint on October 2, 2012. The Illinois Supreme Court later rejected Mr. Walker's effort to broaden the scope of his claims to include later versions.

This Court's difficulty in getting Plaintiffs to adequately identify the statutes they are attacking (and can attack) mirrors that of Judge Petrungaro. And, while Judge Petrungaro focused on the date ***this*** case was filed, the undersigned judge concludes that focus ought to be on the dates the ***underlying*** cases were filed (*i.e.*, the dates on which the challenged fees were paid, since that is when Plaintiffs were allegedly harmed). It does not really make a difference, though, since the public act in effect on those dates is the same.

Perhaps Judge Petrungaro's approach was the correct one, since the Illinois Supreme Court found no fault in it. However, that court's discussion was primarily in the context of pleading rather than standing. *See Walker v. McGuire*, 2015 IL 117138, ¶¶36-42.

As a pleading matter, the Second Amended Complaint is not as clear as it ought to be regarding the specific versions of the statutes Plaintiffs attack. Indeed, it is rather vague.

As identified in the table, the applicable version of the statutes could (but would not necessarily) change depending on whether the appropriate focus is on the date of the

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original complaint in this case (October 2, 2012), the dates the underlying foreclosure cases were filed (April 18, 2012, and August 11, 2015), the date Stephen Diamond was added as a plaintiff (June 9, 2006), or the date of the current complaint (December 4, 2018).[3] However, the Court identifies other amendments that have occurred. Indeed, 735 ILCS was also amended by P.A. 101-396 (eff. August 16, 2019). Likewise, 20 ILCS 3805.7.30 was amended by P.A. 97-1164, (eff. June 1, 2013), and again by P.A. 99-581 (eff. January 1, 2017). Finally, 20 ILCS 3508/7.31 was amended by P.A. 97-1164 (eff. June 1, 2013).

The Court tried to seek clarification by directing Plaintiffs to file an amended Rule 19 statement, and then a second amended Rule 19 statement. Based on the second amended Rule 19 Statement, Plaintiff Rueben Walker claims standing to attack the following:

1. 735 ILCS 5/15-1504.1 (P.A. 82-280, § 15-1504.1, added by P.A. 96-1419, §15, eff. Oct. 1, 2010. Amended by P.A. 97-333, § 575, eff. Aug. 12, 2011; P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, § 15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017.)

2. 20 ILCS 3805/7.30 (P.A. Laws 1967, p. 1931, § 7.30, added by P.A. 96-1419, § 5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P A. 100-513, § 65, eff. Jan. 1, 2018.)

3. 20 ILCS 3805/7.31 (Laws 1967, p. 1931, § 7.31, added by P.A. 96-1419, §5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013).

[3] Statute versions that could arguably impact the Court's analysis relative to the referenced dates include.

Statute	4/18/2012	10/2/2012	8/11/2015	6/9/2016	12/4/2018
735 ILCS 5/15-1504 1	P A 97-333, eff. 8/12/2011	P.A 97-333, eff. 8/12/2011	P.A 98-20, eff. 6/11/2013	P A 98-20, eff 6/11/2013	P A. 100-407, eff. 8/25/2017
20 ILCS 3805/7 30	Added by P A 96-1419, eff. 10/1/2010	Added by P A 96-1419, eff 10/1/2010	P A. 98-20, eff 6/11/2013	P A. 98-20, eff. 6/11/2013	P A 100-513, eff 1/1/2018
20 ILCS 3805/7.31	Added by P.A 96-1419, eff. 10/1/2010	Added by P A 96-1419, eff 10/1/2010	P A 98-20, eff 6/11/2013	P A. 98-20, eff. 6/11/2013	P A. 98-20, eff 6/11/2013

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Plaintiff M. Steven Diamond claims in his second amended Rule 19 statement standing to attack the following:

1. 735 ILCS 5/15-1504.1 (P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, §15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017).

2. 20 ILCS 3805/7.30 (Amended by P.A 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P.A. 100-513, § 65, eff. Jan. 1, 2018.)

3. 20 ILCS 3805/7.31 (Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013).

Ultimately, however, the Court need not distinguish between the iterations of the statutes. At the February 2020 hearing, all counsel agreed that the various amendments did not materially change the statutes' infirmities (to the extent they are infirm at all). They further agreed that the Court cannot strike down a statute that no longer exists, but the Court can make a declaration as to the existence of those infirmities in both the current and prior versions of the statutes. (See February 13, 2020 hearing tr. at 18-22.)

C. <u>Non-Constitutional Issues</u>.

There are two questions in the case that do not directly require constitutional analysis, or which could make it unnecessary to reach the constitutional issues. The Court will address those issues first. *See Coram v. State*, 2013 IL 113867, ¶56 (a court must "consider nonconstitutional issues first and consider constitutional issues only if necessary to the resolution of this case"). These are (1) duress and the voluntary payment doctrine; and (2) the propriety of Count IV.

1. <u>Duress and the Voluntary Payment Doctrine</u>

Ms. Brown argues that Plaintiffs' constitutional claims fail under the voluntary payment doctrine because Plaintiffs did not pay the $50 filing fee "under protest." Specifically, Ms. Brown argues Plaintiffs cannot be class representatives when they themselves do not have a proper claim.[4] *See Perlman v. Time, Inc.*, 133 Ill. App. 3d 348,

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[4] Interestingly, these determinations are often, if not usually, made prior to class certification *See, e.g., De Bouse v. Bayer*, 235 Ill 2d 544, 560 (2009) (where named plaintiff's claim failed, she was not an appropriate representative of the putative class and class certification was not appropriate), *Landesman v. General Motors Corp.*, 72 Ill 2d 44, 48-49 (1978) (holding that "[t]he requirement that the named representatives of the putative class possess a valid cause of action is subsumed" in the class certification requirements) In this case, Judge Petrungaro certified the class in November 2012 To this Court's knowledge, that finding was not raised during the prior appeal. To be clear, the Court does not hold that a named plaintiff's suitability as class representative cannot be challenged eight years after class certification Rather, the Court merely observes that the Illinois Supreme Court might reach that conclusion

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354 (1985) (holding that if the named plaintiff's personal cause of action fails, the entire class action must fail). Plaintiffs counter that the payment was made under duress, and therefore the voluntary payment doctrine does not apply.

"The common-law voluntary payment doctrine embodies the ancient and 'universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal.'" *McIntosh v. Walgreens Boots All., Inc.*, 2019 IL 123626, ¶22, *citing Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541 (1908). Generally, "involuntary payment" is a required component to a claim to recover paid taxes or fees. *See Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 183 (1987); *United Private Detective & Security Ass'n v. City of Chicago*, 56 Ill. App. 3d 242, 244 (1977). Absent a payment made under express protest, a person can establish that the fee was paid involuntarily by showing (1) he lacked knowledge of the facts upon which to protest the taxes or fees at the time they were paid (*i.e.*, a mistake of fact); (2) that the taxes or fees were paid under duress; or (3) fraud *See McIntosh* at ¶22-25, 39; *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004); *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). Plaintiffs primarily rely on the duress exception.

The "kind of duress necessary to establish payment under compulsion has been expanded over the years."[5] *Midwest Medical Records Assoc., Inc. v. Brown*, 2018 IL App (1st) 163230 ¶24, *quoting Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 848 (1995). As the appellate court in *Midwest Medical Records* observes, duress may be implied, and has included duress of property, and compulsion of business. *Id.* at ¶¶25, 28. "In determining whether payment is made under duress, the main consideration is whether the party had a choice of option, *i.e.*, whether there was 'some actual or threatened power wielded over the payor from which he has no immediate relief and from which no adequate opportunity is afforded the payor to effectively resist the demand for payment.'" *Id.* at ¶28, *quoting Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 849 (1995). Indeed, "duress exists where the taxpayer's refusal to pay the tax would result in loss of reasonable access to a good or service considered essential." *Wexler*, 211 Ill. 2d at 24, *citing Geary*, 129 Ill. 2d at 396-400.

In *Midwest Medical Records*, the court concluded that duress existed because the litigants would have forfeited the ability to assert his legal rights if he had not paid the fee. *Midwest Medical Records* at ¶32. Indeed, the court stated, "plaintiffs could not avail themselves of the judicial process without payment. Plaintiff's refusal to pay the fee

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[5] Indeed, a lengthy line of appellate court cases has steadily chipped away at the doctrine, in a variety of contexts, to the point that the rule has been arguably swallowed by application of its exceptions. The Court also notes that, in ***other*** contexts, it appears the legislature has sought to override the existence of the voluntary payment doctrine See 35 ILCS 220/23-5 ("whenever taxes are paid *** and a tax objection complaint is filed *** 100% of the taxes shall be deemed paid under protest")

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would have immediately resulted in loss of access to the courts ***. This is a[n] *** immediate threat ***."

The Court finds that the duress exception applies in this case for two independently sufficient reasons.[6] The first follows the reasoning of *Midwest Medical Records*. The Court finds that Plaintiffs in this case would have been restricted from reasonably accessing the court system (*i.e.*, they would have lost a substantial right) had the fee not been paid. The Court notes that, at the January 2020 hearing, the Illinois Attorney General (but not the attorneys for Ms. Brown and Ms. Chasteen) conceded that, in court-fee cases like this one, duress necessarily and inherently exists. (See January 24, 2020 hearing tr. at 10-13.)

The second reason has less to do with case law; it is based on Reuben Walker's live testimony. Mr. Walker testified that he was anxious to get his foreclosure case on file and exercise his rights as a mortgagee due to concerns of fraud and other complications to the underlying case. His understanding was that he was required to pay the fee in order to file the lawsuit. He was not aware that he could pay the fees under protest, and believed he was ineligible for a fee waiver. He further testified that if the Will County Circuit Clerk informed him that the filing fee was voluntary and not required, he would not have paid the fee. The Court finds Mr. Walker's testimony was both compelling and credible. The Court finds that Mr. Walker's established they he was under duress (as that term has been used in connection with the voluntary payment doctrine) when he paid the filing fee.

Accordingly, the voluntary payment doctrine does not defeat Plaintiffs' claims.

2. <u>Count IV: Protest Fund</u>

Count IV seeks creation of a protest fund. This Court is unaware of an Illinois reviewing-court case recognizing "protest fund" as a cause of action. Further, the Court see no reason why it ought to be. Creation of a protest fund is a remedy. Plaintiffs' counsel acknowledged as much during the January 2020 hearing. The Court also notes that a protest fund was indeed already created in this case (at least with regard to foreclosure cases filed in Will County) by Judge Petrungaro shortly after this case was filed.

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[6] Generally, for an exception to apply, facts supporting application of the exception must be pled. *See McIntosh v. Walgreens Boots All., Inc*, 2019 IL 123626 at ¶34 Here, Ms. Brown raised the voluntary payment doctrine in her ***summary judgment*** motion, but she actually asked for ***dismissal*** She sought dismissal because, among other reasons, Plaintiffs failed to plead in the Second Amended Complaint that the filing fee was paid involuntarily or under duress At the January 2020 hearing, Ms Brown agreed to waive her arguments regarding the need to plead duress, and further agreed that the Court should consider the issue on the substantive merits within the context of summary judgment (and not as a request for dismissal for failure to plead).

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Because creation of a protest fund is not a cause of action in Illinois, summary judgment is granted for the State on Count IV.

D. Constitutionality of the Statutes

1. Standards for Constitutional Review

The Court begins with the strong presumption that the statutes are constitutional. *See In re D.W.*, 214 Ill. 2d 289, 310 (2005). To overcome this presumption, the parties challenging the statutes must clearly establish their invalidity. *People v. Melongo*, 2014 IL 114852, ¶20. The Court has a duty to construe a statute in a manner that upholds its constitutionality, if reasonably possible. *Id.*

The Court directed Plaintiffs' to clarify whether they were waging an "as applied" or "facial" constitutional attack on the statutes. In their supplemental brief, filed April 22, 2019, they stated their claims were based "primarily on a 'facial' basis" but that they were also making an "as applied" argument relative to their due process and equal protection claims.

"A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully [citation], because an enactment is facially invalid only if no set of circumstances exists under which it would be valid." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305-06 (2008). "Successfully making a facial challenge to a statute's constitutionality is extremely difficult, requiring a showing that the statute would be invalid under ***any*** imaginable set of circumstances." *In re M.T.*, 221 Ill. 2d 517, 536 (2006) (emphasis in original). Because a successful facial attack effectively voids a statute for all parties in all contexts, findings of facial invalidity are made only as a last resort. *See Pooh-Bah Enterprises, Inc. v. Cty. of Cook*, 232 Ill. 2d 463, 473 (2009).

The test of a law's constitutionality depends largely on the nature of the right that is claimed. *See In re D.W.*, 214 Ill. 2d 289, 310 (2005). As a threshold matter, the parties dispute whether the Court is to apply "rational basis" or "strict" scrutiny. The rational-basis test is limited and highly deferential. *Id.* Under the rational-basis test, a court will uphold a statute if it bears a rational relationship to a legitimate legislative purpose and is not arbitrary or unreasonable. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004).

Plaintiffs counter that this case involves an infringement on fundamental rights, and therefore the strict-scrutiny standard applies. "To withstand the strict scrutiny standard, a statute must serve a compelling state interest, and be narrowly tailored to serve the compelling interest, *i.e.*, the legislature must use the least restrictive means to serve the compelling interest." *Lulay v. Lulay*, 193 Ill. 2d 455, 470 (2000).

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Identifying the appropriate standard of review is not always easy. The State is indeed correct that, ordinarily, a statute's constitutionality is weighed on a rational-basis test. *Tully v. Edgar*, 171 Ill. 2d 297, 304 (1996); *Lipe v. O'Connor*, 2014 IL App (3d) 130345. But the question often turns on whether the statute implicates an infringement on fundamental rights Not every right secured by the State or Federal constitutions is fundamental, though. *Kalodimos v. Vill. of Morton Grove*, 103 Ill. 2d 483, 509 (1984) In the context of constitutional review, fundamental rights are limited to "those that lie at the heart of the relationship between the individual and a republican form of nationally integrated government." *People ex rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 97 (1977). Fundamental rights include the expression of ideas (*i.e.*, speech), participation in the political process, interstate travel, and intimate personal privacy interests, among other things. *Id.* at 97. Plaintiffs' argument for strict-scrutiny analysis is unpersuasive.

Regardless, the Court need not wade too deeply into this "level of analysis" thicket. This case is largely controlled by *Crocker v. Finley*, 99 Ill. 2d 444 (1984). There, the Illinois Supreme Court examined the constitutionality of court filing fees and employed a rational-basis analysis. *See id.* at 457 ("We can find no rational basis for imposing this tax on only those petitioners filing for dissolution of marriage"). As the Court will explain, since the statutes cannot survive the rational-basis analysis employed in *Crocker*, it is unnecessary to consider whether they can withstand strict scrutiny.

2. Count I: Separation of Powers (Article II, section 1)

Under the Illinois Constitution, the "legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another." Ill. Const. 1970, art II, § 1. The separation of powers doctrine is designed to "ensure that the whole power of two or more branches of government shall not reside in the same hands." *Morawicz v. Hynes*, 401 Ill. App. 3d 142-149-50 (2010). But the separation of powers clause "does not seek to achieve a complete divorce among the three branches of government" with a division of "rigid, mutually exclusive components." *Id.* Rather, the separation of powers doctrine "allows for the three branches of government to share certain functions. *Id.*

Plaintiffs contend that the statutes violate separation of powers principles because they "require an arm of the judicial branch, the Clerk of the Circuit Court, to 'administer' a portion of the funds collected for use as part of the [FPP]." The Court rejects this argument for three reasons.

First, Plaintiffs' arguments are sparse to say the least. Parties have the obligation to present the Court with a sufficient basis to rule in their favor. *See Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010) (undeveloped arguments, or contentions with some argument but no authority, are forfeited). In particular, at the summary judgment stage, the parties must "put up or shut up." *Parkway Bank & Tr. Co. v. Korzen*, 2013 IL App (1st) 130380, ¶14. Plaintiffs have put up almost nothing by way of factual and legal support.

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Second, as far as the Court can tell based on the practically nonexistent factual record presented, the Housing Authority administers the FPP. Not the clerk

Third, Plaintiffs' arguments are contrary to the holding in *Wenger v. Finley*, 185 Ill. App. 3d 907 (1989). In that case, the chief judge's administration of a dispute resolution fund was found to be compatible with the separation of powers clause.

Given the statutes' presumptive validity and Plaintiffs' heavy burden to show otherwise, the Court finds that Plaintiffs have failed to establish that the statutes violate Article II, section 1.

3. Count III: The Free Access Clause (Article I, section 12)

The Court next examines Plaintiffs' claim under the Free Access Clause because it is most directly dispositive of the case. But the Court must first add some context to Plaintiffs' Free Access Clause claim. Plaintiff's Second Amended Complaint and Rule 19 statement do not expressly reference the access to justice protections of Article I, section 12. Instead, Count III alleges that:

> [T]he Illinois Constitution of 1970, [as] interpreted by the Illinois Supreme Court [in *Crocker v. Finley*, 99 Ill. 2d 444 (1984)] prohibits the imposition of a filing fee upon litigants where the fee is collected for a purpose that is not court-related and which does not remain exclusively within the control of and retained to finance the Court system only "

Further, the Seconded Amended Rule 19 statement reflects Plaintiffs' constitutional challenge on "the prohibition on the use of Court fees *** as established by decisions of the Supreme Court of Illinois."

Thus, at first blush, it appears Plaintiffs do not base their constitutional claim on any enumerated part of the Illinois Constitution. Rather, they base it directly on *Crocker* (and specifically, as their arguments suggest, *Crocker* at 451-56). But *Crocker* does not conjure state constitutional protections from thin air. The Illinois Supreme Court's discussion in *Crocker* at 451-56 is clearly based on the Free Access Clause. *See Crocker* at 451 (stating "[w]e first address *** the Illinois constitutional right to obtain justice by law freely"); *see also Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 156 (2003) ("*Crocker* was decided under the free access clause and, to a lesser extent, under the due process clause").

The Court is thus left to analyze a constitutional claim that Plaintiffs barely made, or at least did not make well. Still, "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603(c). Further, a pleading should be considered on its character rather than its label. *In re Haley D.*, 2011 IL 110886, ¶67; *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). There appears

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to be no disagreement by the State that Plaintiffs are in fact asserting a Free Access Clause claim. Accordingly, the Court will consider the statutes' constitutionality in that context.

The Constitution's Free Access Clause appears in Article I, section 12, and states:

> Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.

Ill. Const. 1970, art. I, §12.

The Free Access Clause protect parties from the imposition of fees that unreasonably interfere with their rights to a remedy in the law or unreasonably impede the administration of justice. *See Rose v. Pucinski*, 321 Ill. App. 3d 92, 99 (2001). As Plaintiffs observe, *Crocker* is the leading case on the Free Access Clause. In *Crocker*, the Court considered the validity of a statute that required the clerk to collect a special $5 fee from petitioners filing dissolution of marriage cases. The fee, paid on top of ordinary filing fees, was collected to fund domestic violence shelters and related services.

In its analysis, the *Crocker* Court deemed the $5 charge a litigation "tax" rather than a fee, and then considered the purposes for which a fee or tax may be imposed. Even though the court declared the $5 charge a "tax" rather than a fee, its ultimate determination makes little distinction between the two. The court was unequivocal, stating, "we now conclude that court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts. We consider this requirement to be inherent in our Illinois Constitutional right to obtain justice freely." *Crocker*, 99 Ill. 2d at 454. The court also stated that litigants "should not be required, as a condition of their filing, to support a general welfare program that relates neither to their litigation nor to the court system." *Id*. at 455.

The *Crocker* court relied, in part, on *Ali v. Danaher*. That case was decided under the Free Access provisions of the 1870 Illinois Constitution. But the *Crocker* court found it instructive, and quoted the *Ali* court's determination that the fee to support a law library had a relationship to the court system that was "clear." *See Crocker*, 99 Ill 2d at 453-54, citing *Ali*, 47 Ill. 2d at 237.

In *Boynton v. Kusper*, 112 Ill. 2d 356 (1986), the challenged statute required county clerks to place part of the marriage license fee into a domestic abuse fund. The court found that the relationship between those who were being taxed and those who were benefitting from that tax was too remote. *Boynton*, 112 Ill. 2d at 367-68.

The Court has reviewed additional Free Access Clause cases cited by the parties, including *Gatz v. Brown*, 2017 IL App (1st) 160579 (children's waiting room in courthouses); *Zamarron v. Pucinski*, 282 Ill. App. 3d 354 (1996) (fee to fund court

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automation); *Rose v. Pucinski*, 321 Ill. App. 3d 92 (2001) (mandatory arbitration fee); *Mellon v. Coffelt*, 313 Ill. App. 3d 619 (2000) (arbitration fee); and *Wenger v. Finley*, 185 Ill. App. 3d 907 (1989) (fee to fund dispute centers).

The analytical theme that runs (sometimes expressly, sometimes implicitly) through *Crocker*, *Ali*, *Boynton*, *Gatz*, *Zamarron*, *Rose*, *Mellon*, and *Wenger* is that the relationship between the fee and its impact on "the operation and maintenance of the courts" cannot be too attenuated. Rather, it must be relatively direct, clear, and ascertainable. Indeed, the *Crocker* court rejected arguments that the $5 litigation tax would improve the overall administration of justice. The Court found that the asserted relationship was "too remote" and concluded that the service-funding scheme, if permitted, would open the door to "countless other social welfare programs." *See Crocker*, 99 Ill. 2d at 455-56.

The State argues that section 7.30 and the FPP "funds a service that counsels those who are in danger of foreclosure" and that a "direct link exists between those who file for foreclosure and the important governmental interest in the decreasing of foreclosure filings which burden the court system." Further, the State argues that the FPP benefits all civil litigants by providing a "more efficient and expeditious administration of justice by avoiding the extra burden the mass filings of foreclosure put upon the court system." Finally, the State argues that the FPP benefits the court system by decreasing the court system's time and resources spent on foreclosure. However, the State narrows the scope of the available counseling and forgets that these services are available to people ***who don't even have mortgages***. Further, the Court acknowledges that counseling might benefit the court system, but those benefits are indirect at best. Rather, these are precisely the sort of benefits the *Crocker* court deemed "too remote" to pass muster under the Free Access Clause. This fee[7] represent the social welfare program *Crocker* warned about, and that the Free Access Clause prohibits.

The State further argues that section 7.31 and the rest of the statutory framework is designed to care for property that is often poorly maintained. The State further argues that foreclosed properties are often abandoned and constitute a nuisance. The statutes fund municipalities and counties with subsidies derived from filing fees to minimize the problems associated with foreclosed properties. That is all well and good, but the APF's grass cutting, tree trimming, graffiti removing, and general "repair or rehabilitation" are

[7] The Court uses the term "fee" loosely. To be clear, it appears to the Court that the "fee" is in fact a litigation tax, as was the case in *Crocker* This is evident because the collected monies have little direct relation to what the litigant is getting for his paid fee. *See Crocker*, 99 Ill 2d at 452 *See also Diginet, Inc v. Western Union ATS Inc.*, 958 F 2d 1388, 1391-92 (7th Cir 1992) (explaining that a fee is meant to offset costs imposed on the party granting a privilege, while a tax is a revenue generating mechanism). However, this distinction is perhaps of little relevance since, as previously noted, the *Crocker* court required that "court filing fees ***and*** taxes may be imposed only for purposes relating to the operation and maintenance of the courts" (Emphasis added.) *See Crocker*, 99 Ill 2d at 454.

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"benefits" even ***more*** removed from "operation and maintenance of the courts" than is the counseling benefit. The statutory scheme is tantamount to a litigation-tax funded neighborhood beautification plan.

In short, the Court agrees with Plaintiffs that the statutes in this case collectively impose a fee on a certain class of litigants, and that fee is used for things other than operation and maintenance of the courts. Indeed, when a foreclosure plaintiff in (for example) Will County has to pay a filing fee that is used to cut the grass, pick up trash, and "repair and rehabilitate" (whatever that entails) abandoned properties in Chicago, and those properties are owned by private individuals or entities (presumably, in most instances, banks), the fee is not at all associated with "operation and maintenance of the courts."[8] Likewise, when a filing fee is collected and then ultimately used to pay private counselors and organizations, who render counseling services to private individuals who are not necessarily involved in litigation (and in some cases do not—and never did—own mortgaged property), that fee, again, is not directly related to "operation and maintenance of the courts." It has little meaningful distinction to, hypothetically, a fee imposed in divorce cases that would fund private marriage counseling for persons who are not yet even married. The Court finds that the statutes violate the Free Access Clause.[9] The fee imposes an unreasonable burden on Plaintiffs' access to the court system. *See Crocker*, 99 Ill. 2d at 455.

4. <u>Count II: Due Process and Equal Protection (Article I, section 2)</u>

Even though the Court's ruling as to the Free Access clause is determinative, the Court sees value in rendering as complete a ruling as possible, given the case's age and procedural history. Therefore, it will address the remaining issues.

Count II of the Second Amended Complaint alleges that the statutes violate the Due Process and Equal Protection guarantees of the Illinois Constitution. Given the Court's finding that *Crocker* controls this case, and *Crocker*'s finding that the filing fees in that case violated the due process and equal protection clauses (*see Crocker*, 99 Ill. 2d at

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[8] Given that the fees collected from the various circuit clerks are essentially pooled then reallocated, the Court has pondered whether *Crocker*'s reference to "operation and maintenance of the courts" means the ***Illinois court system*** as a whole, or the judicial maintenance and operational needs of the ***county*** where the fee is collected. In other words, if a special fee is paid to the Will County Clerk as a component of Will County filing costs, must the fee be used to operate and maintain the Will County court system? Or, may it be used to operate and it be used to fund Cook County courthouse operations? It seems to this Court that the spirit of *Crocker* requires that a fee paid in Will County, for a case that places an incremental strain on the Will County judiciary and the Will County Circuit Clerk, ought to be used to pay for operations of the ***Will County Court system only***. Given the conclusions the Court has already reached relative to the Free Access Clause, this Court need not resolve this question, but guidance from the Illinois Supreme Court would be welcome.

[9] In reaching this determination, the Court did not rely on the report of the Statutory Court Fee Task Force, which was submitted by Plaintiffs

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456-57), the Court must find that the statutes also violate Article I, section 2 for the same reasons as those expressed in *Crocker.*

5. **Count II: Uniformity Clause (Article IX, section 2)**

The Court has already determined, pursuant to *Crocker*, that the fee violates the Due Process and Equal Protection clause of the Illinois Constitution. Our supreme court has repeatedly said that "[i]f a tax is constitutional under the uniformity clause, it inherently fulfills the requirements of the equal protection clause." *See Geja's Cafe v. Metro. Pier & Exposition Auth.*, 153 Ill 2d 239, 247 (1992); *Allegro Servs., Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill 2d 243, 250 (1996). This Court is unaware of a case expressly declaring the opposite to be true (*i.e.*, that if a tax is unconstitutional under the equal protection clause, than it inherently violates the Uniformity Clause too). But this would make sense since the Uniformity Clause was "intended to be a broader limitation on legislative power to classify for nonproperty-tax purposes than the limitation of the equal protection clause. *See Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 153 (2003); *see also Milwaukee Safeguard Ins. Co. v. Selke*, 179 Ill. 2d 95, 102 (1997); *see also Federated Distributors, Inc. v. Johnson*, 125 Ill. 2d 1, 9–10 (1988) ("Although the due process clauses of the Federal and State Constitutions and the equal protection clause of the Federal Constitution had previously served as limitations upon unreasonable classifications *** the Committee believed that the taxpayers of Illinois should receive additional protection"). Nonetheless, the Court acknowledges that *Crocker* was not a Uniformity Clause case (*see Arangold*, 204 Ill. 2d at 156),[10] and so it will analyze the Uniformity Clause challenge relatively independent from its *Crocker*-based findings.

The Uniformity Clause of the Illinois Constitution provides as follows:

> "In any law classifying the subjects or objects of nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall be reasonable."

Ill. Const. 1970, art. IX, §2.

The Uniformity Clause makes two basic demands. *See Primeco Pers. Commc'ns, L.P. v. I.C.C.*, 196 Ill. 2d 70, 84 (2001). The first requires the General Assembly to classify the subjects or objects of nonproperty taxes reasonably. *Id.* As to this first requirement, a classification may be considered reasonable if it (A) is based on a real and substantial difference between those who are taxed and those who are not taxed; and (B) bears some

[10] While it is true that *Crocker* was not a Uniformity Clause case (*see Arangold*, 204 Ill 2d at 156), the Court must nonetheless be mindful of *Crocker*'s caution that "[i]f the right to obtain justice freely is to be a meaningful guarantee, it must preclude the legislature from raising general revenue through charges assessed to those who would utilize our courts" *Arangold*, 204 Ill 2d at 149, *quoting Crocker*, 99 Ill 2d at 455.

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reasonable relationship to the object of the legislation or to public policy. *See id.* Once a reasonable classification has been established, the second requirement is that the members of that class must be taxed uniformly. *Id.*

In the context of a uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification. *See Arangold*, 204 Ill. 2d at 153. The challenging party must then persuade the court that the taxing body's explanation is legally or factually insufficient. *See id.* Despite the more stringent standard under the uniformity clause, the court's inquiry is relatively narrow. *Id.* The court need not have proof of perfect rationality as to each and every taxpayer. *Id* Rather, there must be minimum standards of reasonableness and fairness as between groups of taxpayers. *See id.*

Turning to the first requirement, the Court first "determine[s] the object (or purpose) of the taxing provision at issue." *Primeco*, 196 Ill. 2d at 85. (Emphasis omitted.) The Court finds that the purpose of 735 ILCS 5/15-1504.1 is to fund the legislative aims of 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. Legislative findings relative to the Housing Development Act (which includes sections 7.30 and 7.31) are codified at 20 ILCS 3805/3, but are too voluminous to quote here. Those findings are accurately characterized by the previously-referenced transcript as being intended to "create[] additional programs for people in foreclosure problems" and "help people who need help with their mortgage situations and in our foreclosure-plagued society." (See General Assembly, House Civil Judiciary Comm. Transcripts (May 7, 2010) at 10:11-16, 4:16 to 6:1; 6:19-21.) These purposes are carried out, in part, by the imposition of filing fees used for mortgage counseling, and for property beautification and maintenance.

The Court next considers whether the statutes' object is reasonably related to the class of entities taxed. *Primeco*, 196 Ill. 2d at 85. Plaintiffs argue the statutes impose a "burden of payment of a fee upon Plaintiffs and others similarly situated which is used for general revenue purposes and benefits the citizens of Illinois generally rather than only a specific class or classification, thereby creating an unreasonable and arbitrary classification and burden." They further argue that the statutes violate the Uniformity Clause by creating a "burden on those involved in the foreclosure process while, at the same time, providing a benefit to limited and select group of individuals/entities, including but not limited to giving a substantial portion of these funds to a municipality [*i.e.*, Chicago] and giving the remainder on an equally non-uniform basis throughout Illinois."

The Court finds that there is no real and substantial difference between plaintiffs seeking access to the court system in mortgage foreclosure cases, and those seeking access to the courts in non-foreclosure contexts. Indeed, the statutes' taxing classification (burdening only those persons or entities filing mortgage foreclosure

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cases[11]) does not bear a reasonable relationship to the purpose of the tax. Accordingly, the Court finds that the statutes violate the Uniformity Clause (Ill. Const. 1970, art. IX, §2).

III. CONCLUSION

In light of the foregoing, the Court FINDS and ORDERS the following:

A. No one has suggested that the class needs to be recertified given the amendments to the original complaint and the amendments to the statutes. To the extent necessary, the Court reaffirms the conclusions and directives of the November 2012 class certification order. Further, the Court finds that both named plaintiffs are suitable class representatives.

B. Summary judgment is granted in favor of Plaintiffs, and against the State, on Counts II and III.

C. Summary judgment is granted in favor of the State, and against Plaintiffs, on Counts I and IV.

D. The Court finds that 735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31, in all of their various iterations from the date the underlying mortgage cases were filed through today, are facially unconstitutional. These statutes violate the Free Access, Equal Protection, Due Process, and Uniformity Clauses of the Illinois Constitution of 1970.

E. The Court finds that the statutes are not severable.

F. The Court's findings of unconstitutionality are necessary, and cannot rest on alternative non-constitutional grounds.

G. The Court finds that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statutes at issue.

H. The Court finds Plaintiffs have established that they have no adequate remedy at law, that they possess a clearly ascertainable right, and that they will suffer irreparable harm if no relief is granted. The Court enters a permanent injunction enjoining the Circuit Clerks of the State of Illinois from enforcing and following 735 ILCS

---

[11] The Court notes that the statutes also distinguish the amount of the fee based on the number of foreclosure cases filed The more cases filed, the higher the per-case fee The likely import of this disparity is that large banks and mortgage lenders will pay higher per-case filing fees, while individuals and smaller lenders will pay less. This distinction seems to raise Uniformity Clause questions on its own However, the Plaintiffs have not adequately raised this issue and so the Court does not rely on it in making its decision.

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5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31 as they are currently enacted. Specifically, the Circuit Clerks are not to impose, collect, hold, or disburse the filing fees at issue.

I. On the Court's motion, the effect and enforcement of the injunction (discussed in the preceding paragraph) is stayed until further order. A stay is appropriate to provide the Illinois Supreme Court a meaningful opportunity to review the case.

J. There are still remaining issues in this case, such as Plaintiffs' request for the return of collected fees. The case is set for further hearing and status regarding remaining issues on March 11, 2020, at 1p.m. On that date, the Court will also consider the propriety of a Rule 304(a) finding relative to this Order.

K. The Will County Circuit Clerk is directed to mail a copy of this Order to all counsel of record.

ENTERED:

Dated: March 2, 2020

John C. Anderson
Circuit Judge

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WILL COUNTY ILLINOIS
WILL COUNTY COURT ANNEX

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FILED
MAY 14 2020
WILL COUNTY CIRCUIT CLERK
BY ____________

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

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,	)	**Case No. 12-CH-5275**
Plaintiffs,	)	
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,	)	**John C. Anderson** **Circuit Judge**
Defendants.	)	

ORDER

On March 2, 2020, the Court issued a Memorandum Opinion and Order declaring three statutes (735 ILCS 5/15-1504.1; 20 ILCS 3805/7.30; and 20 ILCS 3805/7.31) unconstitutional, and enjoining their enforcement.

In entering the March 2, 2020 ruling, and for a substantial period of time before issuing the ruling, the Court has grappled with Plaintiffs' standing to attack the various iterations of the statutes that existed after plaintiffs incurred the filing fees that are at issue in the case.

To be sure, Plaintiffs have standing to attack those versions of the statutes (*i.e.*, those Public Acts) that existed at the time they filed their underlying foreclosure actions. Further, the Court finds Plaintiffs may seek a refund of fees collected under those versions.

Reuben Walker filed his mortgage foreclosure case on April 18, 2012. Steve Diamond filed his foreclosure case on August 11, 2015. The public acts that existed on those dates are as follows:

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Statute\Plaintiff	Walker 4/18/2012	Diamond 8/11/2015
735 ILCS 5/15-1504.1	P.A. 97-333, eff. 8/12/2011	P.A. 98-20, eff. 6/11/2013
20 ILCS 3805/7.30	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013
20 ILCS 3805/7.31	Added by P.A. 96-1419, eff. 10/1/2010	P.A. 98-20, eff. 6/11/2013

The Court is unclear, however, whether Plaintiffs have standing to seek relief in the form of (a) return of fees collected under ***subsequent*** versions of the statutes (including the ***current*** version); and (b) injunctive relief regarding the ***current*** version of the statutes. Should the Court's focus be the constitutionality of the public acts, or alternatively, the statutes? Put another way, can the amendment of the statutes destroy or limit class-action plaintiffs' standing?

At the February 2020 hearing, all counsel agreed that the various amendments did not materially change the statutes' infirmities (to the extent they are infirm at all). All counsel further agreed that the Court cannot strike down a statute that no longer exists, but the Court can make a declaration as to the existence of those infirmities in both the current and prior versions of the statutes. Indeed, the Court directed the following question to the Will County State's Attorney, Cook County State's Attorney, and Illinois Attorney General (collectively, the "State"):

> Let's say hypothetically that I find that the statute that existed at the time Mr. Walker filed his mortgage foreclosure case was unconstitutional for whatever reason, can I find that the subsequent amended versions are unconstitutional? Must I find that they are unconstitutional? Because they really haven't changed in any meaningful way....
>
> The attorneys for the State took a moment to confer and answered:
>
> We think the Court can declare that a certain provision that has followed through the various enactments, if the Court found that to be unconstitutional and if the Court found that it is so intertwined into the whole statute, I think you could strike down the current statute and you could enter a declaratory—you could enter a declaration that the prior versions were unconstitutional at the time they were in effect because that language that was there brought them down. I don't think—I agree you can't strike down a statute that isn't there anymore, but I still think you can declare it was unconstitutional at the time because of the infirmity that you find.

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All other attorneys representing the State agreed verbally or nodded their head affirmatively; none expressed disagreement. (See February 13, 2020 tr. at 18-22.) Plaintiffs' counsel also essentially agreed.

The Court, still not quite convinced of the parties' collective position and still struggling with the question, emailed all counsel on March 4, 2020, asking them to be prepared to discuss this issue when they next appeared in Court. The parties were in Court again on March 11, 2020, where the Court asked a number of standing-related questions, including whether anyone wanted to consider the necessity of adding other named parties and amending the complaint.[1] No one actively argued that standing was lacking. Counsel eventually left the courthouse with the agreed understanding that they would confer and seek to enter into a more formal stipulation, if possible, as it relates to standing. The Court scheduled another status conference to discuss standing, and the case as a whole, on March 25, 2020. However, that was cancelled due to COVID-19. Instead, the Court and parties emailed back and forth in an effort to bring the case to a conclusion. One email from plaintiffs' counsel, dated April 22, 2020, advises in pertinent part:

> **A conference was held yesterday afternoon among attorneys for the parties who wished to discuss plaintiffs' previously tendered case stipulations and proposed order. At the conference, defense counsel from Cook County State's Attorney's Office and the Illinois Attorney General's Office informed plaintiffs' counsel that their respective offices are not allowed to enter into any stipulations in this case. Thereafter, plaintiffs' counsel informed defense counsel that it is plaintiffs' position that it can see no logical reason for adding more class representatives to challenge statutes (and their iterations) which all have the same infirmities and where all money collected is placed in a common fund to be distributed.**

The parties have collectively advised the Court that they do not wish to brief the standing issue (which, again, was raised by the Court), that they would like a final ruling on it, and they agree that a Rule 304(a) finding is appropriate.

---

[1] On May 11, 2020, the Court sought to obtain a copy of the March 11, 2020 transcript and was told by the court reporter that the audio recording system, for unknown reasons, was not functioning that day. No transcript is available. The Court then asked all counsel of record, via email, whether they wished to submit an agreed statement of facts, bystander's report, or something else to preserve the record due to the absence of a transcript. Counsel from the Cook County State's Attorney and Illinois Attorney General expressly declined *via* email. Counsel from the Will County State's Attorney did not respond within the requested period. Plaintiffs' counsel advised the Court *via* email that he not only wished to submit a bystander's report, but he *included one* in his communication. However, there is a procedure for submitting a bystander's report, and it was not followed. Plaintiffs may, if they choose, file their proposed bystander's report, with notice and a proposed hearing date, if they wish. All parties will have an opportunity to either agree or object. Or, if Plaintiffs feel this Order adequately and accurately reflects what was said on March 11, 2020, they are free to forego the necessity of the bystander's report. It's the parties' record to protect. Information regarding the procedure for the bystander's report is available at: https://courts.illinois.gov/forms/approved/appellate/Appellate_Bystander/Appellate_Instructions_BR_%20ASF.pdf

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The Court has no interest in complicating the procedural posture of this case. Still, trial courts have the authority and ***obligation*** to consider their own jurisdiction. *Brandon v. Bonell*, 368 Ill. App. 3d 492, 507 (2006). Generally, the "Circuit Courts shall have original jurisdiction of all justiciable matters." *See* ILL. CONST. 1970, ART. VI, § 9. Standing is an element of justiciability. *In re Marriage of Rodriguez*, 131 Ill. 2d 273, 280 (1989).

Under a traditional standing analysis, the Court is limited to deciding "actual, specific controversies, and not abstract questions or moot issues." *In re M.I.*, 2013 IL 113776, ¶32. A person seeking to challenge a statute's constitutionality must be within the class aggrieved by the alleged constitutionality. *Id.* Indeed, the general rule is that "if there is no constitutional defect in the application of the statute to a litigant, that person does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." *Id.* Further, a "party may not raise a constitutional challenge to a provision of a statute that does not affect him or her." *Id.* at ¶34.

The Court is not aware of any Illinois state-court cases involving a plaintiff's standing to bring a class action challenging the enforcement of a frequently-amended statute. Nor is the Court aware of Illinois class action cases where a named-plaintiff's standing was impacted by statutory amendment after the class is certified. The Court is aware, however, of loosely analogous United States Supreme Court cases holding that, for a standing inquiry, a court must focus on the standing of the certified class to seek equitable relief. For example, in *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 557, 42 L.Ed.2d 532 (1975), the Court held that "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." This Court is also aware of the ruling in *United States Parole Commission v. Geraghty*, 445 U.S. 388, 400, 100 S.Ct. 1202, 1210, 63 L.Ed.2d 479 (1980), where the Court held that the "personal-stake requirement relat[ing] to the first purpose of the case-or-controversy doctrine" is met in class actions simply by class certification notwithstanding the subsequent loss of a "personal stake" by the class representative. Certification will preserve a class's standing even after the named individual representatives have lost the required "personal stake" in the claim. *See id.* at 399, 95 S.Ct. at 557.

In this case, on November 9, 2012, Judge Bobbi Petrungaro certified the class (without objection), and she defined the class in terms of a statute and not a public act. Still, that does not mean Illinois courts are "to follow federal law on issues of standing" and, in fact, the Illinois Supreme Court has "expressly rejected federal principles of standing." *See Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill. 2d 217, 254 n.4 (2010).

At bottom, however, this Court concludes that it need not answer the substantive question of whether plaintiffs have standing to attack the latest iteration of the statutes because that issue has been implicitly and expressly waived.

The Illinois Supreme Court has applied waiver in the context of standing. *See, e.g., Lebron*, 237 Ill. 2d at 253; *Flynn v. Ryan*, 199 Ill. 2d 430, 439 (2002) ("Because lack of standing is an

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affirmative defense *** it could be argued that defendants have waived the standing issue");[2] *see also Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 494 (1988) (lack of standing is an affirmative defense; it is a defendant's burden to plead and prove lack of standing).

The Illinois Appellate Court has similarly held that standing can be waived. In *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1102 n.5 (2001), *aff'd*, 201 Ill. 2d 529 (2002), the appellate court explained:

> The standing issue here is both jurisdictional and constitutional in nature. This court, in ruling that a party has waived the issue of standing, has occasionally stated that standing is not jurisdictional, but is an affirmative defense. *E.g., Contract Development Corp. v. Beck*, 255 Ill. App. 3d 660, 664 [] (1994) (citation omitted). However, the fact that standing is an affirmative defense under section 2–619 does not preclude it from being jurisdictional. After all, lack of subject matter jurisdiction is a ground for dismissal under section 2–619. 735 ILCS 5/2–619(a)(1) (West 1998).
>
> Nevertheless, the ruling in Beck (and similar cases) that standing can be waived is correct. Parties cannot waive an issue of subject matter jurisdiction. *Segers v. Industrial Com'n*, 191 Ill. 2d 421, 427 [] (2000). However, other jurisdictional issues can be waived. *Segers*, 191 Ill. 2d at 427 [] (primary jurisdiction); *Volkmar v. State Farm Mutual Automobile Ins. Co.*, 104 Ill. App. 3d 149, 151 [] (1982) (personal jurisdiction). Standing is one such issue. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 [] (1988). Presumably, this is because the essence of the standing inquiry is not the subject matter per se, but whether a litigant, either in an individual or representative capacity, is entitled to have the court decide the merits of a particular dispute or issue. *See In re Estate of Wellman*, 174 Ill. 2d 335, 345 [] (1996).

Regarding subject matter jurisdiction, "the ***only*** consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine," and "[i]f it does, then subject matter jurisdiction is present." (Emphasis in original.) *In re Luis R.*, 239 Ill. 2d 295, 301 (2010).

The Court finds that any challenges the State might have made to the named plaintiffs' standing could be, and were, waived. First, there is a constructive waiver, or forfeiture. Quite simply, the State has not seriously contended, before this Court, that plaintiffs lack standing to challenge, or seek relief in connection with, the subsequent iterations of the statute. Indeed, even after the March 11, 2020 status, the Court expressly asked the State whether it wished to submit briefs on the issue of standing, and the State declined. Second, the State's February 13,

[2] In *Flynn*, the Illinois Supreme Court decided that its powers are not limited by waiver. *See Flynn*, 199 Ill. 2d at 439 ("waiver is an admonition to the parties, not a limitation on the powers of this court").

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2020 comments amount to an express waiver of standing. Therefore, the Court finds that the named plaintiffs have standing to seek injunctive relief as to the current version of the statutes, and restitution as to all versions of the statutes that existed from the time they filed their underlying claims through the present versions.

Based on the foregoing, it is ORDERED that: (a) the Court's reaffirms its findings set forth in the March 2, 2020 in their entirety; (b) to the extent plaintiffs lack standing to seek relief under subsequent iterations of the statutes, that lack of standing has been implicitly and expressly waived; (c) the stay of enforcement of the injunction, contained in the March 2, 2020 order, remains in force until further order; (d) there is no stay on discovery relating to remaining issues of monetary damages and remedies; (e) pursuant to Rule 304(a), regarding the March 2, 2020 order, the Court finds on its own motion (and the parties have expressed agreement) that there is no just reason for delaying either enforcement or appeal or both; (f) status is set for discussion of all remaining issues to be decided regarding remedies (such as return of filing fees collected or imposition of attorneys' fees) on November 2, 2020, at 9AM. Counsel of record are provided copies of this Order both via email and U.S. Mail.

ENTERED:

Dated: May 14, 2020

John C. Anderson
Circuit Judge

SUBMITTED - 11419994 - Carson Griffis - 12/9/2020 8:59 AM

Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
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APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT,
WILL COUNTY, ILLINOIS

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,	)
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,	) No. 12-CH-5275
Defendant-Appellant,	)
PEOPLE OF THE STATE OF ILLINOIS *ex rel*. KWAME RAOUL, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,	)
Intervenor-Defendant-Appellant,	)
and	)
DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County,	)
Intervenor-Defendant-Appellant.	) The Honorable JOHN C. ANDERSON, Judge Presiding.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Illinois Supreme Court Rules

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302(a)(1) and 304(a), Intervenor-Defendant People of the State of Illinois *ex rel.* Kwame Raoul, Attorney General of the State of Illinois, appeal to the Illinois Supreme Court from a final order entered by the Honorable Judge John C. Anderson of the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois on May 14, 2020. In addition, the People appeal from prior orders of the circuit court, including but not limited to a March 2, 2020 order invalidating three statutes as unconstitutional under the Illinois Constitution — 735 ILCS 5/15-1504.1 (2018), 20 ILCS 3805/7.30 (2018), and 20 ILCS 3805/7.31 (2018). Copies of the March 2 and May 14, 2020 orders are attached.

By this appeal, the People request that the Illinois Supreme Court reverse and vacate such orders, and grant any other appropriate relief.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

By: /s/ Evan Siegel
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June 10, 2020

SUBMITTED - 11419994 - Carson Griffis - 12/9/2020 8:59 AM

Andrea Lynn Chasteen
Will County Circuit Clerk
Twelfth Judicial Circuit Court
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APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, WILL COUNTY, ILLINOIS

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,	)
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,	)
Defendant-Appellant,	) No. 12-CH-5275
PEOPLE OF THE STATE OF ILLINOIS *ex rel.* KWAME RAOUL, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,	)
Intervenor-Defendant-Appellant,	)
and	)
DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County,	)
Intervenor-Defendant-Appellant.	)
	) The Honorable JOHN C. ANDERSON, Judge Presiding.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Illinois Supreme Court Rules 302(a)(1) and

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304(a), Intervenor-Defendant Dorothy Brown, in her official capacity as the Clerk of the Circuit Court of Cook County (the "Cook County Circuit Clerk"), appeals to the Illinois Supreme Court from a final order entered by the Honorable Judge John C. Anderson of the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois on May 14, 2020. In addition, the Cook County Circuit Clerk appeals from prior orders of the circuit court, including but not limited to a March 2, 2020 order invalidating three statutes as unconstitutional under the Illinois Constitution — 735 ILCS 5/15-1504.1 (2018), 20 ILCS 3805/7.30 (2018), and 20 ILCS 3805/7.31 (2018). Copies of the March 2 and May 14, 2020 orders are attached.

By this appeal, the Cook County Circuit Clerk requests that the Illinois Supreme Court reverse and vacate such orders, and grant any other appropriate relief.

June 12, 2020

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

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Of counsel

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Andrea Lynn Chasteen
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Twelfth Judicial Circuit Court
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Clerk: MZ

APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT,
WILL COUNTY, ILLINOIS

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, 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, Defendant-Appellant, PEOPLE OF THE STATE OF ILLINOIS *ex rel.* KWAME RAOUL, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, Intervenor-Defendant-Appellant, and DOROTHY BROWN, in her official capacity as the Clerk of the Circuit Court of Cook County, Intervenor-Defendant-Appellant.	No. 12-CH-5275 The Honorable JOHN C. ANDERSON, Judge Presiding.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Illinois Supreme Court Rules

SUBMITTED - 11419994 - Carson Griffis - 12/9/2020 8:59 AM

302(a)(1) and 304(a), Defendant Andrea Lynn Chasteen, Clerk of the Circuit Court of Will County, appeals to the Illinois Supreme Court from a final order entered by the Honorable Judge John C. Anderson of the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois on May 14, 2020. In addition, Chasteen appeals from prior orders of the circuit court, including but not limited to a March 2, 2020 order invalidating three statutes as unconstitutional under the Illinois Constitution — 735 ILCS 5/15-1504.1 (2018), 20 ILCS 3805/7.30 (2018), and 20 ILCS 3805/7.31 (2018). Copies of the March 2 and May 14, 2020 orders are attached.

By this appeal, Chasteen requests that the Illinois Supreme Court reverse and vacate such orders, and grant any other appropriate relief.

Respectfully submitted,

JAMES W. GLASGOW,
State's Attorney,
Will County, Illinois

By: /s/ Marie Quinlivan Czech
MARIE QUINLIVAN CZECH,
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June 12, 2020

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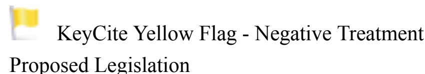

Proposed Legislation

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 20. Executive Branch
Illinois Housing Development Authority
Act 3805. Illinois Housing Development Act (Refs & Annos)

20 ILCS 3805/7.30

3805/7.30. Foreclosure Prevention Program

Effective: January 1, 2018
Currentness

§ 7.30. Foreclosure Prevention Program.

(a) The Authority shall establish and administer a Foreclosure Prevention Program. The Authority shall use moneys in the Foreclosure Prevention Program Fund, and any other funds appropriated for this purpose, to make grants to (i) approved counseling agencies for approved housing counseling and (ii) approved community-based organizations for approved foreclosure prevention outreach programs. The Authority shall promulgate rules to implement this Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation and the annual receipt of funds, the Authority shall make grants from the Foreclosure Prevention Program Fund derived from fees paid as specified in subsection (a) of Section 15-1504.1 of the Code of Civil Procedure as follows:

(1) 25% of the moneys in the Fund shall be used to make grants to approved counseling agencies that provide services in Illinois outside of the City of Chicago. Grants shall be based upon the number of foreclosures filed in an approved counseling agency's service area, the capacity of the agency to provide foreclosure counseling services, and any other factors that the Authority deems appropriate.

(2) 25% of the moneys in the Fund shall be distributed to the City of Chicago to make grants to approved counseling agencies located within the City of Chicago for approved housing counseling or to support foreclosure prevention counseling programs administered by the City of Chicago.

(3) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located outside of the City of Chicago for approved foreclosure prevention outreach programs.

(4) 25% of the moneys in the Fund shall be used to make grants to approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs, with priority given to programs that provide door-to-door outreach.

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(c-5) Where the jurisdiction of an approved counseling agency is included within more than one of the geographic areas set forth in this Section, the Authority may elect to fully fund the applicant from one of the relevant geographic areas.

Credits

Laws 1967, p. 1931, § 7.30, added by P.A. 96-1419, § 5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013; P.A. 99-581, § 65, eff. Jan. 1, 2017; P.A. 100-513, § 65, eff. Jan. 1, 2018.

20 I.L.C.S. 3805/7.30, IL ST CH 20 § 3805/7.30
Current through P.A. 101-651. Some statute sections may be more current, see credits for details.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 20. Executive Branch
Illinois Housing Development Authority
Act 3805. Illinois Housing Development Act (Refs & Annos)

20 ILCS 3805/7.31

3805/7.31. Abandoned Residential Property Municipality Relief Program

Effective: June 11, 2013
Currentness

§ 7.31. Abandoned Residential Property Municipality Relief Program.

(a) The Authority shall establish and administer an Abandoned Residential Property Municipality Relief Program. The Authority shall use moneys in the Abandoned Residential Property Municipality Relief Fund, and any other funds appropriated for this purpose, to make grants to municipalities and to counties to assist with costs incurred by the municipality or county for: cutting of neglected weeds or grass, trimming of trees or bushes, and removal of nuisance bushes or trees; extermination of pests or prevention of the ingress of pests; removal of garbage, debris, and graffiti; boarding up, closing off, or locking windows or entrances or otherwise making the interior of a building inaccessible to the general public; surrounding part or all of an abandoned residential property's underlying parcel with a fence or wall or otherwise making part or all of the abandoned residential property's underlying parcel inaccessible to the general public; demolition of abandoned residential property; and repair or rehabilitation of abandoned residential property, as approved by the Authority under the Program. For purposes of this subsection (a), “pests” has the meaning ascribed to that term in subsection (c) of Section 11-20-8 of the Illinois Municipal Code. The Authority shall promulgate rules for the administration, operation, and maintenance of the Program and may adopt emergency rules as soon as practicable to begin implementation of the Program.

(b) Subject to appropriation and the annual receipt of funds, the Authority shall make grants from the Abandoned Residential Property Municipality Relief Fund derived from fees paid as specified in paragraph (1) of subsection (a-5) of Section 15-1504.1 and subsection (a) of Section 15-1507.1 of the Code of Civil Procedure as follows:

(1) 30% of the moneys in the Fund shall be used to make grants to municipalities other than the City of Chicago in Cook County and to Cook County;

(2) 25% of the moneys in the Fund shall be used to make grants to the City of Chicago;

(3) 30% of the moneys in the Fund shall be used to make grants to municipalities in DuPage, Kane, Lake, McHenry and Will Counties, and to those counties; and

(4) 15% of the moneys in the Fund shall be used to make grants to municipalities in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties, and to counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties. Grants distributed to the municipalities and counties shall be based on (i) areas of greatest need within these

counties, which shall be determined, to the extent practicable, proportionately on the amount of fees paid to the respective clerks of the courts within these counties, and (ii) on any other factors that the Authority deems appropriate.

The percentages set forth in this subsection (b) shall be calculated after deduction of reimbursable administrative expenses incurred by the Authority, but shall not be greater than 4% of the annual appropriated amount.

(c) Where the jurisdiction of a municipality is included within more than one of the geographic areas set forth in this Section, the Authority may elect to fully fund the municipality from one of the relevant geographic areas.

Credits

Laws 1967, p. 1931, § 7.31, added by P.A. 96-1419, § 5, eff. Oct. 1, 2010. Amended by P.A. 97-1164, § 5, eff. June 1, 2013; P.A. 98-20, § 5, eff. June 11, 2013.

20 I.L.C.S. 3805/7.31, IL ST CH 20 § 3805/7.31
Current through P.A. 101-651. Some statute sections may be more current, see credits for details.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 735. Civil Procedure
Act 5. Code of Civil Procedure (Refs & Annos)
Article XV. Mortgage Foreclosure (Refs & Annos)
Part 15. Judicial Foreclosure Procedure (Refs & Annos)

This section has been updated. Click here for the updated version.

735 ILCS 5/15-1504.1

5/15-1504.1. Filing fee for Foreclosure Prevention Program Fund, Foreclosure Prevention Program Graduated Fund, and Abandoned Residential Property Municipality Relief Fund

Effective: August 25, 2017 to June 4, 2019

§ 15-1504.1. Filing fee for Foreclosure Prevention Program Fund, Foreclosure Prevention Program Graduated Fund, and Abandoned Residential Property Municipality Relief Fund.

(a) Fee paid by all plaintiffs with respect to residential real estate. With respect to residential real estate, at the time of the filing of a foreclosure complaint, the plaintiff shall pay to the clerk of the court in which the foreclosure complaint is filed a fee of $50 for deposit into the Foreclosure Prevention Program Fund, a special fund created in the State treasury. The clerk shall remit the fee collected pursuant to this subsection (a) to the State Treasurer to be expended for the purposes set forth in Section 7.30 of the Illinois Housing Development Act. All fees paid by plaintiffs to the clerk of the court as provided in this subsection (a) shall be disbursed within 60 days after receipt by the clerk of the court as follows: (i) 98% to the State Treasurer for deposit into the Foreclosure Prevention Program Fund, and (ii) 2% to the clerk of the court to be retained by the clerk for deposit into the Circuit Court Clerk Operation and Administrative Fund to defray administrative expenses related to implementation of this subsection (a). Notwithstanding any other law to the contrary, the Foreclosure Prevention Program Fund is not subject to sweeps, administrative charge-backs, or any other fiscal maneuver that would in any way transfer any amounts from the Foreclosure Prevention Program Fund into any other fund of the State.

(a-5) Additional fee paid by plaintiffs with respect to residential real estate.

(1) Until January 1, 2020, with respect to residential real estate, at the time of the filing of a foreclosure complaint and in addition to the fee set forth in subsection (a) of this Section, the plaintiff shall pay to the clerk of the court in which the foreclosure complaint is filed a fee for the Foreclosure Prevention Program Graduated Fund and the Abandoned Residential Property Municipality Relief Fund as follows:

(A) The fee shall be $500 if:

(i) the plaintiff, together with its affiliates, has filed a sufficient number of foreclosure complaints so as to be included in the first tier foreclosure filing category and is filing the complaint on its own behalf as the holder of the indebtedness; or

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(b) Not later than March 1 of each year, the clerk of the court shall submit to the Illinois Housing Development Authority a report of the funds collected and remitted pursuant to this Section during the preceding year.

(c) As used in this Section:

"Affiliate" means any company that controls, is controlled by, or is under common control with another company.

"Approved counseling agency" and "approved housing counseling" have the meanings ascribed to those terms in Section 7.30 of the Illinois Housing Development Act.

"Depository institution" means a bank, savings bank, savings and loan association, or credit union chartered, organized, or holding a certificate of authority to do business under the laws of this State, another state, or the United States.

"First tier foreclosure filing category" is a classification that only applies to a plaintiff that has filed 175 or more foreclosure complaints on residential real estate located in Illinois during the calendar year immediately preceding the date of the filing of the subject foreclosure complaint.

"Second tier foreclosure filing category" is a classification that only applies to a plaintiff that has filed at least 50, but no more than 174, foreclosure complaints on residential real estate located in Illinois during the calendar year immediately preceding the date of the filing of the subject foreclosure complaint.

"Third tier foreclosure filing category" is a classification that only applies to a plaintiff that has filed no more than 49 foreclosure complaints on residential real estate located in Illinois during the calendar year immediately preceding the date of the filing of the subject foreclosure complaint.

(d) In no instance shall the fee set forth in subsection (a-5) be assessed for any foreclosure complaint filed before the effective date of this amendatory Act of the 97th General Assembly.

(e) Notwithstanding any other law to the contrary, the Abandoned Residential Property Municipality Relief Fund is not subject to sweeps, administrative charge-backs, or any other fiscal maneuver that would in any way transfer any amounts from the Abandoned Residential Property Municipality Relief Fund into any other fund of the State.

Credits

P.A. 82-280, § 15-1504.1, added by P.A. 96-1419, § 15, eff. Oct. 1, 2010. Amended by P.A. 97-333, § 575, eff. Aug. 12, 2011; P.A. 97-1164, § 15, eff. June 1, 2013; P.A. 98-20, § 15, eff. June 11, 2013; P.A. 100-407, § 5, eff. Aug. 25, 2017.

735 I.L.C.S. 5/15-1504.1, IL ST CH 735 § 5/15-1504.1
Current through P.A. 101-651. Some statute sections may be more current, see credits for details.

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	Exhibit A – Oct. 30, 2012 Letter Addressed to the Honorable Clay Campbell from the State's Attorney of Will County	C1710
	Exhibit B – 2012 Directory of State's Attorney	C1711-12
02/20/2020	Affidavit of David Novoselsky	C1713-18
03/02/2020	Circuit Court Memorandum Opinion and Order	C1719-37
03/02/2020	Report of Proceedings held on Feb. 13, 2020 in the Circuit Court of the 12th Judicial Circuit, Will County, IL	C1738-79
	Official Court Reporter for the 12th Judicial Circuit, Will County, Illinois, Steve Vithoulkas	C1780
03/02/2020	Report of Proceedings held on Jan. 24, 2020 in the Circuit Court of the 12th Judicial Circuit, Will County, IL	C1781-1816
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	Exhibit A – 735 ILCS 5/15-1504.1	C1840-62
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04/27/2020	Third Amended Rule 19 Statement	C1914-16
05/14/2020	Bystanders' Affidavit Daniel K. Cray	C1917-22
05/14/2020	Circuit Court Order	C1923-29
05/21/2020	Circuit Court Order (Remote Appearances and Civil Matters)	C1930-47
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Report of Proceedings

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Report of Proceedings held on Jan. 24, 2020 regarding voluntary payment doctrine, whether statute could stand if another is deemed unconstitutional, and notion of a protest fund	R86-121
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CERTIFICATE OF FILING AND SERVICE

I certify that on December 9, 2020, I electronically filed the foregoing Brief and Appendix 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.

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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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