Nos. 126086, 126087 & 126088 (consolidated)

IN THE SUPREME COURT OF ILLINOIS

REUBEN D. WALKER and M. STEVEN DIAMOND, Individually and on Behalf of Themselves and for the Benefit of the Taxpayers and on Behalf of All Other Individuals or Institutions Who Pay Foreclosure Fees in the State of Illinois, Plaintiffs-Appellees, v.	)	On Direct Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
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. and	)	No. 12 CH 5275
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.	)	Honorable John C. Anderson, Judge Presiding.

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES
REUBEN D. WALKER AND M. STEVEN DIAMOND

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ORAL ARGUMENT REQUESTED

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RESPONSE BRIEF OF PLAINTIFFS-APPELLEES
REUBEN D. WALKER AND M. STEVEN DIAMOND

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NATURE OF THE CASE

Plaintiffs-Appellees Reuben Walker and Steven Diamond filed a class action complaint challenging the validity of three statutes that imposed an additional fee on plaintiffs filing residential mortgage foreclosure complaints. The fee is deposited into the Foreclosure Prevention Program Fund, which is administered by the Illinois Housing Development Authority and used to fund community-based housing counseling and foreclosure prevention outreach programs, and to offset the costs incurred by municipalities and counties in maintaining and rehabilitating abandoned residential properties. See 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. On cross-motions for summary judgment, the circuit court held that the voluntary payment doctrine did not defeat Plaintiffs' claims. The circuit court further held that the statutes were unconstitutional under the Free Access, Due Process, Equal Protection and Uniformity Clauses of the Illinois Constitution.

Defendant-Appellant Andrea Chasteen, in her official capacity as the Clerk of the Circuit Court of Will County ("Will County"), and Intervenors-Defendants-Appellants People of the State of Illinois *ex rel*. Kwame Raoul ("State") and Dorothy Brown[1], in her official capacity as the Clerk of the Circuit Court of Cook County ("Cook County") appealed the circuit court's order directly to this Court.

[1] Dorothy Brown was originally named. Iris Martinez is the newly elected Clerk of the Circuit Court of Cook County.

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ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court properly determined that the voluntary payment doctrine did not defeat Plaintiffs' claims after it held an evidentiary hearing on the issue and heard the testimony of Plaintiff Walker.
2. Whether the additional fee imposed on Plaintiffs who filed residential foreclosure actions violated the state constitutional right to obtain justice freely, where the fee supported a general welfare program that related neither to the plaintiffs' litigation nor to the operation of the court system.
3. Whether the additional fee imposed on Plaintiffs who filed residential foreclosure actions violated the Due Process, Equal Protection and Uniformity Clauses of the Illinois Constitution by arbitrarily imposing the burden of funding a general welfare program on a narrow class of litigants.

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STATEMENT OF FACTS

(As a preliminary matter, this Court should disregard the newspaper articles and other secondary sources the State has submitted for the first time as "facts" in the Statement of Facts set forth in the State's Brief. Ill. S. Ct. R. 321 (eff. Feb. 1, 1994.)

A. The Statutes Involved.[2]

Plaintiffs Rueben D. Walker and Steven Diamond filed a class action challenging the constitutionality of the legislation that imposed an add-on fee on any Illinois litigant who files and action to foreclose a residential mortgage, 735 ILCS 5/15-1504.1, 20 ILCS 3805/7.30 and 20 ILCS 3805/7.31. (C953-68.) Plaintiffs asserted that legislation imposed an obligation on litigants such as themselves, to bear the ultimate cost of a fee for deposit into the Foreclosure Prevention Program Fund, a special fund created by the State Treasury. (*Id.*) Plaintiff Walker filed an action before the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, seeking a foreclosure of property located within Will County, under Docket No. 12 CH 02010. (C954.) At the time of filing, Walker paid a court filing fee assessed under the Foreclosure Prevention Program Fund. (*Id.*) Plaintiff Diamond filed a mortgage foreclosure action in the Circuit Court of Cook County, Illinois seeking to foreclose upon property located within Cook County, under Docket No. 15 CH 12027. (*Id.*) At the time of filing Diamond likewise paid the court filing fee that included a tax assessed under the Foreclosure Prevention Program Fund. (*Id.*)

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[2] As noted in the State's Brief, the statutes at issue have been amended several times during the pendency of this litigation, but the amendments, including amendments to the fee structure, have not changed the statutes' alleged infirmities. (C1724-25.) Plaintiffs' Brief also cites to the current versions of the statutes.

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Under the statutes at issue, the fees collected are used for community-based housing counseling services and foreclosure prevention counseling, including pre-purchase and post-purchase home counseling. The fees may also be applied as grant money for various maintenance projects at abandoned properties such as tree trimming, grass cutting, pest abatement, garbage removal and other repair or rehabilitation.

Section 15-1504.1 requires mortgage foreclosure plaintiffs to pay to the Clerk of the Circuit Court an additional fee for inclusion in the Foreclosure Prevention Program Fund, Foreclosure Prevention Program Graduated Fund, and Abandoned Residential Property Municipality Relief Fund. 735 ILCS 5/15-1504.1 (eff. June 5, 2019). The Circuit Court Clerk must remit 98 percent of the fees collected pursuant to this statute to the State Treasurer as follows: (A) 28% to the State Treasurer for deposit into the Foreclosure Prevention Program Graduated Fund; and (B) 70% to the State Treasurer for deposit into the Abandoned Residential Property Municipality Relief Fund. The Clerk of the Court may retain 2% of the fees collected to defray administrative expenses. 735 ILCS 5/15-1504.1.

Under 20 ILCS 3805/7.30(a) of the Housing Development Act, the Illinois Housing Development Authority shall establish and administer a Foreclosure Prevention Program Fund for the purposes of making grants to approved counseling agencies for approved housing counseling and approved community-based organizations for approved foreclosure prevention outreach programs. 20 ILCS 3805.30 (eff. Jan. 1. 2018). Grants from the Foreclosure Prevention Program Fund derived from the fees paid in section 15-1504.1 must be distributed as follows:

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(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.

(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 the City of Chicago or 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. 20 ILCS 3805/7.30 (b).

The Housing Authority shall also make grants from the Foreclosure Prevention Program Graduated Fund from the fees collected pursuant to Section 15-1504.1 as follows:

(1) 30% shall be used to make grants for approved housing counseling in Cook County outside the City of Chicago;

(2) 25% shall be used to make grants for approved housing counseling in the City of Chicago;

(3) 30% shall be used to make grants for approved housing counseling in DuPage, Kane, Lake, McHenry, and Will Counties; and

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(4) 15% shall be used to make grants for approved housing counseling in Illinois in counties other than Cook, DuPage, Kane, Lake, McHenry, and Will Counties. 20 ILCS 3805/7.30 (b-1).

As used in this statute, 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 the term expressly excludes a "not-for-profit corporation or other entity or person that provides legal representation or advice in a civil proceeding or court-sponsored mediation services, or a governmental agency." 20 ILCS 3805/7.30 (b-5). An "Approved foreclosure prevention outreach program" includes pre-purchase and post-purchase home ownership counseling, and education about the foreclosure process. *Id.*

Under 20 ILCS 3805/7.31 The Illinois Housing Development Authority shall make grants from the Abandoned Residential Property Municipality Relief Fund derived from fees paid as specified in section 15-1504.1 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

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(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. 20 ILCS 3805.31 (eff. June 11, 2013).

Under section 7.31(a), the monetary grants must be used for such things as cutting grass at abandoned properties, trimming trees and bushes, extermination of pests, removing garbage and graffiti, installing fencing, demolition and "repair or rehabilitation of abandoned residential property." 20 ILCS 3805/7.31(a).

B. Procedural History

Plaintiff Walker filed his original complaint on October 2, 2012 (C11-29), and on November 9, 2012, the court certified a class consisting of "all plaintiffs who paid the 735 ILCS 5/1404.1 fee." (C115.) Approximately a year later, the circuit court granted partial summary judgment in favor of Walker finding that the provision in section 15-1504.1 authorizing 2% of the at issue filing fee to be retained by the clerk for administrative expenses created an impermissible fee office. (C601-11.) On September 4, 2015, this Court reversed and remanded, holding that circuit court clerks did not fall within the state constitutional provision prohibiting fee officers in the judicial system. See *Walker v. McGuire*, 2015 IL 117138.

Upon remand, Plaintiff filed a second amended complaint adding Mr. Diamond as a plaintiff. (C953-68.) Plaintiffs alleged that the statutes violate separation of powers (Ill. Const. 1970, art. II, sec. 1); the equal protection, due process, and uniformity clauses (Ill. Const. 1970, art. I, sec. 2; art. IX, sec. 2) and the free access clause (Ill. Const. 1970, art. I, sec. 12) and as interpreted *Crocker v. Finley*, 99 Ill. 2d 444 (1984). (*Id.*)

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Plaintiffs, along with defendant Will County, intervenor-defendant the State, and intervenor-defendant Cook County filed cross motions for summary judgment. (C1023, C1061, C1133.) Cook County argued that Plaintiffs' constitutional claims failed under the voluntary payment doctrine because Plaintiffs did not pay the court filing fee under protest. (C1136, C1608.) Cook County later clarified that it was seeking dismissal on the merits rather than on Plaintiffs' alleged failure to plead duress in their complaint. (R. 89-90.) Plaintiffs argued in response that they paid the court filing fees under duress, as they had to pay the fees to file their mortgage foreclosure actions, and therefore the voluntary payment doctrine did not apply. (C1534-40, C1582-87, C1618-21, R86-122).

Neither Will County nor the State joined Cook County's argument that Plaintiffs' claims failed under the voluntary payment doctrine. At a hearing before Judge John Anderson on January 24, 2020 (R86-122), the assistant attorney general explained why the State was not arguing the voluntary undertaking doctrine as a defense in this action.

> "THE COURT: Now, the Will County Clerk and the Attorney General are not raising this argument?
> MR. BHAVE: The People are not.
> THE COURT: Is it because you guys think the argument stinks?
> MR. BHAVE: I don't know whether I can say it stinks. [Assistant State's Attorney] Mr. Castiglione has done a good job articulating it. We just don't agree with it.
> THE COURT: Why?
> MR. BHAVE: Well, our impression is that coming to a courthouse and the clerk's office will not accept the filing without the fee.
> THE COURT: Okay. And I'm not saying that's an unreasonable position to take. So, in your view, would there always be duress?
> MR. BHAVE: We have come to the conclusion within our office that in these court filing fees, and we have had some other court filing fee cases, especially in the realm of I think it was *Gassman*, a First District case that your office is familiar within.
> MR. CASTIGLIONE: Uh-huh.
> MR. BHAVE: Where our office has taken the position in court filing fees, you are essentially being denied access to the courts without the payment of the

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fee, so the payment of the fee is mandatory, obligatory. You have no other option but to pay the fee.

THE COURT: So, you would concede duress?

MR. BHAVE: In the court filing fees context, yeah, we would." (R. 94-95.)

After hearing argument on the voluntary payment doctrine, the circuit court requested an evidentiary hearing on the issue. (R. 100-101, 119-120). At the evidentiary hearing, Plaintiff Walker testified that he paid the court filing fee out of necessity to protect his mortgage interest in a residential property after the mortgagor stopped making mortgage payments. (R. 130-31.) Walker testified that he believed the court filing fees were required to file a mortgage foreclosure action in Will County (R. 131), and his attorney paid the filing fee of $476 and billed Walker for that amount. (R. 132.) Walker further testified that Will County's posted fee schedule from 2012 listed a flat filing fee of $476 for a residential mortgage foreclosure (R. 132), and at the time he paid the filing fee, he had no understanding that any portion of the required fee may have been utilized for illegitimate purposes. (R. 133.) Walker assumed the fee was required, and he likened the fee to the recording fee he was required to pay to record the mortgage and the deed. (R. 133.) Further, he testified that if the Will County Clerk had informed him that the mortgage foreclosure filing fee was voluntary and not required, he would not have paid it. (R. 138.)

C. The Circuit Court's Rulings.

The circuit court granted partial summary judgment in favor of Plaintiffs, finding that the challenged fee statutes violated the free access, due process and equal protection, and uniformity clause protections guaranteed by the Illinois Constitution. (C1719-37.) Before reaching the constitutional issues involved, the circuit court granted summary

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judgment for the State on Count IV of Plaintiffs' second amended complaint, which sought the creation of a protest fund, reasoning that a protest fund is a remedy and not a cause of action. (C1727-28.) The circuit court also ruled that the voluntary payment doctrine did not bar Plaintiffs' case because the duress exception applied for two independently sufficient reasons. (C1725-27.) First, the circuit court found that duress inherently existed under the analysis set forth in *Midwest Medical Records Association v. Dorothy Brown*, 2018 IL App. (1st) 163230, as Plaintiffs would have been restricted from reasonably accessing the court system had they not paid the required court fee. (C1727.) The circuit court also held that Plaintiff Walker's testimony established that he paid the filing fee under duress as the term has been used in connection with the voluntary payment doctrine. (*Id.*) The circuit court found Walker's testimony to be "both compelling and credible." (*Id.*)

Turning to the constitutional challenges, the circuit court held that Plaintiffs failed to meet their burden to demonstrate that the statutes violated separation of powers principles under the Illinois Constitution that the "legislative, executive and judicial branches are separate. No branch shall exercise power properly belonging to another." Ill. Const. 1970 art. II, sec. 1. (C1729-30.) According to the circuit court, the Illinois Housing Development Authority, and not the circuit clerks, administers the funds collected under the statutes. (C1730.)

The circuit court next examined Plaintiffs' claim under the Free Access Clause, reasoning that it was most directly dispositive of the case. (C1730-33.) According to the circuit court, the "analytical theme" articulated in [*Crocker v. Finley*, 99 Ill. 2d 444 (1984)] and running through the cases interpreting the Free Access Clause of the Illinois

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Constitution (Ill. Const. 1970, art. IIll, sec. 12), 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." (C1732.) The circuit court rejected the State's arguments that 20 ILCS 3805/7.30 provided counseling to those who are in danger of mortgage foreclosure and thus decreased the number of mortgage foreclosure filings, noting that the statute also provides for counseling services to individuals who do not even have mortgages. (C1732.) The circuit court found that the "tax funded neighborhood beautification plan" set forth in 20 ILCS 3805/7.31 was even more removed from the operation and maintenance of the courts. (C1732-33.) According to the circuit court:

> "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 the 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.' 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 court." 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 violated the Free Access Clause. The fee imposes an unreasonable burden on Plaintiffs' access to the court system. See *Crocker,* 99 Ill. 2d at 455." (C1733.)

The circuit court ruled that the challenged fees also violated the due process and equal protection clauses (Ill. Const. 1970, art. I, sec. 2) for the reasons articulated in *Crocker*. (C1733-34.) Finally, the circuit court analyzed Plaintiffs' challenge to the

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statutes under Uniformity Clause (Ill. Const. 1970, art. IX, sec. 2). (C1734-36.) The circuit court found that the statutes' taxing classification, which burdened only those persons or entities filing mortgage foreclosure cases, did not bear a reasonable relationship to the purpose of the tax. (C1735-36.) Accordingly, the circuit court held that the statutes also violated the Uniformity Clause (Ill. Const. 1970, art. IX, sec. 2). (C1736.)

The circuit court held that the fee provisions in the three statutes, in all their iterations, from the date the underlying mortgage cases were filed through the present, were facially unconstitutional and in violation of the Free Access, Equal Protection, Due Process and Uniformity Clauses of the Illinois Constitution of 1970. (C1736.) The circuit court further ordered that its findings of unconstitutionality were necessary as there were no alternative non-constitutional grounds, and the statutes were not severable. (C1736.)

On May 14, 2020, the circuit found that there was no just reason for delaying enforcement or appeal of its March 2, 2020 order under Illinois Supreme Court Rule 304(a). (C1928.) Defendant-Appellant Will County, and Intervenors-Defendants-Appellants the State and Cook County appealed the circuit court's order directly to this Court and under Supreme Court Rule 302(a)(1), and the Court subsequently consolidated the three appeals. (C1948, C1976, C2004)). The State and Cook County have filed briefs in this matter. Will County has not filed a brief and has instead filed a motion to adopt the State's brief (but not the brief of Cook County).

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ARGUMENT

I. STANDARD OF REVIEW

A. Summary Judgment.

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 the parties have filed cross-motions for summary judgment, they agree that the case involves only legal questions and ask the court to decide the case on the existing record. *Dynak v. Bd. Of Educ. Of Wood Dale Sch. Dist.* 7, 2020 IL 125062, ¶ 15.

B. The Voluntary Payment Doctrine.

The circuit court found that the duress exception applied to the voluntary payment doctrine for two independently sufficient reasons. First, the circuit court followed the reasoning of *Midwest Medical Records Association, Inc. v. Brown,* 2018 IL App. (1st) 163230, and thus found 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." To the extent the circuit court's ruling was based on principles of law and case decisions, the standard of review is *de novo*. *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 429 (2009).

However, the circuit court also held an evidentiary hearing and heard testimony from Plaintiff Walker about the circumstances that led him to pay the court filing fee and whether he paid the court fee voluntarily. The circuit court found the testimony of Walker to be both "compelling and credible." Factual determinations of a trial court are reviewed under the manifest weight of the evidence standard and will be reversed only where the

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opposite conclusion is clearly evident, or the finding is arbitrary, unreasonable or not based in evidence. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 17.

C. The Constitutionality of the Statutes.

The constitutionality of a statute is a question of law that is reviewed *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003). To overcome the presumption of constitutionality, the party challenging the statute must clearly establish the statute's invalidity. *People v. Mosely*, 2015 IL 115872, ¶ 22. In construing statutory language, a court must ascertain and give effect to the legislature's intent, keeping in mind that the best and most reliable indicator of that intent is the statutory language itself, given its plain and ordinary meaning. *People v. Perez*, 2014 IL 115927, ¶ 9.

When examining the constitutionality of a statute, a court will ordinarily apply the rational basis test. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 122 (2004). Under the rationale basis test, a court must identify the public interest that the statute was intended to protect, examine whether the statute bears a reasonable relationship to that interest, and determine whether the method used to protect or further that interest is reasonable. *Arangold Corp.*, 204 Ill. 2d at 147. However, a statute that impinges on a fundamental right is subject to strict scrutiny. *Lulay v. Lulay*, 193 Ill. 2d 455, 470 (2000). "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*, 193 Ill. 2d at 470.

The Court should apply the strict scrutiny standard when reviewing the challenged statutes because the statutes impinge on the fundamental right to access the courts. The free access clause of the Illinois Constitution provides that "[e]very person

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shall find a certain remedy of the laws for all injuries and wrongs," and "shall obtain justice by law, freely, completely, and promptly." Ill. Const. 1970, art. I, sec. 12. The free access clause serves to protect litigants from the imposition of fees that interfere with their rights to a remedy in the law or impede the administration of justice. *Rose v. Pucinski*, 321 Ill. App. 3d 92, 99 (1st Dist. 2001).

There is no fundamental right to be free of *all* court filing fees as long as the fees are related to the services rendered by the courts or the maintenance of the courts. *Crocker v. Finley*, 99 Ill. 2d 444, 454 (1984). Such fees do not violate the free access clause when they are in the nature of reimbursements for services rendered by the court. *Crocker*, 99 Ill. 2d at 454. However, as this Court reasoned in *Crocker*, the legislature may not impinge on a litigant's right to obtain justice freely by imposing additional court fees to fund general revenue programs. *Crocker*, 99 Ill. 2d at 455.

In *Boynton v. Kusper*, this Court analyzed whether strict scrutiny or the lesser rational relation standard applied to a constitutional challenge to a statute that imposed a tax on marriage licenses for the purpose of funding domestic violence shelters. 112 Ill. 2d 356 (1986). Applying the analysis in *Crocker*, this Court reasoned that although marriage was a fundamental right, not every regulation relating to the prerequisites to marriage was subject to strict scrutiny. *Boynton*, 112 Ill. 2d at 368. Nonetheless, this Court held that the imposition of a special tax upon the issuance of a marriage license to fund domestic violence shelters imposed a direct impediment to the exercise of the fundamental right to marry and was therefore subjected to the heightened test of strict scrutiny and not to the lesser rational-relation test. 112 Ill. 2d at 369.

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"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important State interests and is closely tailored to effectuate only those interests." *Id.* As this Court observed, although the tax on marriage licenses imposed by the challenged statute was nominal, "[o]nce it is conceded that the State has the power to impose a special tax on a marriage license, that is to single out marriage for special tax consideration, there is no limit on the amount of the tax that may be imposed." *Id.* at 369.

This Court has held that the activities being taxed in both *Crocker* and *Boynton* were constitutionally protected. *Arangold Corp.*, 204 Ill. 2d at 151. According to the *Arangold Corp* Court:

> "In *Crocker* and *Boynton*, this court found the relationship between the dissolution actions and marriage licensed on one hand and domestic violence programs on the other to be too remote to permit the tax to stand. The main thrust of the *Crocker* decision was its holding that the tax unconstitutionally burdened litigants' access to the courts." In *Boynton*, while we engaged in a rational basis analysis, we also noted that the tax directly impeded the fundamental right to marry and that it failed to satisfy the heightened strict scrutiny standard of review." 204 Ill. 2d at 150.

The statutes at issue before this Court address a fundamental constitutionally protected right as they create a "fee" imposed on litigants to be used outside of the judicial system for, *inter alia*, payment to various private groups to provide credit counseling and to assist in the upkeep of abandoned residential property. As the *Crocker* Court reasoned, "if 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." 99 Ill. 2d at 455. Because access to the courts is constitutionally protected, the strict scrutiny standard should apply. The proponents of the

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legislation now being challenged have failed to demonstrate that the legislation has been narrowly tailored to effectuate a compelling state interest.

Moreover, as the circuit court observed, the statutes cannot survive scrutiny under the rational basis test based on the analysis employed in *Crocker*. Although the legislature has the power to tax, that power may not be used arbitrarily and the classification of those taxed must be reasonable. *Crocker*, 99 Ill. 2d at 456-57. Critically, to survive challenge under even a rational basis standard, "court filing fees and taxes may be imposed only for purposes relating to the operation and maintenance of the courts." *Id.* at 454.

Defendant and Intervenors argue that under the rational basis test, the fees must be upheld if they were "reasonably designed to remedy the particular evil that the legislature was targeting" and "if any set of facts can reasonably be conceived to justify it." While the cases cited in their briefs may correctly state general principles of constitutional law and statutory construction in challenges to legislation, none of those decisions address the fact situation before this Court. This matter is more correctly resolved by the principles articulated by this Court in *Crocker* and *Boynton*.

II. THE VOLUNTARY PAYMENT DOCTRINE DID NOT APPLY AS PLAINTIFFS WOULD HAVE FORFEITED THEIR ABILITY TO ACCESS THE COURTS HAD THEY NOT PAID THE CHALLENGED FEE.

A. Plaintiffs Did Not Pay the Fee Voluntarily.

Cook County argues that Plaintiffs cannot be adequate class representatives because they voluntarily paid the court fees. (See Cook County's Brief, pp. 5-6.) The cases Cook County cites for this proposition address whether class certification is appropriate. Here, the class has been certified since 2012. (C115.) In any event and for

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the reasons discussed herein, Cook County's argument fails because Plaintiffs did not pay the court fee voluntarily.

"The common-law voluntary payment doctrine embodies the ancient and universally recognized rule that money voluntarily paid under a claim of right to payment and with knowledge of the facts cannot be recovered back on the ground that the claim was illegal." *McIntosh v. Walgreens Boots Alliance Inc.*, 2019 IL 123626, ¶ 22 (citations omitted). "To avoid application of the voluntary payment doctrine, it is necessary to show not only that the claim asserted was unlawful but also that the payment was not voluntary, such as where there was some necessity that amounted to compulsion and payment was made under the influence of that compulsion." *McIntosh*, 2019 IL 123626 at ¶ 23.

Accordingly, a payment is considered "involuntary" where: "(1) the payor lacked knowledge of the facts upon which to protest the payment at the time of payment, or (2) the payor paid under duress." *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). This Court has long recognized that payment may not be voluntary where the payor was compelled to make the unavoidable payment to protect a business or property interest:

> "The ancient doctrine of duress of person, and later of goods, has been relaxed and extended so as to admit of compulsion of business and circumstances, and perhaps a telephone corporation having a system in general operation and connected with customers and other business houses might reasonably influence a business house to make an unwilling payment of an amount illegally demanded which would make payment compulsory. The telephone has become an instrument of such necessity in business houses that a denial of its advantages would amount to a destruction of the business." *Illinois Glass Co. v. Chicago Tel. Co.*, 234 Ill. 535, 541 (1908).

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In contrast, fees are *voluntary* where they are within the power of the payee to avoid. *Ross v. City of Geneva*, 43 Ill. App. 3d 976, 984 (2nd Dist. 1976). However, the mere payment, without protest, of unavoidable fees or charges does not constitute waiver of a right to recovery. *Ross*, 43 Ill. App. 3d at 984. "In determining whether payment is made under duress, the main consideration is whether the party had a choice or option, i.e., whether there was some actual or threatened power wielded over the payor from which he had no immediate relief and from which no adequate opportunity is afforded the payer to effectively resist the demand for payment." *Midwest Medical Records Association, Inc. v. Brown,* 2018 IL App (1st) 163230, ¶ 28.

The kind of duress necessary to establish payment under compulsion has been expanded over the years to include economic duress and business necessity. *Midwest Medical Records*, 2018 IL App (1st) at ¶ 24. For example, in *Norton v. City of Chicago*, the appellate court held that the voluntary payment doctrine did not bar the plaintiffs' complaint even though the plaintiffs had paid without protest three-dollar penalty fees added onto parking fines. 293 Ill. App. 3d 620, 627 (1st Dist. 1997). According to the *Norton* Court, the demand notices implied that failure to pay the fine would result in steeper penalties and/or court action and advised the plaintiffs not to contact the traffic court. *Norton*, 293 Ill. App. 3d at 628. The court ruled that because the demand notices were coercive and left the plaintiffs with little choice but to comply, the plaintiffs' payments were necessarily involuntary and made under duress. *Id.*

In *Getto v. City of Chicago*, the plaintiff challenged the method defendants used in calculating a tax imposed on telephone service. 86 Ill. 2d 39, 42 (1981). The defendants argued that the plaintiffs paid the telephone bills without protest. *Id.* at 49.

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The plaintiff asserted in response that he made the payments under compulsion and they were thus involuntarily because he feared that the defendant telephone company would terminate his telephone service if he did not pay the tax. *Id.* at 46. The *Getto* Court reasoned:

> "Even were it to be held that the plaintiff had sufficient knowledge of all the facts to permit a conclusion that all payments *** were voluntary, we judge that the implicit and real threat that phone service would be shut off for nonpayment of charges amounted to compulsion that would forbid the application of the voluntary payment doctrine." *Id.* 86 Ill. 2d at 51.

In *Midwest Medical Records Association*, the case most analogous to the present action, the plaintiffs filed their claim after each were charged a $60 filing fee for filing motions to reconsider interlocutory orders. 2018 IL App (1st) 163230, ¶ 3. The plaintiffs had each paid the filing fees in the separate underlying cases; and they had not paid the fees under protest. *Id.* at ¶ 3. The plaintiffs then instituted lawsuits, arguing that the fees were unauthorized and that they had paid the fees involuntarily. *Id.* According to the plaintiffs, they paid the fees under duress because they would have otherwise been denied their constitutional right to challenge interlocutory orders, thus subjecting them to adverse judgments and their attorneys to malpractice claims. *Id.* at ¶ 26. The appellate court agreed, reasoning that although the plaintiffs did not plead in their complaint that they paid the court fee under protest, "it is indisputable that they would have forfeited the ability to challenge the interlocutory orders if they had not paid the filing fee as the Clerk would have refused to accept their motions." *Id.* at ¶ 32.

In the present matter, Plaintiffs, like the plaintiffs in *Midwest Medical Records*, did not voluntarily pay the court fees; they had to pay the posted filing fee to be permitted access to the courts. Plaintiffs were required to pay the court fee to proceed with their

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mortgage foreclosures and protect their property interests; and they could not have availed themselves of the judicial process without first making the required payment. Plaintiffs refusal to pay the fee would have immediately resulted in loss of access to the courts.

B. The Circuit Court Neither Misinterpreted *Midwest Medical Records* nor Misapplied the Facts of That Case to the Present Matter.

Cook County argues that the circuit court erred in ruling that the duress exception to the voluntary undertaking doctrine applied, in part because it misinterpreted the "nuanced" finding of *Midwest Medical Records*. (Cook County's Brief, p. 9.) According to Cook County, "*Midwest* found that at a minimum, the circuit court should not have resolved the issue of duress as a matter of law on the pleadings, as it is generally a question of fact." (Cook County's Brief, p. 7.) Cook County argues that "[w]hile *Midwest* refrained from deciding duress as a matter of law based upon what was pled in the complaint, the circuit court did precisely that." (Cook County's Brief, p. 9.) This argument is unavailing for several reasons. First, Cook County sought the application of the voluntary undertaking doctrine in its motion for summary judgment. (R89.) When parties file cross-motions for summary judgment, they agree that only a question of law is involved, and the parties invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. Counsel for Cook County stipulated that Cook County was not seeking dismissal on the pleadings and the issue of whether the Plaintiffs paid the court fees voluntarily should be resolved on the merits. (R90.)

Moreover, the circuit court held an evidentiary hearing (R123-65) wherein Plaintiff 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 in the

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underlying case. (R130-31.) He further testified that he understood that he had to pay the fee to file his mortgage foreclosure lawsuit, and he was not aware that he could pay the fees under protest. (R131-33, R136.) According to Plaintiff Walker, he would not have paid the fee if he knew he had had any choice in the matter. (R138.) The circuit court found Plaintiff Walker's testimony "both compelling and credible" (C1727) and Cook County has not demonstrated that the circuit court's factual determinations are against the manifest weight of the evidence. *Hartney Fuel Oil Co.*, 2013 IL 115130, ¶ 17.

C. *McIntosh v. Walgreens Boots Alliance, Inc.* Is Not Controlling as the Plaintiff in That Case Never Argued That the Payment of a Tax on Bottled Water Was Made Under Duress.

Cook County maintains that *McIntosh v. Walgreens Boots Alliance, Inc.* is controlling. In *McIntosh*, the plaintiff brought a class action against a retailer alleging that the retailer had violated the Consumer Fraud and Deceptive Practices Act by unlawfully collecting Chicago's bottled water tax on retail sales of beverages that were exempt from the tax. 2019 IL 123626, ¶ 1. Notably, the plaintiff in *McIntosh* did not argue that he was compelled to pay the water tax. He instead argued that his payment was procured by fraud or deception. *McIntosh*, 2019 IL 123626, ¶ 22. The *McIntosh* plaintiff likely did so because bottled water is not deemed a necessity. See *Isberian v. Village of Gurnee*, 116 Ill. App. 3d 146, 151 (1st Dist. 1983) (holding that plaintiff seeking relief from a $0.25 tax imposed on amusement park admission ticket failed to demonstrate duress because tickets to an amusement park are not necessities). As the supreme court has held, "duress exists where the taxpayer's refusal to pay the tax would result in loss of access to a good or service considered essential." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23-24 (2004). Clearly, the filing of a mortgage foreclosure proceeding as

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the only legal means to protect and recover a property asset merits a different consideration than a plaintiff's purchase of carbonated water solely to form a legal basis to challenge a fee.

D. Neither the State nor Will County Joined Cook County's Argument That Plaintiffs' Claims Fail Under the Voluntary Payment Doctrine, and the State Made Clear Its Position That the Court Fees Were Necessarily Paid Under Duress.

Cook County appears to argue that the circuit court impermissibly relied on statements from the Assistant Attorney General to reach its conclusion that the voluntary payment doctrine does not apply. (Cook County's Brief, pp. 9-10.) However, the circuit court's order expressly sets forth Judge Anderson's reasoning and his consideration of both the case law and the testimony of Plaintiff Walker. (C1719-37.) Cook County's argument that the assistant attorney general engaged in "imprecise phrasing" (Cook County's Brief, pp. 9-10) is likewise contradicted by the record. Neither Will County nor the State joined in Cook County's argument that Plaintiffs' claims failed under the voluntary payment doctrine. At a hearing before Judge John Anderson, the assistant attorney general unequivocally stated the State's position, "[w]here our office has taken the position in court filing fees, you are essentially being denied access to the courts without payment of the fee, so the payment of the fee is mandatory, obligatory. You have no other option but to pay the fee." (R. 94-95.)

E. The Tax Challenge Cases Cited by Cook County Are Readily Distinguishable From the Present Matter as Plaintiffs Were Required to Pay a Filing Fee to Access the Courts.

Cook County argues that the present matter is akin to *Freund v. Avis Rent-A-Car System, Inc.* 114 Ill. 2d 73 (1986). In *Freund*, car rental customers asserted that they had been overcharged because the state and local taxes had not been properly calculated on

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their car rental receipts. 114 Ill. 2d at 75. However, because the car rental agreement forms provided detailed itemizations of both the tax rates and the items being taxed, the *Freund* Court reasoned that plaintiffs were precluded by the voluntary payment doctrine from maintaining their action because they had not paid the fee under protest. *Id.* at 83. The car rental agreement forms contained sufficient information from which plaintiffs could have determined to protest the charges. *Id.* at 82-83.

There are critical differences between *Freund* and this matter. First, Plaintiff Walker testified that the posted filing fee of $476 for mortgage foreclosure actions was a flat fee and neither he (or his attorney) had any reasonable way to know at the time they paid the fee that any portion of the fee was being used for an impermissible purpose. (R132-33); See *Geary*, 129 Ill. 2d at 293 (a payment is involuntary where the payor lacked knowledge of the facts upon which to protest the payment at the time of payment.) Second, the plaintiffs in *Freund* did not argue that they paid the charges set forth in the car rental agreement form under duress. Here, Walker testified that he (and his attorney) reasonably believed he had no choice but to pay the filing fee to gain access to the courts. (R132-33.)

The other cases cited by Cook County, *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62 (2008), and *Lusinski v. Dominick's Finer Foods, Inc.*, 136 Ill. App. 3d 640 (1st Dist. 1985), stand for the general proposition that under the voluntary payment doctrine, a taxpayer may not recover taxes voluntarily paid, even if the taxing body assessed or imposed the taxes illegally, unless the taxpayer meets certain statutory requirements. Generally, taxes paid voluntarily though erroneously cannot be recovered without statutory authorization.

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McIntosh, 2019 IL 123626 at ¶ 25. In *Hartney Fuel Oil*, the fuel company paid certain retail occupation taxes under protest by suing for a refund under the State Officers and Employees Money Disposition Act ("Protest Fund Act") (30 ILCS 230/1 et seq. (West 2008)). 2103 IL 115130, ¶ 11. In *Empress Casino*, the plaintiffs sought a declaration that legislation imposing surcharges on river boat casinos was unconstitutional after the casinos paid the surcharge under protest under the Protest Fund Act. 231 Ill. 2d at 68. In *Lusinski*, the plaintiff shopper brought a class action suit challenging a state tax on the value of non-reimbursable grocery store coupons. 136 Ill. App. 3d at 640-41. On appeal, the *Lusinski* Court upheld the dismissal of the plaintiff's complaint because the plaintiff had failed to follow the procedure outlined in the Protest Fund Act and failed to show she paid the tax under duress or without knowledge of the facts. 136 Ill. App. 3d at 644.

However, a taxpayer need not utilize the Protest Fund Act or any other statutory mechanism for the recovery of taxes paid *involuntarily*. See *Geary,* 129 Ill. 2d at 408 (the plaintiffs' challenge to a municipal retail tax on female hygiene products did not need to proceed under the Protest Fund Act because the plaintiffs' allegations established that they had paid the tax under duress). Moreover, *Hartney Fuel Oil Co.*, *Empress Casino Joliet Corp.*, and *Lusinski* are not factually analogous to the present matter. Notably, the *Lusinski* Court distinguished "duress cases" where the litigants had no reasonable means of recourse except to pay the tax and held that the *Lusinski* plaintiff's inability to use a discount coupon unless she paid the disclosed tax did not rise to the level of duress. 136 Ill. App. 3d at 645.

Here, Plaintiffs established that they paid the court filing fees under duress as they needed to expeditiously bring their mortgage foreclosures before the court. Plaintiffs

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faced an immediate financial threat if they failed to pay the required court fee. (R130-31.) The Plaintiffs' predicament was analogous to that of the plaintiffs in *Midwest Medical Records*. The circuit court correctly ruled that the voluntary payment doctrine does not defeat Plaintiffs' claims.

III. THE CIRCUIT COURT DID NOT ERR IN ITS DETERMINATION THAT THE STATUTES VIOLATED THE FREE ACCESS CLAUSE, WHICH PROTECTS LITIGANTS FROM THE IMPOSITION OF FEES THAT UNREASONABLY INTERFERE WITH THEIR RIGHT TO SEEK A REMEDY IN THE LAW.

A. Under the Free Access Clause, Court Filing Fees Must Be Related to Services Rendered by the Courts or for Maintenance of the Court System.

The Illinois Constitution's Free Access Clause provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs" and "shall obtain justice by law, freely, completely and promptly." Ill. Const. 1970, art. I, sec. 12. The free access clause serves to protect litigants from the imposition of fees that interfere with their rights to a remedy in the law or imped the administration of justice. *Rose v. Pucinski*, 321 Ill. App. 3d 92, 99 (1st Dist. 2001). The free access clause qualifies the due process standard by imposing the additional requirement that the court filing fees must be related to the operation and maintenance of the court system. *Rose*, 321 Ill. App. 3d at 99.

Under the free access clause, court filing fees must be related to services rendered by the courts or maintenance of the courts; filing fees that go to fund general welfare programs and not to court-related services are unconstitutional. *Crocker,* 99 Ill. 2d at 454-555. In *Crocker*, this Court struck down as unconstitutional a $5 filing fee charged in dissolution of marriage cases to fund a domestic violence program. The *Crocker* court reasoned that "[d]issolution of marriage petitioners should not be required, as a condition

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of their filing, to support a general welfare program that relates neither to their litigation nor to the court system." *Id.* at 445. This Court held 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." *Id.* at 454.

The defendants in *Crocker* argued that the support and counseling received from domestic violence shelters would allow potential litigants to use the court system more efficiently in much the same way that a county law library improves the administration of justice. *Id.* at 456. The *Crocker* Court was not persuaded, and instead found the asserted relationship was simply too remote to save the $5 tax from its constitutional shortcomings. *Id.* "If the domestic violence services are deemed sufficiently court related to validate the funding scheme, countless other social welfare programs would qualify for monies obtained by taxing litigants." *Id.*

The *Crocker* Court clarified the difference between a fee, which is regarded as compensation for services rendered, and a tax, which is a charge having no relation to the services rendered and is assessed to provide general revenue. *Id.* at 452. "Thus, court charges imposed on a litigant are fees if assessed to defray the expenses of this litigation. On the other hand, a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax." *Id.*

Court fees have been held constitutional in *Lipe v. O'Connor*, 201 IL App (3d) 130345 (2014), *Ali v. Danaher*, 47 Ill. 2d 231 (1970), *Wenger v. Finley*, 185 Ill. App. 3d 907 (1st Dist. 1989), *Zamarron v. Pucinski*, 282 Ill. App. 3d 354 (1st Dist. 1996) and *Mellon v. Coffelt*, 313 Ill App. 3d 619 (2nd Dist. 2000). In *Lipe*, the court determined

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that a fee to fund neutral child custody exchange sites served to improve the administration of the courts. *Lipe*, 2014 IL App (3d) 130345, ¶ 18. In *Ali*, a $1 county law library fee charged on all civil litigants was determined not to violate the free access clause because the county law libraries were opened to all litigants and was conductive to a proper and even improved administration of justice. 47 Ill. 2d at 237. Similarly, in *Wenger*, a court fee assessed to fund dispute resolution centers was upheld as it related to the operation and maintenance of the courts. 185 Ill. App. 3d at 915. A fee to fund court automation was found to benefit the entire court system in *Zamarron*, 282 Ill. App. 3d at 660, and a fee to fund a court-annexed arbitration program was found to benefit the overall administration of the courts in *Mellon*, 313 Ill. App. 3d at 631. The validity of such fees in these cased depended entirely on whether they were deemed necessary to support the court system or to defray the expenses of litigation.

B. The Challenged Fees Impermissibly Fund a General Welfare Program Outside the Control of the Judiciary.

Under *Crocker*, court filing fees and taxes may be imposed only for purposes relating to the operation and the maintenance of the courts. 99 Ill. 2d at 454. Here, the fees neither fund court programs nor defray court expenses. The fees are instead a revenue-raising measure designed to fund a particular statewide social program administered outside the control of the judiciary by the Illinois Housing Authority Development Authority ("IHDA"). The IHDA utilizes the funds to make monetary grants to "approved counseling agencies for housing counseling and community organizations for foreclosure prevention outreach programs" and to finance such things as cutting grass, tree trimming and rehabilitating abandoned residential property. The challenged fees are

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neither controlled nor administered by the courts, and they have no real relation to the administration of the court system.

735 ILCS 5/15-1504.1 requires mortgage foreclosure plaintiffs to pay an additional court fee to fund the Foreclosure Prevention Fund, a special fund created by the State Treasury. The circuit court clerks must submit the fees collected for deposit in the Foreclosure Prevention Graduated Program Fund and the Abandoned Residential Property Municipality Relief Fund. The IHDA uses the money collected from foreclosure plaintiffs to fund community-based foreclosure prevention outreach programs and housing counselling. Under the statute, such "approved foreclosure prevention outreach programs" include pre-purchase and post purchase home counseling, and education regarding the foreclosure process. 20 ILCS 3805/7.30 (b-5).

As the circuit court rightfully noted, such community-based counseling is available to people who do not even have mortgages. (C1732.) The State counters that the "circuit court's reasoning ignored that people who are not currently mortgagors may take out mortgages in the future." (State's Brief, p.21.) While that may be so, this Court dealt with and rejected similar arguments in *Crocker*. "If the domestic violence services are deemed sufficiently court related to validate the funding scheme, countless other social welfare programs would qualify for monies obtained by taxing litigants." *Crocker*, 99 Ill. 2d at 455-56. Here, the possibility that some persons who receive such community-based counseling may take out mortgages in the future and may also need to seek redress through the court system is simply too remote to survive scrutiny under the free access clause. As the circuit court reasoned, this fee represents the type of social welfare program *Crocker* warned about and that the free access clause prohibits. (C1732.)

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Under 20 ILCS 3805/7.31, the Illinois Housing Development Authority uses fees collected from foreclosure plaintiffs to make monetary grants for such things as cutting grass at abandoned properties, trimming trees and bushes, extermination of pests, removing garbage and graffiti, installing fencing, demolition and "repair or rehabilitation of abandoned property." 20 ILCS 3805/7.31 (eff. June 11, 2013). The circuit court found these community benefits to be even more removed from the operation and maintenance of the courts. (C1732-33.) Property that is in foreclosure has not been abandoned. Regardless, foreclosure plaintiffs must pay as a condition precedent for filing their foreclosure actions, a tax to be used, in part, to maintain someone else's private but abandoned property and to defray the costs borne by municipalities in the upkeep of vacant property. Court filing fees used for the purpose of trimming bushes and trees and cutting grass at vacant properties across the state bears no relation to the operation and maintenance of the courts.

Whether the statutes at issue have a laudable purpose is of no moment. The legislation violates the prohibition on the use of court fees charged to litigants who file matters before the judicial branch for activities or purposes outside the court system.

C. The Defendant and Intervenors' Argument That to Survive Scrutiny Under the Free Access Clause, the Foreclosure Fees Need Only Bear a "Conceivable" Relationship to Court Operations Is Belied by This Court's Analysis in *Crocker*.

Due Process requires that the legislation bear a reasonable relationship to a public interest and that the means adopted are a reasonable method of accomplishing that objective. *Crocker*, 99 Ill. 2d at 456. The free access clause of the Illinois Constitution qualifies the due process standard by imposing the further requirement that court filing fees must relate to the operation and maintenance of the court system. *Id.*

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The State argues that this Court should reverse the circuit court if there is "any conceivable, reasonable relationship between the foreclosure fee and court operations or maintenance." (State's Brief, p. 18.) Any general welfare program may conceivably have an indirect tangential benefit to the court system. Funding for road improvements and public transportation may provide easier access to the courts; and funding for after school programming may help young people avoid trouble. However, that rationale has been squarely rejected by this Court in *Crocker*, and under *Crocker* the statutes are unconstitutional under even a rationale and reasonable basis test because the fees paid by mortgage foreclosure plaintiffs fund general welfare programs outside of and unrelated to the operation of the courts. 99 Ill. 2d at 455.

The State also likens the challenged fee to the fee to fund county law libraries that was at issue in in in *Ali v. Danaher* and argues that county law libraries provided only an indirect benefit to the courts. 47 Ill. 2d 231 (1970). However, as the *Ali* Court determined (in the pre-Internet era), the county law libraries *directly* benefitted the court system and were conducive to the administration of justice because the county law libraries provided attorneys, judges, and litigants free access to legal resources. *Ali*, 47 Ill. 2d at 237. Here, the challenged statutes do not directly benefit mortgage foreclosure litigants or the court system.

D. There Is Already in Place a Court-Managed Program to Address the Impact of Mortgage Foreclosures on the Court System.

Although the challenged statutes have been in effect since 2010, this Court has not relied on the legislative branch to address the impact of mortgage foreclosures on the courts. When faced with an increase in mortgage foreclosure cases and the resultant burden on the courts, this Court adopted its own rules in 2013. Ill. S. Ct. R. 99.1 (eff.

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Mar. 1, 2013). The changes in Illinois foreclosure practice embodied in Supreme Court Rule 99.1 establish court protocols that require lenders to provide homeowners with information regarding the foreclosure process, seek modification of loans for eligible homeowners before they complete foreclosures and provide sufficient notice to homeowners throughout the foreclosure process, up to and including the actual sale of the foreclosed home. Ill. S. Ct. R. 99.1 (eff. Mar. 1, 2013); Ill. S. Ct. R. 113 (eff. May 1, 2013); and Ill. S. Ct. R. 114 (eff. May 1, 2013).

Illinois Supreme Court Rule 99.1 also requires each judicial circuit electing to establish a mortgage foreclosure mediation program to adopt rules for the conduct of the mediation proceedings and to establish and submit to this Court a plan for funding the mediation proceedings. Such plans must address any costs charged to a participant in a mortgage foreclosure case and provide a sustainability plan for funding mortgage foreclosure mediations. Ill. S. Ct. R. 99.1. According to the Committee Comments:

> "The plan required in paragraph (c) recognizes the Supreme Court's need to understand the extent of the mortgage foreclosure problem in the county or counties in each judicial circuit applying for approval. The Supreme Court should be provided the history of the mortgage foreclosure filings in the judicial circuit, the available resources, and the staffing scope of the judicial circuit that shows that the mortgage foreclosure program is realistically attainable for the judicial circuit. The judicial circuit applying for approval should provide a plan that is comparable in scope, size and capacity to the mortgage foreclosure problem facing that circuit. Additionally, the plan should include information about available

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resources for qualified homeowners that will contribute to the successful implementation of such a program." Ill. S. Ct. R. 99.1, Committee Comments.

Under Rule 99.1, each circuit court has the flexibility to assess the need for and scope of any proposed mortgage foreclosure mediation program for litigants within the county; and each circuit court can best determine how to fund and sustain such local programing. The circuit courts manage and fund mortgage foreclosure mediation proceedings themselves, and any fee a circuit court collects from a mortgage foreclosure litigant may be properly used to defray the circuit court's expenses in implementing that court's foreclosure mediation program.

Conversely, the fee statutes at issue do not fund *any* court programs. The fee statutes neither support the court system nor defray expenses of the court system. To the contrary, under 20 ILCS 3805/7.30, the term "approved community-based organizations" expressly excludes a "not-for-profit corporation or other entity or person that provides legal representation or advice in a civil proceeding or court-sponsored mediation services." 20 ILCS 3805/7.30 (b-5). While the fee statutes may serve worthwhile causes, they serve no judicial function. Fees that are not deemed to be for court-related purposes are violative of the open access to the courts guarantee set forth in the Illinois Constitution. *Crocker*, 99 Ill. 2d at 455. "If the right to obtain justice feely 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." *Id.*

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E. The Statutes Impose an Impermissible Litigation Tax on Mortgage Foreclosure Litigants.

As the circuit court observed, "[t]he statutory scheme is tantamount to a litigation-tax funded neighborhood beautification plan." The challenged fees fund a social welfare program under the operation of the executive branch of government and impose an impermissible tax upon foreclosure plaintiffs attempting to make use of the courts. As this Court held in *Crocker*:

> "The salutary goals of our new domestic violence act are not at issue in this case. Nor is the General Assembly's decision that the laws were sorely needed. Instead, the question presented is whether the legislature may impose a court filing fee on a limited group of litigants where the funds so collect go ultimately into the State Treasury to fund a general welfare program." *Crocker*, 99 Ill. 2d at 451.

The statutes fund social welfare programs under the executive branch of the government. The legislature obviously thought the statutes serve a laudable purpose, and the desirability of these programs is not at issue. However, charging mortgage foreclosure plaintiffs a fee to fund these programs is at issue and is impermissible. "The courts may not be a tax collector for the executive branch of government." *Fent v. State ex rel. Dept. of Human Services*, 236 P.3d 61 (Okla. 2010) at ¶¶ 23, 24. However laudable its purpose, the legislation should be supported by general revenue funds, not by fees charged to a particular class of mortgage foreclosure litigants seeking redress through the courts. The circuit court did not err in finding that the statutes violated the free access clause of the Illinois Constitution as the fee imposes an unreasonable burden on Plaintiffs' access to the court system. This Court should affirm the judgment of the circuit court of Will County and remand the case to that court for further proceedings.

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IV. THE IMPOSITION OF A TAX UPON A NARROW GROUP OF LITIGANTS TO FUND A GENERAL WELFARE PROGRAM IS VIOLATIVE OF BOTH EQUAL PROTECTION AND DUE PROCESS.

A. The Filing Fee Was an Unconstitutional Violation of Plaintiffs' Due Process Rights.

The challenged filing fee unreasonably interferes with Plaintiffs' access to the courts. This finding alone is sufficient to render the statutes invalid. However, the *Crocker* Court also considered the *Crocker* plaintiffs' due process argument as a separate basis for invalidating the statute that required petitioners seeking a dissolution of marriage to pay a $5 fee to fund services for victims of domestic violence. According to the *Crocker* Court, the court filing fee, although nominal, was nevertheless an unconstitutional violation of plaintiffs' due process rights. 99 Ill. 2d at 456.

The *Crocker* Court recognized that domestic violence shelters and programs were available to all adults and dependents who were the subject of domestic violence, and there was no special relationship between dissolution of marriage petitioners and those who used the programs. 99 Ill. 2d at 456. The *Crocker* Court determined that regardless of whether the filing fee was imposed under either the State's police power or its power to tax, the filing fee could not be imposed arbitrarily, and the classification of those taxed had to be reasonable. 99 Ill. 2d 456-57.

Under the Illinois Constitution, "any law classifying the subject 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. 1970, art. IX, sec. 2. The Illinois constitution also provides that: "An unreasonable or arbitrary classification for tax purposes places upon members of a class a burden not shared by others and is violative of due process, as well as equal protection, guaranteed by our Constitution." Ill. Const.

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1970, art. I, sec. 2. Accordingly, the *Crocker* Court found no rational basis for imposing the fee (effectively a tax) on only those petitioners filing for dissolution of marriage; thereby causing members of that class to bear the cost of maintaining the public welfare program, while excluding all other classes of taxpayers. 99 Ill. 2d at 457.

In *Boynton v. Kusper*, this Court revisited the due process analysis in *Crocker*. 112 Ill. 2d 356, 364 (1986). The *Boynton* plaintiffs argued that a statute that assessed a fee on marriage license applicants to fund the Domestic Violence Shelter and Service Fund was violative of due process under the Illinois Constitution under article IX, section 2. The *Boynton* Court agreed and determined that the relationship between the purchase of a marriage license and domestic violence was too remote to satisfy even the rational-relation test of due process because the fee charged bore no relationship to the county clerk's service of issuing and recording marriage licenses. 112 Ill. 2d at 366.

The *Boynton* Court reasoned that, "[i]f the relation between the procurement of a marriage license and domestic violence were found to be sufficient to satisfy the requirements of due process, then as noted in *Crocker*, countless other social welfare programs would qualify for monies obtained by imposing a similar tax on those who apply for marriage licenses." 112 Ill. 2d at 367. According to the *Boynton* Court, the *Boynton* defendants' expansive cause-and-effect analysis could connect countless social welfare programs to those individuals seeking marriage licenses. *Id*. at 367-68. "Since most marriages produce children, why should we not defray educational costs by the imposition of yet another add-on tax to marriage licenses?" *Id*. at 368. The *Boynton* Court refused to allow that door to be opened.

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B. Burdening Mortgage Foreclosure Plaintiffs With Filing Fees Is Not a Reasonable Means of Funding the Desired Programming.

Notably, the *Boynton* Court was careful to clarify that the issue before it was not whether reasonable service fees could be imposed on individuals seeking to enter into marriage contracts. *Id.* at 369. Nor was the *Boynton* Court addressing the merits of a general state regulation or tax. *Id.* However, according to the *Boynton* Court, the imposition of a tax on marriage licenses was not a reasonable means of funding the desired programming. *Id.* at 368. "[B]y the statute in question, the legislature has singled out marriage a special object of taxation." *Id.* at 369.

In a similar vein, the tax in the present matter is levied only on those individuals seeking to file mortgage foreclosure proceedings in the circuit courts. The State argues that Abandoned Property Fund "could mitigate the many ill effects of property abandonment that give rise to litigation" and the "abandoned properties lead to a host of social problems, including crime, accidents, and even more foreclosures." (State's Brief, p. 19.) It is a strain to conclude that a mortgage foreclosure plaintiff in downstate Illinois should be singled out from other litigants or from the general population to fund programs to help alleviate crime, accidents, or other social problems in Chicago and its suburbs.

It may be assumed that the legislature enacted the statutes to address perceived social problems. It is the funding of these programs by imposing fees solely on mortgage foreclosure litigants that is impermissible and violative of due process.[3] Mortgage foreclosure plaintiffs cannot be singled out to finance general welfare programs that

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[3] See Report of the Statutory Court Fee Task Force (June 1, 2016) addressing barriers to access to justice and additional issues associated with fees and other court costs. (C808-96.)

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address a host of social problems that affect the general population. *Boynton*, 112 Ill. 2d at 368-69. The circuit court correctly concluded that the statutes are violative of both equal protection and due process for the same reasons as those expressed in *Crocker* and *Boynton*. This Court should affirm the judgment of the circuit court and remand this matter for further proceedings.

V. THE LEGISLATION VIOLATES THE UNIFORMITY CLAUSE AS IT BURDENS RESIDENTIAL MORTGAGE FORECLOSURE LITIGANTS ACROSS THE STATE TO FUND HOUSING COUNSELING AND THE MAINTENANCE OF PRIVATELY OWNED PROPERTY; PARTICULARLY WHERE A SUBSTANTIAL PORTION OF THE FUNDS GO TO A SINGLE MUNICIPALITY.

A. The Statutes Violate the Uniformity Clause as There Is No Real and Substantial Difference Between the People Taxed and Those Not Taxed.

The statutes at issue violate the free access clause of the Illinois Constitution (Ill. Const. 1970, art. I, sec. 12) and are additionally violative of Plaintiffs' rights under the due process and equal protection clauses of the Illinois Constitution. Ill. Const. 1970. Art. I, sec. 2. The statutes also violate the uniformity clause of the Illinois Constitution, although the Court need not reach this issue. The uniformity clause of the Illinois Constitution 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. 1970, art. IX, sec. 2.

"To survive scrutiny under the uniformity clause, a non-property 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. The uniformity clause was intended to be a broader limitation on legislative power to classify for non-property tax purposes

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than the limitation of the equal protection clause and was meant to ensure that taxpayers would receive added protection in the state constitution based upon a standard of reasonableness that is more rigorous than that contained in the federal constitution." *Arangold*, 204 Ill. 2d at 153.

When faced with a good faith uniformity challenge, the taxing body bears the initial burden of producing a justification for the classification. *Id.* at 153. The challenging party must then persuade the court that the taxing body's explanation is insufficient as a matter of law or unsupported by the facts. *Id.* While the uniformity clause is not intended to "straight jacket" the General Assembly, it nevertheless requires minimum standards of reasonableness and fairness between taxpayers. *Id.* In the present matter, the circuit court did not err in finding that the statutes' taxing classification, which burdened only those persons or entities filing mortgage foreclosure cases, did not bear a reasonable relationship to the purpose of the tax.

The circuit court reasoned 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. (C1734-36.) On appeal, the State disagrees, arguing:

> "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.' 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." (State's Brief, p. 26.)

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Foreclosure proceedings are attempts to recover possession of privately owned real property. A property in foreclosure is not abandoned. Moreover, it is unreasonable to conclude that a foreclosure plaintiff seeking to gain access to the circuit court in downstate Illinois has "given rise" to neighborhood blight in Chicago (and certainly no more so than any other litigant accessing the court system). As the circuit court observed, "a filing fee being paid in Will County is being used to maintain private property in Chicago." (R. 42-43.) "It sort of sounds like this is a court-fee-funded neighborhood beautification project." (R. 42-43.)

B. The Legislature Impermissibly Shifted the Tax Burden to Residential Mortgage Foreclosure Litigants to Address Statewide Problems That Affect Everyone, Provide Resources to Individuals Who Do Not Have Mortgages, and Maintain Privately Held but Abandoned Property.

The State argues that the Abandoned Property Fund was established because "municipalities were spending 'thousands and thousands of dollars' of taxpayer money to maintain and secure properties that were abandoned during the foreclosure process." (State's Brief, p. 23.) The challenged legislation impermissibly shifted that tax burden from the municipalities to a select group of litigants seeking access to the courts to file mortgage foreclosure actions.

Pursuant to the terms of the Illinois Housing Development Act, 20 ILCS 3805/7.30, 25% of the monies in the fund are to 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;" and 25% of the monies in the fund are to make grants to "approved community-based organizations located within the City of Chicago for approved foreclosure prevention outreach programs." A full fifty percent of the fees

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collected under this statute from litigants filing foreclosure actions in any circuit court in all 102 counties are allocated for the benefit of a single municipality, the City of Chicago. Moreover, under the statute, housing counseling is available to mortgage holders and nonmortgage holders alike.

A portion of the fees collected from mortgage foreclosure plaintiffs is also to be disbursed pursuant to the terms of the Abandoned Residential Property Municipality Relief Fund, 20 ILCS 3805/7.31, which assists counties and municipalities with the costs for cutting neglected weeds or grass, trimming trees, exterminating pests, removing garbage and maintaining or rehabilitating abandoned residential property. Under the statute, 55% of all fees collected are allocated to Chicago and Cook County even though Chicago already has in place enforcement procedures to address the negative impact of improperly maintained vacant buildings. Critically, the City of Chicago properly places the onus of property maintenance on the owners of the vacant property.

The Municipal Code of Chicago properly places the burden of caring for and maintaining vacant properties on the owners of the vacant properties. The City of Chicago has adopted registration and maintenance requirements applicable to the owners of vacant buildings and the mortgagees of certain vacant buildings that have not been registered by an owner. (See https://ipiweb.cityofchicago.org/vbr/) The City of Chicago requires the owner of a vacant building to register the vacant building on the Department of Buildings Website, pay a base registration fee and, if necessary, renewal fees every six months as long as the building remains vacant, secure the abandoned building, keep the lot clean, cut the grass, and remove garbage, debris, dead trees and fallen limbs. (See https://ipiweb.cityofchicago.org/vbr/).

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Defendant and Intervenors have not met their initial burden of producing a reasonable justification for singling out and burdening mortgage foreclosure plaintiffs with the cost of providing housing counseling and maintaining vacant residential properties. in finding the statutes violative of the uniformity clause. As the circuit court determined, "the statutes' taxing classification (burdening only those persons or entities filing mortgage foreclosure cases) does not bear a reasonable relationship to the purpose of the tax." (C1735-36.) The circuit court did not err in finding the statutes violative of the uniformity clause.

CONCLUSION

For the foregoing reasons, Plaintiffs Reuben D. Walker and Steven Diamond request that this Court affirm the circuit court's March 2, 2020 order and remand the case to the circuit court for further proceedings.

Respectfully submitted,

REUBEN D. WALKER and M. STEVEN DIAMOND, Plaintiffs-Appellees

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 42 pages.

By: /s/ Daniel K. Cray
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CERTIFICATE OF FILING AND SERVICE

I certify that on February 17, 2021, I electronically filed the foregoing Plaintiffs-Appellees Reuben D. Walker and M. Steven Diamond's Response Brief 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 document are true and correct to the best of my knowledge, information and belief.

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