IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, on behalf of itself and all similarly situated organizations; and MARY DIXON, on behalf of herself and all similarly situated persons,	)	Case No. 09 C 7706
Plaintiffs,	)	The Hon. Joan B. Gottschall
v.	)	
JESSE WHITE, Illinois Secretary of State, in his official capacity,	)	
Defendant.	)	

PLAINTIFFS' POST-HEARING REPLY BRIEF

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INTRODUCTION

Defendant's Post-Hearing Memorandum (R. 44, "Def. Mem.") narrows and simplifies the dispute. The Secretary makes no attempt to argue that the $1,000 fee under the amended Lobbyist Registration Act ("Act" or "LRA") is constitutional under *Murdock* and its progeny; and he concedes that "[i]f the Court decides that it has jurisdiction over this case in spite of the Tax Injunction Act, then based on the evidence at the hearing, it appears likely plaintiffs will succeed on the merits of their claim that the $1,000 is higher than it needs to be to cover the administrative costs of the Act." Def. Mem. at 19. Because the Court's prior ruling (R. 30) that the Tax Injunction Act does not apply to this case was correct, the Court should find that the fee is unconstitutionally excessive and enter injunctive relief. As there has been no response submitted on the merits of this argument, Plaintiffs rest on Section II of their Post-Hearing Brief (R. 43, "Pl. Br.").

The Secretary devotes his defense to the Tax Injunction Act ("TIA") and to Plaintiffs' alternative claim that the media and religion exemptions violate the First and Fourteenth Amendments. With regard to the former, Plaintiffs refer the Court to its TRO opinion (R. 30) and to Plaintiffs' prior brief on that issue (R. 25). In Section I below, Plaintiffs reply to the new points the Secretary raises in asking the Court to reconsider its prior TIA ruling. As for the exemptions, the landscape has changed in light of the Secretary's lack of defense to the merits of the "excessive fee" claim. That claim suffices to support injunctive relief, and the Court could enter such relief without deciding whether the exemptions render the fee unconstitutional. As a matter of judicial economy, Plaintiffs suggest that the exemptions issue be stayed pending disposition of the excessive fee claim. *See* Section IV below. Nevertheless, Plaintiffs reply in Section II below to the Secretary's arguments regarding the exemptions, in case the Court

chooses to base injunctive relief now or at a later time on alternative grounds (if it agrees with Plaintiffs on that issue).

Section III below sets forth plaintiffs' requested injunctive relief – an injunction against requiring lobbyists to pay the $1,000 fee under the amended Act, or any other fee exceeding the Secretary's actual and reasonable costs. Finally, Section IV shows that (a) the exemption claims should be stayed, (b) trial on the merits of Plaintiffs' excessive fee claim should be consolidated with the preliminary injunction hearing held on January 14, pursuant to Rule 65(a)(2), and (c) judgment on Plaintiffs' excessive fee claim can be entered now pursuant to Rule 54(b), based on a finding by this Court that there is no just reason for delay.

I. THE TAX INJUNCTION ACT DOES NOT APPLY TO THIS CASE.

Though not styled as such, the Secretary's post-hearing brief is essentially a motion to reconsider the Court's rejection of his previous argument that the Tax Injunction Act ("TIA") deprives the Court of jurisdiction. Plaintiffs refer the Court to their prior brief (R. 25) and to its TRO opinion (R. 30) regarding the fundamental reasons why the registration fee under the LRA is properly construed as a "fee" and not a "tax" under the TIA. The Secretary makes new arguments in his post-hearing brief, none of which warrants reconsideration of the Court's prior ruling.

A. The fee increases in 2003 do not render the LRA fee a "tax."

It is unclear precisely what the Secretary is arguing by referring to certain legislative changes enacted in 2003 (Def. Mem. at 2-4), but it appears to be as follows: (i) the legislature raised about 300 user fees as part of the Fiscal Year 2004 budgetary process in order to raise additional revenue and address a fiscal crisis, and (ii) as part of that process, certain fees paid into special statutory funds, including some from the Lobbyist Registration Administration Fund

("LRAF"), were "swept" out of such funds into the General Revenue Fund. The Secretary suggests that the facts that these fees "were raised to generate state revenues in the hundreds of millions of dollars," and that they applied to some 300 funds to avoid a "free rider" problem, render the LRA fee a "tax" under the TIA. Def. Mem. at 5. The Secretary misreads history and ignores relevant facts, both of which fatally undermine his position.

1. This case is about the 2009 amendments to the LRA, not the 2003 budgetary enactments.

It is perhaps not surprising that the Secretary is focusing on statutes passed nearly seven years ago rather than the Public Act passed in August 2009 that is at issue in this case. The intent and structure of the recently amended LRA are controlling here. The Secretary offers no counter to the facts regarding the plain language of the LRA, which was relied on by the Court in its TRO ruling and which remains true and undisputed: the LRA expressly allocates 80% of each registration fee ($800 of $1,000) to the LRAF, $50 of which "is intended to be used to implement and maintain electronic filing of reports under this Act," the next $100 of which is "for administration and enforcement of this Act," and the amount of the 2010 fee increase, $650, is "to be used for the costs of reviewing and investigating violations of this Act." 25 ILCS 170/5. As the Secretary pointed out in his TRO brief, the recent amendments to the LRA were part of Senate Bill 54, ultimately passed as Public Act 96-055, which was a large piece of ethics reform legislation. *See* R. 22-1 at 2 & Ex. A thereto. They were *not*, as was the case in 2003, part of a general budgetary overhaul. Thus, the fee increase at issue targeted one fee directed to less than 4,000 payers, not 300 fee increases collectively targeting tens of thousands of payers, as was the case in 2003.

The legislative history and other evidence confirm that administration and enforcement of the LRA were the principal intended purposes of the LRA's increased fees. On May 20, 2009,

the bill's House sponsor – Speaker Madigan – testified before the House Executive Committee regarding the bill. He explained that the bill "increases the registration fee to pay for additional inspections." *See* PX 22 (CD recording of proceedings) Track 3 at 4:20-4:53. The next day, during floor debate before the full Illinois House of Representatives, Speaker Madigan again stated that the bill would "increase the registration fee [for lobbyists] to pay for the additional inspections." *See* PX 23 (CD recording of proceedings) at 6:07-6:42, and R. 22-5 (the Secretary's unofficial transcript of the recording) at Ex. 1, p. 2. Similarly, in an e-mail sent a week earlier, one of Speaker Madigan's aides informed Mr. Burns, the Secretary's Inspector General, that the changes to the Act included: "Increase annual registration fee to $1000, with the additional costs going to fund additional inspectors or activities of the IG." Burns Dep. Tr. 47:9-48:17 and Burns Dep. Ex. 3.[1] Nothing in the amended Act or its history suggests any purpose – let alone a principal purpose – to raise general revenues.

2. <u>The language and history of the amended Act control as to its intent.</u>

The Secretary's reliance on the 2003 statutes implies that the Court should disregard what the amended LRA unequivocally says, and what the Speaker and his aide said about that amendment, as to legislative intent for how the new $1,000 fee is to be spent. He speculates, without any evidence to contradict the express and unequivocal legislative language and history, that, instead of being intended for administration and enforcement of the Act, the fee increase in the Act may have been intended to generate a pool of funds to be later "swept" into the General Revenue Fund. *See* Def. Mem. at 6 ("if the $1,000 leads to a large surplus in the fund, it could be swept into the GRF"). But the Secretary has offered no basis other than speculation for the Court to disregard the legislature's intent as expressed both in clear statutory language and in

[1] The Secretary submitted the Burns deposition transcript and exhibits after the hearing of January 14, 2010. Plaintiffs had previously indicated that they did not object to its introduction.

contemporaneous statements by a legislative leader. Nor should the Court speculate on whether the legislature might enact future statutes to authorize a transfer of surplus funds paid into the LRAF.

While the Stipulated Facts indicate that the increased fees will likely generate a substantial surplus of over $2 million, *see* R. 43 (Pl. Br.) at 7, 9-11, this does not suggest that the 2009 amendment was intended to generate funds to "sweep" into general revenues rather than to achieve the stated purpose of defraying administration and enforcement costs. Rather, it reflects that the legislature was operating in the dark as to how much the changes to the law would cost, and it substantially overshot the mark. No one in the Secretary of State's office requested, based on any budgetary analysis, any fee increase, PX 24 (Stip. Facts) ¶¶ 21-22, and the legislature passed the statute without the benefit of such an analysis. Ms. Trimmer testified on cross examination at the preliminary injunction hearing that neither she, nor to her knowledge other employees of the Secretary, provided any budgetary analysis regarding the LRA to the legislature; and the Inspector General was not aware of any fiscal impact analysis given to the legislature. Burns Dep. Tr. 51:20-52:6. That the legislature charged too much by acting on too little data does not change the character of the charge, or override the Act's expressly stated intention to use the fee principally for administration and enforcement of the Act.

3. <u>The Secretary misreads the 2003 budgetary acts.</u>

Even if the 2003 budgetary statutes were relevant to determining the primary purpose of the 2009 amendments, they do not support the Secretary's conclusion that the LRA fee is a "tax" and not a "fee" under the TIA. Indeed, the case he cites, *Illinois State Chamber of Commerce v. Filan*, 837 N.E.2d 922 (Ill. 2005), and the legislative history discussed in that opinion, contradict the Secretary's arguments.

Filan was a state and federal constitutional challenge by the Chamber of Commerce to certain new fees charged to employers that were deposited in funds for administration of the worker's compensation system. The Illinois Supreme Court rejected the Chamber's challenge. In doing so it discussed two "steps" of the 2003 budgetary enactments. The first was to increase fees or establish new fees to bring "user fees for state regulatory services and licenses in line with other states ***in order to recover actual program costs***, generating over $300 million in new revenue to the state in fiscal year 2004. Illinois State Budget, Fiscal Year 2004, at 1-10. Approximately 300 fees were to be affected by this provision." *Filan*, 837 N.E.2d at 925 (emphasis added). The second was "a mechanism . . . called 'Administrative Cost Allocations' [that] provided for the transfer of monies in certain funds to the General Revenue Fund (GRF)." *Id.* The Secretary's brief quotes from *Filan* regarding this second purpose, where the Court quoted the State's Fiscal Year 2004 Budget Summary:

> "In order to ensure that each fund is paying its 'fair share' for administrative services and oversight provided with general funds, this budget creates a charge based on the level of revenue and activity of each fund. Many funds require a full array of state services, including accounting, investing, auditing, leasing and legal representation. Many of these services are supported through the General Revenue Fund. A $330 million charge for services will be assessed on funds. To partially pay for prior administrative cost subsidies, $144 million in fund balances will be transferred from select funds to the General Revenue Fund in fiscal year 2003. The total revenue generated from administrative cost allocations is $474 million." Illinois State Budget, Fiscal Year 2004, at 1-10.

837 N.E.2d at 925. Some of these increases were later "swept" from special purpose funds into the General Revenue Fund. *Id.*

These two purposes of the 2003 enactments, as described in *Filan*, as well as in the Comproller's 2004 Fee Imposition Report that the Secretary cites, support Plaintiffs, not the Secretary. They demonstrate that the legislature determined that for years preceding 2003, the State had been *undercharging* for user fees. The fees were both "below-market," in the sense

that they were lower than comparable fees charged by other States, and they were inadequate, in that they did not support State activities relevant to the users, such that the General Revenue Fund was being used to subsidize these State activities. The intent of the 2003 budgetary process was to "recover actual program costs" to remedy this imbalance. *Id.* at 925. That was particularly the case regarding the worker's compensation process at issue in that case, where there had not been any user fees prior to 2003 and it had been funded entirely from general revenues, resulting in a "free rider" problem that the new budgetary act was intended to correct, including by ending the *de facto* subsidy by the General Revenue Fund. *Id.* at 933-34. As the quotation above states, the $144 million in fund "sweeps" was intended to repay *partially* the subsidies in prior years from the General Revenue Fund to particular programs.

The Secretary's reliance on this incomplete and sketchy history is baffling since it undermines his argument that the LRA fees should be viewed as general revenue taxes. To the extent the history lesson he proffers teaches anything, it is that general revenues had been supporting particular programs for years, and program fees were increased so that the fees would both pay for the direct and indirect costs of future program administration and repay general revenues for the past imbalance. This structure is fully consistent with the Court's prior ruling that the LRA fees are not general "taxes." Nothing in the history discussed by the Secretary supports his contrary conclusion that the LRA fees were intended to raise general revenues, and he offers no other evidence to support his argument.

The Secretary also misreads the record regarding the funding from 2003 through 2008 of the Secretary's lobbyist registration activities. While he points out that in these prior years about $600,000 was paid into the GRF (from the $200 per registrant allocation in the Act) and some additional funds have been "swept" from LRAF surpluses to the GRF or other funds for other

state purposes, Def. Mem. at 3-4, he ignores the stipulated evidence and the testimony of his own witnesses that this has been a two-way street: the Secretary has used general revenue funds to pay for general overhead and staff that support lobbyist registration activities. This is fully in accord with the discussion in *Filan* that "many funds require a full array of state services, including accounting, investing, auditing, leasing and legal representation," 837 N.E.2d at 925, which are paid for from general revenues. Thus, as the Secretary's budgetary witnesses testified, his office does not budget on a strictly programmatic basis, *i.e.*, it does not administer or fund lobbyist-related activities strictly from the LRAF or exclusively with employees assigned solely to that function. PX 27 (Trimmer Dep.) 31:2-32:21, 35:5-37:22. Rather, some employees work exclusively on lobbyist activities and others work on a variety of functions (particularly regarding information technology matters), and the LRAF pays for some of this while the General Revenue Fund and the so-called "483" fund pays for the rest. *See* PX 24 (Stip. Facts) ¶¶ 4-20; PX 27 (Trimmer Dep.) 31:2-32:21.

Thus, in FY 2008, the Secretary spent $984,003 to administer the Act, of which less than half, $446,376, was from the LRAF, while the other half-plus was subsidized by the General Revenue Fund ($440,651) and the 483 Fund ($96,976). *Id.* ¶ 7; PX 6 at 2. In FY 2009 the LRAF contribution to the expenditures to administer the Act rose to $499,891, while the contributions from the General Revenue Fund and 483 Fund dropped to $109,228 and $32,660, respectively, due to the completion of computer infrastructure work. PX 24 (Stip. Facts) ¶ 12; PX 6 at 2; PX 27 (Trimmer 30(b)(6) Dep.) at 65:25-68:3. However, for FY 2010 and 2011, with increased electronic and investigative functions under the amended Act, the Secretary has estimated that the contributions from the General Revenue and 483 Funds will increase again, such that the breakdown for FY 2010 would be $844,300 (LRAF), $328,093 (GRF) and $52,346

(483 Fund), and for FY 2011 would be $897,500 (LRAF), $379,038 (GRF) and $85,821 (483 Fund). Stip. Facts ¶¶ 17, 19; PX 7 at 2.

In sum, when the fuller picture is considered, which includes not only moneys paid directly to or "swept" into the GRF, but also those moneys drawn from the GRF to support the Secretary's lobbyist-related activities, the Secretary's argument dissolves. The simple fact is that the Act's fees historically were, and under the new Act would continue to be, paid *into* both the LRAF and GRF, with funds *from* both sources being drawn upon to administer and enforce the Act. Given this two-way street, even under the prior Act, the fact that more than half of the fees was paid to the GRF sheds little light on the TIA question, since GRF funds were also used to support administration of the Act. This record does not come close to supporting the Secretary's argument that the Act's revenue generation process should be deemed a "tax" under the TIA.

B. The registration fee is not a "tax."

The balance of the Secretary's TIA argument rests on his misreading of history and on the arguments the Court correctly rejected in granting the TRO. He relies heavily, but futilely, on then-Judge Breyer's opinion in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). Justice Breyer observed that levies imposed by state and local governments fall on a spectrum. At one end is a paradigmatic "tax" imposed upon many or all citizens for the benefit of the entire community. At the other end is a paradigmatic regulatory "fee," imposed only on those subject to the regulation and used to defray the cost of regulatory expenses. *Id*. at 685. As Plaintiffs previously showed (R. 25 at 3-5) and this Court held (R. 30 at 2-3), the LRA levy falls closer to the paradigmatic "fee," since it is imposed on less than 4,000 individuals or entities engaging in one type of activity being regulated by the Secretary, with the funds earmarked primarily to defray the regulatory costs.

Trying to tug the registration fee over to the "tax" side of the spectrum, the Secretary emphasizes Justice Breyer's description of cases placing emphasis on the levy's "ultimate use," namely, whether it provides a general benefit to the public or defrays an agency's costs of regulation. 967 F.2d at 685. The Secretary ignores the Seventh Circuit's clarification of this term "ultimate use." Placing the ultimate use test in "its proper context," *Hager v. City of West Peoria*, 84 F.3d 865, 872 (7th Cir. 1996), the Seventh Circuit held that "[r]ather than a question solely of *where* the money goes, the issue is *why* the money is taken." *Id*. at 870-71 (emphasis in original). This question necessarily focuses on the legislative intent as to "ultimate use" *at the time of enactment*, not on how the government ultimately decides to spend the money if a surplus is generated. "If it is *calculated* not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation." *Id.* at 870 (emphasis added).[2]

Here, as shown above, the evidence is clear *why* the lobbyist registration fees are imposed: the expressly stated purpose, reflected in both the statute and the statements of the Speaker and his staff, is to defray the costs of regulating those subject to the fee. Indeed, that is the entire stated purpose of the $650 fee increase. Further, even with respect to the $200 portion paid into the GRF that has existed since 2003, as shown above the 2003 legislative record the Secretary relies upon does not suggest that the money was intended to drain into some general revenue black hole. Rather, it was meant to underwrite general overhead and other support of the LRA activities and to repay the many years in which the GRF was subsidizing such

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[2] *See also Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1271 n.2 (7th Cir. 1992) (holding that the disputed charge was a TIA fee, because its "*purpose* is regulatory rather than revenue-raising") (emphasis added); *Kathrein v. City of Evanston*, No. 08 C 83, 2009 WL 3055364, *3 (N.D. Ill. Sept. 18, 2009) (Guzman, J.) (emphasizing the disputed charge's "primary purpose" and what it was "meant" to do); *Independent Coin Payphone Ass'n, Inc. v. City of Chicago*, 863 F. Supp. 744, 755 (N.D. Ill. 1994) (Aspen, J.) (emphasizing what the government "seeks" to do with the disputed charge).

activities. The stipulated facts and testimony demonstrate that the Secretary has drawn (and intends to draw) funds from the GRF to help defray the ongoing costs of using its general personnel, overhead and systems to assist in administering the Act. Thus, since some portion of the money used to administer and enforce the LRA comes from the General Revenue Fund, the fact that a portion of the registration fees goes into the General Revenue Fund only makes sense, and does not support the Secretary's characterization of even that 20% portion of the lobbyist fee as a "tax."

Even if more money goes into the General Revenue Fund than ultimately returns to underwrite administration and enforcement of the LRA, such excess does not make the fee a TIA "tax." In other words, if fees intended for a regulatory use generate a future surplus, the fees do not get recharacterized as a "tax" as a result of this miscalculation. *See San Juan Cellular,* 967 F.2d at 687 (telephone charge was a fee, because its purpose was regulatory, even though the statute provided that "fees collected, but not used . . . will be deposited in the General Fund") (internal quotations omitted); *Marigold Foods, Inc. v. Redalen*, 834 F. Supp. 1163, 1166 (D. Minn. 1993) (charge imposed on milk processors was a TIA fee, because it was part of a scheme dedicated "primarily" to regulating milk prices, even though the charge "also raises revenue" that is paid to milk producers); *Gasparo v. City of New York*, 16 F. Supp. 2d 198, 219 (E.D.N.Y. 1998) ("[W]here the predominant purposes of a legislative scheme are regulatory, the mere fact that the scheme also raises revenue does not transform the scheme into a tax.").[3] Indeed, if the

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[3] In *Gasparo*, the court held that a disputed newsstand charge was a tax for purposes of the TIA because the charge "was intended in significant part to raise revenues." 16 F. Supp. 2d at 219. The court based this holding upon an ample factual record, including legislative findings ("the City should receive revenues for the use of its sidewalks"), testimony of a city official ("it will bring the City some additional revenues"), floor debate ("the City should make money"), and subsequent city financial plans (describing it as a "revenue program"). *Id.* at 219-20. Here, in contrast, as discussed above, the record conclusively

rule were otherwise, federal district and circuit courts would be barred from ever examining whether an allegedly excessive fee had the constitutionally required fit with the costs of regulation, which, as this Court has noted, is not the case. *See* R. 30 (TRO Op.) at 4-5 (collecting cases).

The Secretary also argues that the increase of $650 to the LRAF will make it more likely that the $200 dedicated to the General Revenue Fund will be used as general tax revenue. Def. Mem. at 7. This argument tacitly admits, as discussed above, that some General Revenue funds were previously being allocated to administration and enforcement of the LRA to make up for some shortfall in the amounts available from the Lobbyist Fund. More importantly, the argument is speculative, and it ignores the stipulated facts and testimony of his budgetary personnel that even under the amended Act, over $400,000 is budgeted in FY 2011 to be spent from the GRF and "483 Fund" for lobbyist registration purposes. The Secretary has presented no evidence suggesting that an increase in revenues to the Lobbyist Fund would reduce the partial use of resources from the GRF and other sources to pay for his general overhead and personnel who assist with lobbyist registration and other non-lobbyist activities. And it remains the case, as the Court found, that the 20% of the fee earmarked to the GRF is too small a percentage to render the levy a "tax," even if no GRF funds were used by the Secretary to help defray the costs of administration and enforcement.

Finally, it should be noted that in three of the five cases the Secretary cites, the courts held that the fees at issue were indeed fees and not taxes divesting the courts of jurisdiction. *See San Juan Cellular*, 967 F.2d at 686-87 (holding that a 3% charge on a cellular company's revenue was a fee because the funds collected were intended to be used to regulate the paying

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shows the contrary, that the primary intended purpose of the LRA is regulation, not general revenue generation.

party even though surpluses might revert to general revenue); *Hager*, 84 F.3d at 870-72 (holding that a charge for driving heavy trucks on a particular road was a fee, given that the language of the ordinances at issue and the facts underlying their passage did not support a conclusion that they were to levy a tax rather than to regulate trucks); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925 (9th Cir. 1996) (holding that a charge to apple growers to pay for apple promotion was a fee, because, among other things, the fee was assessed against a small number of organizations and spent only for a purpose that did not directly benefit the public at large).[4] The Secretary's remaining two cases, *National Right to Life Political Action Committee State Fund v. Devine*, No. 96-359-P-H, 1997 WL 525139 (D. Me. Aug. 8, 1997) and *Lavis v. Bayless*, 233 F. Supp. 2d 1217 (D. Ariz. 2001), were distinguished by Plaintiffs and the Court previously on the ground that more than half of the fees in those cases were specifically intended to support general revenues rather than regulatory administration or enforcement. *See* R. 25 (Pl. TRO Reply) at 7-8 (distinguishing both cases); R. 30 (TRO Op.) at 3-4 (distinguishing *Devine*).

For the foregoing reasons, the Court should reaffirm its ruling that the TIA does not apply here and does not divest the Court of jurisdiction to enjoin the fee. Because the Secretary does not dispute that the $1,000 fee is unconstitutionally excessive, it should be enjoined. *See* Section III below.

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[4] The Secretary also cites *San Juan* and *Bidart* for the proposition that the fact that the fee is enacted by the legislature rather than by an administrative agency is a factor favoring tax treatment. This reflects the fact that legislatures have taxing authority while administrative agencies generally do not, but it does not answer the question of whether such authority was exercised by the legislature. The cases do not support the Secretary's gloss that this factor "strongly favors" the "tax side" of the equation, Def. Mem. at 5, and many cases have held that levies enacted by legislative bodies are fees, not taxes, under the TIA, including *Hager* (ordinance imposing trucking fee), *Government Suppliers* (statute imposing registration fee on waste collection trucks), and *Marigold Foods* (statute charging premiums to milk processors).

II. THE EXEMPTIONS ARE UNCONSTITUTIONAL.

As plaintiffs demonstrate in their opening post-hearing brief, the media exemption comprises speaker-based discrimination in violation of the Free Speech Clause and the Equal Protection Clause, and the religion exemption comprises speaker-based, content-based, and viewpoint-based discrimination in violation of the Free Speech Clause, the Equal Protection Clause, and the Establishment Clause. *See* R. 43 at 13-21.[5] The Secretary's contrary arguments (Def. Mem. at 7-19) lack merit, and the Court should reject them if and when it decides to reach this issue.[6]

A. The media exemption is unconstitutional.

1. The Secretary misreads the exemption.

The Secretary asserts that the media exemption covers "only those media representatives who are engaged in journalistic duties, not media representatives engaged in lobbying activities." Def. Mem. at 15. *See also id.* at 14 (asserting that the exemption does not apply to "persons engaged in direct lobbying activities on behalf of media groups"). That is simply not what the Act says.

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[5] Plaintiffs' legal arguments regarding speaker-based discrimination (Pl. Br. at 17-20) are buttressed by the U.S. Supreme Court's recent decision in *Citizens United v. FCC*, 2010 WL 183856 (Jan. 21, 2010). It states: "[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints. . . . Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.* at *19.

[6] The lobby fee exemptions are properly resolved by means of a facial challenge. *Cf.* Def. Mem. at 17-18. As shown below, in every application, these exemptions unfairly treat similarly situated speakers differently, with no lawful basis for doing so. Further, the Secretary has taken the position in open court that the exemptions present a pure question of law, with no need for fact discovery and findings. Finally, even if some applications of the exemptions were lawful – and plaintiffs deny that this is so – a statute violates the First Amendment on its face when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 1191 n.6 (2008) (citation and internal quotation omitted).

To give a specific illustration of the dispute, consider a newspaper that writes articles about bills seeking to legalize same-sex marriage, and editorializes that same-sex marriage should be legal or illegal. The newspaper's publisher might also meet personally with legislators, spend lavishly on dinners and drinks, and urge the same position, as well as various other positions, such as tax breaks for businesses and a bailout for the ailing print industry. The Secretary reads the media exemption as covering only the first action of publishing news and comment. But the plain language of the exemption is principally directed to the news media's engagement in the second type of activity.

The Secretary performs no textual analysis in support of his assertion, except to quote in full the statutory language of the exemption. The statutory language squarely refutes the Secretary's assertion, especially when considered in context of the Act as a whole and in comparison with media exemptions in other States.

First, the Secretary ignores the Act's definitions, which establish that publication of news and comment is already outside the definition of "lobbying," which "means any *communication with* an official of the executive or legislative branch of State government . . . for the ultimate purpose of influencing any executive, legislative, or administrative action." 25 ILCS 170/1(e) (emphasis added). Publishing or broadcasting news is a "communication with" the general public, not "with" State officials. Thus, registration is not required for journalists' publication or broadcast of news or comment. If there were any doubt on the matter, a narrow and clear exemption would have been written, like those in other States, that exempt such activities. *See* R. 43 (Pl. Br.) at 14 n.9.

Second, the plain language of the exemption is much broader than the Secretary asserts and does not support his narrow interpretation. It applies to: "Persons who own, publish, or are

employed by a newspaper or other regularly published periodical, or who own or are employed by a radio station, television station, or other bona fide news medium which in the ordinary course of business disseminates news, editorial or other comment, or paid advertisements which directly urge the passage or defeat of legislation." 25 ILCS 170/4(b). This exemption clearly applies not merely to journalists performing journalism, but to non-journalistic lobbying activities on any topic by certain kinds of persons, based on their connection to certain kinds of media. Specifically, it applies to persons who "own" or "publish" or "are employed by" news media – which is defined, in turn, as "a newspaper or other regularly published periodical" or "a radio station, television station, or other bona fide new medium" – provided that this news media "in the ordinary course of business disseminates news, editorial or other comment, or paid advertisement which directly urge the passage or defeat of legislation."

On its face, then, this statutory language extends to all activities of persons who own, publish, or are employed by such news media. Nothing in the words, grammar, or structure of this statutory language limits the exemption to actual journalism or any other particular set of activities. Thus, the exemption extends to the lobbying activities of media-related persons, not just to the traditional media activities of such persons, such as writing and publishing news and opinion about legislative current events. Nor does the Secretary offer any legislative history in support of his contra-textual interpretation of the media exemption. Plaintiffs are aware of no such legislative history.

Contrary to the Secretary's argument (Def. Mem. at 15), his proposed narrowing interpretation cannot be squared with the legislative language and thus cannot be adopted to avoid a constitutional issue. Federal courts are "without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent."

Stenberg v. Carhart, 530 U.S. 914, 944 (2000). "[A] federal court may not slice and dice a state law to 'save' it; [the court] must apply the Constitution to the law the state enacted and not attribute to the state a law [the court] could have written to avoid the problem." *K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992). In interpreting state law, federal courts use the same principles as state courts do. *Id*. In Illinois, "[e]ach word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous." *In re Detention of Lieberman*, 776 N.E.2d 218, 223 (Ill. 2002). While Plaintiffs would likely be sympathetic to a narrow media exemption designed to clarify that news articles and editorials do not require lobbyist registration and advance fees, the language of the exemption in the Act cannot reasonably be limited in such a fashion.

2. The media exemption is not properly tailored.

The Secretary offers no government purpose in support of this exemption, properly interpreted to extend to lobbying activities of the news media. It follows that the Secretary cannot meet his burden under *Mosley* and its progeny to prove that the exemption is a narrowly tailored means to advance a substantial government interest. *See* R. 43 (Pl. Br.) at 17-20.

Not to the contrary are the cases cited by the Secretary, holding that the First Amendment is not violated when government exempts some groups but not others from general taxation on economic activity. *See* Def. Mem. at 15-17, citing *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding a sales tax that exempted print media, but not cable media), and *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (upholding an income tax rule under which contributions to certain charities are tax deductible, but not contributions to charities engaged in substantial lobbying). The issue in those cases was government's substantial power to craft taxes on economic activity, including the power to decide whether to exempt from such economic

taxation all, some, or no expressive activity. Here, on the other hand, the issue is government's far more limited power to place a price tag directly and solely on expressive activity (such as lobbying), and to exempt from that burden on speech only certain favored speakers.[7] In any event, even if this case is controlled by the rationality standard set forth in *Regan*, 461 U.S. at 547, the Secretary has not advanced any reason at all – let alone a rational reason – for Illinois to exempt from lobby registration, disclosure, and fees those persons who own, publish, or are employed by news media, no matter on what issues they lobby. Such media persons may lobby regarding freedom of the press. But many non-media organizations (including the ACLU) will lobby on those same media issues, without the exemption. In short, the media exemption – properly interpreted to extend to the lobbying activities of the media – cannot survive even rationality review.

B. <u>The religion exemption is unconstitutional.</u>

The Secretary argues that the religious exemption from lobbyist registration, disclosure, and fee payments is a discretionary accommodation of religion that passes muster under the Establishment Clause. *See* Def. Mem. at 8-10. Not so.

There is "room for play in the joints" between the Free Exercise Clause and the Establishment Clause, that is, for discretionary accommodations of religious free exercise that are neither required by the former clause nor forbidden by the latter. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Such accommodations are upheld when they "alleviate[] exceptional government-created burdens on private religious exercise." *Id.* at 720. *See also Corporation of*

[7] While the power to impose differential taxation on economic activity is not relevant here, it bears emphasis that this power has substantial limits: general economic taxes may not "single out the press" absent "a compelling justification"; taxes that "target[] a small group of speakers" are "also suspect"; there may be no "purposeful attempt to interfere" with speech; and there can be no content discrimination. *Leathers*, 499 U.S. at 447-49.

the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1992) (holding that such accommodations are upheld if they "alleviate[] significant governmental interference with the ability of religious organizations to define and carry out their religious mission"); *Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) ("the Constitution allows the State to accommodate religious needs by alleviating special burdens"). *Accord* Def. Mem. at 9, 13 (twice quoting this *Amos* formulation).

Cases upholding discretionary accommodations on this basis have identified serious burdens on religious free exercise that would have been created by government in the absence of the religious exemption. *See, e.g., Cutter*, 544 U.S. at 720-21 (upholding a federal statute requiring state prisons to accommodate prisoners' free exercise, because the prisons "exert[] a degree of control unparalleled in civilian society" that is "severely disabling to private religious exercise"); *Amos*, 483 U.S. at 336 (upholding the Title VII exemption for religious employers, including for their employees performing secular functions, because of the "significant burden . . . on pain of substantial liability" of "predict[ing] which . . . activities a secular court will consider religious"); *Pre-School Owners Ass'n v. DCFS*, 119 Ill. 2d 268, 272, 280-81 (1988) (upholding the exemption of institutions "operated primarily to provide religious education" from state regulation and licensing of childcare facilities, including "examination" of facilities and operators, and criminal prosecution where facilities violate agency-issued regulations).

Discretionary accommodations have also been allowed where they avoid an excessive entanglement of church and state. *See, e.g., Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (upholding the exemption of church property from property taxation, because "[e]limination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes"); *Dayton Area Visually Impaired Persons, Inc. v.*

Fisher, 70 F.3d 1474, 1482-83 (6th Cir. 1995) (upholding the exemption of religious charities from charity regulation, because doing so absolved government "of the responsibility to examine the financial records of religious bodies," and also their "inner workings").[8]

On the other hand, some discretionary accommodations of religious free exercise violate the Establishment Clause – such as the sales tax exemption for religious literature sold by religious organizations struck down in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The three-Justice plurality rejected the state's argument that the tax break was a permissible accommodation, because "[n]o concrete need to accommodate religious activity has been shown." *Id.* at 18. *See also id.* at 15 (opining that a discretionary accommodation violates the Establishment Clause if it "cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion").[9] Two more Justices opined that the disputed exemption was not a permissible accommodation, because it comprised "[a] statutory preference

[8] The Secretary's other cases (Def. Mem. at 8-10) are inapposite. In one, government provided a similar accommodation to similar secular groups. *Georgia Cemetery Ass'n v. Cox*, 403 F. Supp. 1206, 1213 (N.D. Ga. 2003) (upholding a law regulating "for-profit cemeteries," and exempting "non-profit cemeteries – including both cemeteries that are religiously affiliated and those that are public or family owned"). In another case, the court upheld a token accommodation, while striking down a "sweeping" accommodation. *Arkansas Day Car Ass'n v. Clinton*, 577 F. Supp. 388, 396, 398 (E.D. Ark. 1983) (upholding the religious exemption from "the formality of obtaining a license" to operate a daycare center, because such centers "must still certify substantial compliance with the law" and the government may still "verify compliance through inspection," while striking down an "over-accommodation" for older religious childcare centers that effectively barred government inspections). In two more cases, the Court addressed mandatory accommodations, not discretionary accommodations. *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down a law excluding religious leaders from holding public office); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (striking down an agency decision denying unemployment benefits to a person fired for refusing to work on her Sabbath).

[9] The *Texas Monthly* plurality also rejected the argument that the religious exemption could be saved by "other sales tax exemptions . . . for *different* purposes," such as "sales of food," as opposed to an exemption providing "like benefits for nonreligious groups." 489 U.S. at 15 n.4 (emphasis in original). Here, the religion exemption from the lobby fee provides no "like benefit" for comparable secular groups, and this discriminatory treatment is not saved by the lobby fee's various exemptions "for different purposes," such as committee witnesses, vendors, and unpaid lobbyists. *Cf.* Def. Mem. at 11.

for the dissemination of religious ideas." *Id.* at 28 (Blackmun, J., with O'Connor, J., concurring in the judgment). In short, discretionary exemptions that do not directly alleviate an actual and substantial government-created burden on free exercise do not pass Establishment Clause muster.

Here, the Secretary has adduced no evidence tending to show that the religion exemption from lobbyist registration, reporting, and fee payment directly alleviates any government-created burden on religious free exercise – let alone an actual burden that is "exceptional," *Cutter*, 544 U.S. at 720, or "significant," *Amos*, 483 U.S. at 335, or "special," *Grumet*, 512 U.S. at 705. Nor has the Secretary submitted evidence showing that the exemption helps avoid an excessive entanglement of church and state. To the contrary, the exemption is more likely to foster entanglement. For example, the Inspector General might be required to review whether the exemption applied to particular lobbyists, and thus to decide whether a religious lobbyist's activities were actually "for the purpose of protecting the right of the members thereof to practice the religious doctrines of that church or religious organization." 25 ILCS 3(a)(7). That inquiry would require scrutiny by a state official of religious practices and doctrines.

Further, the Secretary has not squarely asserted a government interest that justifies the religion exemption. Instead, the Secretary speculates about what might or might not have been the legislature's objectives in creating the religion exemption:

> It would have been entirely reasonable for the Illinois legislature in 1969 at the law's passage to take the view that its target in passing the original lobbyist registration law was corporate or at least non-sectarian advocacy or lobbying. It could have wanted to avoid the potential problem of regulating religious groups or clergy who may come to Springfield to advocate for issues those groups felt were of central importance to their faith. It may also have believed that the likelihood of undue influence from these groups was small, and that there was no need to require them to register. Moreover, it may be contrary to the tenets of some religions to be compelled to register with the government for anything; the legislature may have wanted to avoid this problem by providing a general exemption for all religions who might seek to contact the legislature about faith-based issues.

See Def. Mem. at 18. In other words, the Secretary states that the legislature might have created the religion exemption because: (1) government only has an interest in regulating "corporate" advocacy; (2) government has an interest in not regulating religious groups lobbying on faith issues, due to unstated "potential problem[s]"; (3) government has no interest in regulating religious groups, because "the likelihood of undue influence from these groups was small"; and (4) "it may be contrary to the tenets of some religions to be compelled to register with the government for anything."

These speculative reasons wholly lack merit. If the government was interested only in "corporate" lobbying, it could have exempted all non-corporate lobbying, and not solely religious lobbying. Likewise, the Secretary submits no evidence, or other basis to believe, that "the likelihood of undue influence from these [religious] groups [is] small," compared to other non-profit groups such as the ACLU. Religious groups can exert great influence on some legislators on certain issues, such as creationism or abortion, to name just two. Further, the Secretary has not identified a religious group with religious objections to lobbying registration and fee payments, let alone explained how lobbying registration would significantly burden the free exercise of such groups. Contrary to his characterization, nothing in the Act "regulates religious groups." Rather, it requires registration and certain disclosures by lobbyists, not any governmental involvement in or regulation of religious speech or practices. Notably, it appears that at least one religious group has chosen to register as a lobbyist, without violating the tenets of its faith. *See* Def. Mem. at 19 n.2, citing Def. Ex. 6. Finally, the Secretary has failed to identify any other "potential problem" that might arise from lobbyist registration by religious groups.

III. THE COURT SHOULD ENJOIN THE EXCESSIVE FEE.

Plaintiffs ask the Court to enter the following injunctive relief:

> Defendant Jesse White, in his official capacity as Illinois Secretary of State, is hereby enjoined from requiring, as a condition of lobbyist registration, any entity or any registered lobbyist employed by such entity to pay the $1,000 fee set forth in the Lobbyist Registration Act as amended effective January 1, 2010, or to pay any other fee that exceeds the Secretary's actual and reasonable costs of administering and enforcing the Act.

The Secretary now requests that if an injunction is entered by the Court, it allow the Secretary to raise an amount of about $1.2 million dollars per year, his estimate of the annual cost of administration through fiscal year 2011. Def. Mem. at 20-21. Plaintiffs have not challenged this estimate as being unreasonable, and we do not object to an order which recognizes that figure as a present benchmark.

If the Court grants plaintiffs' Rule 65 consolidation request with respect to the excessive fee claim (as sought in Section IV below), then the final judgment should contain declaratory relief declaring the amended fee in the LRA to be unconstitutionally excessive. Upon entry of such a judgment, by operation of Illinois law, the pre-amendment fee structure becomes effective again. *See, e.g., People v. Gersch*, 553 N.E.2d 281, 283 (Ill. 1990); *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 685 (N.D. Ill. 2005) (Pallmeyer, J.) (citing Gersch). Accordingly, it appears that a declaration and a final injunction order that finds the new fee of $1,000 unconstitutional and that enjoins collection or enforcement regarding such a fee would, by operation of Illinois law, restore the pre-amendment $350/$150 bifurcated fee structure under the LRA that the Secretary has asked for.

On the other hand, if the Court proceeds solely on the preliminary injunction, plaintiffs object to the Secretary's request that the Court expressly reinstate the prior fee schedule under the now non-existent provision of the Act, which required a fee of $150 for 501(c)(3)

organizations and a fee of $350 for all other lobbyists. Def. Mem. at 20-21. That relief would constitute a judicial determination of the appropriate allocation of the costs. However, should the Court grant only preliminary relief, plaintiffs do not believe that the Secretary would violate the injunction proposed above by returning to the prior fee schedule without specific "permission" from this Court, so long as the estimated fee revenue approximates the Secretary's projected reasonable costs – a proposition we do not doubt.

Plaintiffs presume that after the entry of injunctive relief, if the State chooses to amend the Act again to establish a fee structure, there will be prior consultation between the Legislature and the Secretary so as to ensure the setting of a reasonable fee in compliance with the Court's declaration and order, and with the Constitution.

IV. A STAY OF THE EXEMPTION CLAIM AND CONSOLIDATION OF THE EXCESSIVENESS CLAIM ARE APPROPRIATE.

A. The Court should defer consideration of the exemptions claim.

As noted in the introduction, the posture of the case has evolved such that Plaintiffs now suggest that the Court defer resolving the dispute regarding the constitutionality of the exemptions. Except for the legal question presented by the Secretary's TIA defense, Plaintiffs' excessive fee claim stands uncontested on the merits, and a declaration and injunction should be entered on that claim as outlined above. Once such relief is entered, the State might choose to respond by amending the Act, which may include amendments to the exemptions. Plaintiffs are amenable to giving the legislative process some time to proceed and conserving the Court's resources on the exemptions claim. Depending on the State's response, Plaintiffs will thereafter determine whether to press that claim. Thus, they ask that the Court stay the exemptions claim at this time. Additionally, as discussed next, they ask that the Court grant their pending

consolidation motion regarding the excessive fee claim and that it enter a final judgment regarding that claim pursuant to Fed. R. Civ. P. 54(b).

B. The Court should grant the consolidation motion regarding the excessive fee claim.

The Court should grant Plaintiffs' motion, pursuant to Rule 65(a)(2), for consolidation of trial on the merits with the preliminary injunction hearing held on January 14. *See* R. 39 (plaintiffs' consolidation motion). Plaintiffs reassert their earlier arguments in support of consolidation, including conservation of judicial resources, the status of discovery, the stipulated facts, and the adequacy of notice to the Secretary. *Id.* The only change is that they now limit the consolidation request to the excessive fee claim. The Secretary's post-hearing brief contains statements that further weigh in favor of consolidation with respect to the excessive fee claim.

First, because the Secretary states that if this Court determines that it has jurisdiction, plaintiffs are likely to prevail on the merits of their excessive fee claim, *see* Def. Mem. at 19, there are no further facts to be developed in discovery or adduced at trial. All that remains is legal argument regarding the Tax Injunction Act, which can readily be resolved now. Likewise, the Secretary has stated that he will not oppose class certification, if this Court determines that it has jurisdiction. *Id.* at 1. Thus, there is no need for further discovery or trial regarding class certification.

Second, in the context of the proper scope of injunctive relief, the Secretary states that his "electronic reporting system makes registration without payment of the fee difficult without significant and time consuming changes to its computer systems, at a time when the regular legislative session is about to begin." *See* Def. Mem. at 20. This shows that the Secretary has an interest in prompt resolution of plaintiffs' claims, which would be advanced by consolidation of the excessive fee claim. The pending exemptions claim would not affect the computer issue.

Entry of final declaratory relief would, as shown above, restore the prior fee structure by operation of Illinois law, thereby addressing the Secretary's concern.

Finally, plaintiffs moved for consolidation on January 11. *See* R. 39. To date, the Secretary has not responded in writing. Nor has the Secretary orally stated any basis in fact or law to deny consolidation.

C. If the Court approves consolidation, it should enter judgment on the excessive fee claim under Rule 54(b).

If the Court decides to enjoin the fee based on the excessive fee claim, without reaching the exemption issues, it can consolidate under Rule 65(a)(2) and enter judgment on that claim pursuant to Rule 54(b). Entry of final judgment on the excessive fee claim is appropriate here because (1) that claim is separate from the exemptions claim and (2) there is no just reason for delay. *See* Fed. R. Civ. P. 54(b); *R.D. Lottie v. West American Ins. Co.*, 408 F.3d 935, 939 (7th Cir. 2005).

"The test for separate claims under the rule is whether the claim that is contended to be separate so overlaps the claim or claims that have been retained for trial that if the latter were to give rise to a separate appeal at the end of the case the court would have to go over the same ground that it had covered in the first appeal." *Id.* (*quoting Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1162 (7th Cir. 1997)); *see also Ty, Inc. v. Publications Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002). Here, the excessive fee claim and the exemptions claim are based on different portions of the statute, different facts and different legal theories. The Court of Appeals would not have to plow old ground if the exemptions issue were ever to come before it.

There is plainly no just reason for delay, as discussed above. The Secretary desires a prompt resolution so that registration can proceed without uncertainty or a need for multiple reprogramming of computer systems. Accordingly, the Court should enter a final judgment on

the excessive fee claim under Rule 54(b) and state in the order that there is no just reason for delay.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court enter a declaratory judgment and permanent injunction – or in the alternative a preliminary injunction – that enjoins the Defendant Jesse White, in his official capacity as Illinois Secretary of State, from requiring any entity, or any registered lobbyist employed by such entity, to pay the $1,000 fee set forth in the Lobbyist Registration Act as amended effective January 1, 2010, or to pay any other fee that exceeds the Secretary's actual and reasonable costs of administering and enforcing the Act. Further, Plaintiffs request that the Court grant their amended motion for class certification, grant their motion for consolidation with respect to the excessive fee claim, enter judgment on that claim under Rule 54(b) with a finding that there is no just reason for delay, and grant such other relief as it deems just and proper.

DATED: January 28, 2010

Respectfully submitted:

/s/ Adam Schwartz
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CERTIFICATE OF SERVICE

I, Adam Schwartz, an attorney, certify that on January 28, 2010, I delivered a copy of this PLAINTIFFS' POST-HEARING REPLY BRIEF on all counsel of record via the ECF electronic filing system.

/s/ Adam Schwartz