E-FILED
Transaction ID: 1-19-0782
File Date: 10/30/2019 6:49 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-19-0782

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON,	)	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division
Plaintiffs-Appellants,	)	
v.	)	No. 2009 CH 03226
DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,	)	Hon. Peter Flynn, Judge Presiding
Defendant-Appellee.	)	

PLAINTIFFS-APPELLANTS' OPENING BRIEF AND APPENDIX

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

This is an appeal of the Circuit Court's wholesale denial of attorneys' fees under the fee-shifting provision of the Illinois Civil Rights Act of 2003 ("the Act"). *See* 740 ILCS 23/5(c)-(d) (2018). Plaintiffs, who were born in Illinois and are transgender, commenced the underlying action against the Illinois State Registrar of Vital Records pursuant to the Illinois Constitution and the Vital Records Act because the Registrar refused to correct the gender markers on Plaintiffs' birth certificates. C87-117, A30-60.[1] It is undisputed that the Plaintiffs' lawsuit served as the catalyst for the Registrar's decision to change the challenged policy and provide Plaintiffs with corrected birth certificates. Accordingly, Plaintiffs sought attorneys' fees, costs, and expenses as prevailing parties under the Act. The Circuit Court, however, denied Plaintiffs' request for attorneys' fees, holding that the Act forbids the award of fees if a litigant is represented *pro bono*. This appeal is not based upon the verdict of a jury and no questions are raised on the pleadings.

JURISDICTION

The Circuit Court denied Plaintiffs' Corrected Petition for An Award of Attorneys' Fees, Costs and Expenses on March 18, 2019. C983-90, A1-8. Plaintiffs thereafter filed this appeal on April 15, 2019, less than thirty days after the Circuit Court issued its decision. C992-94, A173-75. This Court therefore has jurisdiction

[1] Citations to "C_" and to "R_" are to the common law and report of proceedings record on appeal in this matter respectively. Citations to "A_" are to the appendix bound with this brief.

over this appeal pursuant to Illinois Supreme Court Rules 301 and 303 as a timely appeal of a final judgment.

ISSUE PRESENTED FOR REVIEW

Does the fee-shifting provision of the Illinois Civil Rights Act of 2003, 740 ILCS 23/5(c)-(d), prohibit prevailing parties from recovering reasonable attorneys' fees if their attorneys represent them *pro bono*?

STATUTES INVOLVED

Sections 5(c) and 5(d) of the Illinois Civil Rights Act of 2003 provide, in relevant part:

> Sec. 5. Discrimination prohibited.
> ***
> (c) Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought:
>
> (1) pursuant to subsection (b); or
> (2) to enforce a right arising under the Illinois Constitution.
>
> In awarding reasonable attorneys' fees, the court shall consider the degree to which the relief obtained relates to the relief sought.
>
> (d) For the purpose of this Act, the term "prevailing party" includes any party:
>
> (1) who obtains some of his or her requested relief through a judicial judgment in his or her favor;
> (2) who obtains some of his or her requested relief through any settlement agreement approved by the court; or
> (3) whose pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing party relative to the relief sought.

740 ILCS 23/5(c)-(d).

STATEMENT OF FACTS

Plaintiffs are transgender individuals who were born in Illinois and who were issued Illinois birth certificates with incorrect gender markers.[2] C87-88, A30-31. After transitioning to live in accord with their gender identity—with names that match their gender, hormone therapy, and surgical treatment, among other steps—Plaintiffs sought to correct the gender markers on their birth certificates under the Illinois Vital Records Act, 410 ILCS 535/17(d) (2007). C104-05, A47-48. The Registrar denied these requests. C98-100, C105, A41-43, A48. Consequently, Plaintiffs sued under the Illinois Constitution and the Vital Records Act seeking declaratory and injunctive relief. C11-31, C87-117, A9-29, A30-60. Plaintiffs were represented by the Roger Baldwin Foundation of ACLU, Inc. ("RBF") and Jenner & Block LLP. C31, A29. Prompted by Plaintiffs' lawsuit, the Registrar issued the corrected birth certificates, C125, and the Department of Public Health's Division of Vital Records announced that it would terminate the policies challenged by this action, C414. On June 26, 2009, the Registrar moved to dismiss the case as moot, C124-26, and on October 1, 2009, the Circuit Court granted that motion. R42.

Plaintiffs then filed their petition for fees, costs, and expenses as prevailing parties under 740 ILCS 23/5(c). C434-64, C611-33, C683-84, A62-117. Plaintiffs asserted that they had a statutory entitlement to attorneys' fees because their "'pursuit of a non-frivolous claim was a catalyst for a unilateral change in position

[2] The record refers to Plaintiffs as "transsexual," which is now an outdated and disfavored term.

by the'" Registrar. C612, A94, quoting 740 ILCS 23/5(d)(3). In response, Defendants argued the petition was barred by sovereign immunity, and, even if not barred, the fee request was excessive. C828-45, A118-35. Defendants did not, however, dispute that Plaintiffs were "prevailing part[ies]" under Section 5(d)(3) of the Act.

The Circuit Court denied Plaintiffs' request for attorneys' fees. C989-90, A7-8. Initially, the Circuit Court rejected Defendants' sovereign immunity argument, noting that Section 5(c)(2) of the Act necessarily waives sovereign immunity to the extent that it contemplates a fee award against the State. C985, A3. As for the reasonableness of the fee, the Circuit Court announced it would reduce the hours spent on the fee petition by 20% and reduce any fee award by 50% overall. *See* C986, C989, A4, A7.

Rather than enter such an award, however, the Circuit Court held that its assessment of reasonableness was "more academic than practical" because it found that no fee award was available under the Act as a matter of law. C989-90, A7-8. Like the Registrar, the Circuit Court never questioned that Plaintiffs were prevailing parties. The Circuit Court nonetheless offered two rationales for its statutory holding that fees are unavailable. First, it held that because in a *pro bono* case, "the client does not expect to incur, . . . any legal fees," Plaintiffs, having been represented *pro bono*, "cannot recover fees they did not incur." C989-90, A7-8. Second, it held that awarding Plaintiffs' their attorneys' fees would result in "a windfall" and, because Jenner & Block intended to donate any fees to RBF, would

"charge the taxpayers for a *gift*, in the amount of the legal fees plaintiffs did not incur, to recipients *plaintiffs' counsel* will select." C990, A8.

STANDARD OF REVIEW

A trial court's order awarding or denying attorneys' fees ordinarily is reviewed only for an abuse of discretion. There is an exception, however, where, as in this case, the determination of attorneys' fees involves the interpretation of a statute, which triggers *de novo* review. *See Sandholm v. Kuecker*, 2012 IL 111443, ¶ 64 (reviewing *de novo* the trial court's decision to limit an award of attorney fees because the decision involved the interpretation of a statute); *Thomas v. Weatherguard Constr. Co.*, 2018 IL App (1st) 171238, ¶ 63 ("To the extent that an attorney fee determination involves the interpretation of a statute," the Appellate Court's review is *de novo*); *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231 (3d Dist. 2007) ("[W]hether a party may recover attorney fees and costs pursuant to any specific act is a question of law."). Here, because the Circuit Court held that a litigant cannot recover attorneys' fees under the Act as a matter of law if that litigant is represented *pro bono*, *see* C989-90, A7-8, the Circuit Court's decision is reviewed *de novo*. "*De novo* review means that an appellate court performs the same analysis that a trial judge would perform." *Thomas*, 2018 IL App (1st) 171238, ¶ 63.

ARGUMENT

The Act is a critical tool for empowering people to seek redress for unlawful discrimination, whether or not they have the means to retain an attorney. Indeed,

the whole purpose of the fee-shifting provision in Section 5(c) of the Act is to encourage the enforcement of civil rights through the actions of private attorneys general. 93d Ill. Gen. Assem., Senate Proceedings, May 13, 2003, at 135 (statements of Senator Harmon), C707. This case, therefore, will determine whether the fee-shifting provision will continue to incentivize the private vindication of civil rights, regardless of a litigant's ability to afford an attorney.

If this Court holds that prevailing parties represented *pro bono* are not entitled to recover their attorneys' fees under the Act, the Act's fee-shifting scheme will benefit only those people who can afford to pay their lawyers or whose cases involve the potential for large damages awards from which a contingency fee could be drawn. This interpretation of the Act's fee-shifting provision would devastate the purpose of the Act by radically reducing the number of individuals who can vindicate their rights in court if they cannot afford a paid attorney. This Court should reverse the wrongly decided opinion below.

I. Prevailing Parties May Recover Their Reasonable Attorneys' Fees For *Pro Bono* Counsel Under The Illinois Civil Rights Act Of 2003.

A. The Plain Language Of The Act's Fee-Shifting Provision Requires Courts To Award Prevailing Parties Their Reasonable Attorneys' Fees.

The plain language of the Act should resolve this case. The fundamental rule of statutory interpretation is to "ascertain and effectuate the legislature's intent," which is best discerned through the "statutory language, given its plain and ordinary meaning." *Hamilton v. Indus. Comm'n*, 203 Ill. 2d 250, 255 (2003).

The plain language of the Act is clear. It requires awards of reasonable attorneys' fees to prevailing parties, without exception. The Act states: "[u]pon motion, a court *shall* award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party . . . ." 740 ILCS 23/5(c) (emphasis added). It is axiomatic that the General Assembly's use of the word "shall" denotes a clear legislative desire for something to be "mandatory," including in the context of fee-shifting statutes. *Citizens Org. Project v. Dep't of Nat. Res.*, 189 Ill. 2d 593, 598 (2000); *Goldberg v. Astor Plaza Condo. Ass'n*, 2012 IL App (1st) 110620, ¶¶ 38, 40.

In construing a statute, courts must "ascertain and give effect to the intent of the legislature" without "depart[ing] from the plain statutory language by reading into it exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent." *1550 MP Rd. LLC v. Teamsters Local Union No. 700*, 2019 IL 123046, ¶ 30. The Act's fee-shifting provision contains no language allowing courts to deny fees based on a fee agreement between the prevailing plaintiff and their attorney (*e.g.*, whether the representation is paid, *pro bono*, or contingent). Instead, the court's only role is to determine whether plaintiffs have "prevail[ed]," as defined in Section 23/5(d) and to determine whether the fee requested is "reasonable." *See id.* 23/5(c).

These black letter principles should resolve this case. The Registrar never disputed that Plaintiffs are prevailing parties because Plaintiffs' "'pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing

party relative to the relief sought.'" C983, A1; *see also* 740 ILCS 23/5(d)(3). That makes Plaintiffs "prevailing part[ies]" under the Act. All prevailing parties are entitled to the recovery of their reasonable attorneys' fees—full stop.

B. The Legislative History Supports An Award Of Attorneys' Fees To Plaintiffs.

Even if there were room for argument about the Act's plain language, although there is not, the legislative history of the Act would settle this issue. That is because it is beyond dispute that the General Assembly intended for the Act to provide an even stronger incentive for private enforcement of Illinois' civil rights laws than is available under federal civil rights statutes.

The legislative record is clear that the Illinois General Assembly's goal was to provide broader protections than existed at that time under the fee-shifting provision in Section 1988. Specifically, when the Act was passed, the U.S. Supreme Court had recently limited the awards of attorneys' fees under Section 1988. *See e.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (rejecting "catalyst theory" as basis for award of attorneys' fees). As explained on the floor of the Senate, the Act was a "direct response to [these] recent reversals [in] direction by the United States Supreme Court" and had the express goal of "facilitat[ing] private enforcement of civil rights laws." C707.

The Act thus is more generous in its awards of attorneys' fees than Section 1988. For example, the Act mandates awards of attorneys' fees and expert costs, which are discretionary under Section 1988. *Compare* 740 ILCS 23/5(c) ("a court

shall award reasonable attorneys' fees . . . ." (emphasis added) *with* 42 U.S.C. § 1988(b) ("the court, in its discretion, *may* allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .") (emphasis added); C707. Similarly, the Act defines "prevailing party" to include the catalyst theory that the U.S. Supreme Court had eliminated from federal law in *Buckhannon*. *Compare* 740 ILCS 23/5(d) ("'prevailing party' includes any party: . . . whose pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing party") *with Buckhannon*, 532 U.S. at 610 ("'catalyst theory' is not a permissible basis for the award of attorney's fees").

Given that the Act is intended to make attorneys' fees *more* available than under Section 1988, it is notable that when the Act was passed, federal courts for decades had held that Section 1988 did not allow for the denial or reduction of reasonable fees "where there are lawyers or organizations that will take a plaintiff's case without compensation." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). Indeed, federal courts have long been unanimous: "[t]here is no limitation in [Section] 1988 that fees be awarded only when counsel has charged the client." *Witherspoon v. Sielaff*, 507 F. Supp. 667, 669 (N.D. Ill. 1981). Nonprofit legal organizations and law firms providing *pro bono* services thus are entitled to seek fees under Section 1988, even if they charge none to their clients. *See K.L. v. Edgar*, No. 92 C 5722, 2000 WL 1499445, at *9 (N.D. Ill. Oct. 6, 2000); *Witherspoon*, 507 F. Supp. at 670.

If the General Assembly intended for attorneys' fees to be more available in civil rights actions than they are under federal law, then it makes no sense to suggest that the Act does not allow for attorneys' fees when representation is *pro bono* in light of the fact that Section 1988 does permit such awards. Indeed, the Act and Section 1988 are indistinguishable on this point, as neither suggests that the client's personal responsibility for paying their attorneys' fees is relevant.[3]

Against this legal backdrop, the House Judiciary Committee specifically reported that the Act would "allow[] access to courts to individuals who can't afford an attorney." *See* C884. The General Assembly was well aware that in civil rights cases, those individuals often are represented by *pro bono* attorneys. Had the General Assembly wanted to so fundamentally break from the practice under Section 1988, it would have said so.

C. Cases Construing The Federal Analog To The Fee-Shifting Provision Confirm That Plaintiffs Are Entitled To Attorneys' Fees.

The federal precedent concerning Section 1988 is relevant in another respect: it is commonplace for Illinois courts to look to case law on analogous

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[3] Federal courts uniformly have held that federal review of fee petitions brought by Section 1988 prevailing parties with *pro bono* representation is limited to an evaluation of the reasonableness of the fee request. *See K.L*, 2000 WL 1499445, at *8-9. Fees are awarded under Section 1988 if the fee is reasonable "in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less." *Blanchard*, 489 U.S. at 93; *Johnson v. Lafayette Fire Fighters Ass'n Local 472, Int'l Ass'n of Fire Fighters, AFL-CIO-CLC*, 51 F.3d 726, 732 (7th Cir. 1995) (Prevailing parties were entitled to recover attorney fees in civil rights action under § 1988 as measured by prevailing market rate, regardless of whether their representation was act of charity from nonprofit legal assistance foundation).

federal statutes to inform their interpretation of state laws. *See, e.g.*, *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 35; *Cent. Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 10; *Zaderaka v. Ill. Human Rights Comm'n*, 131 Ill. 2d 172, 178-79 (1989). Indeed, as discussed above, there is little doubt that the Act's attorneys' fees provision is based on 42 U.S.C. § 1988. 93d Ill. Gen. Assem., House Proceedings, April 3, 2003, at 146 (statements of Rep. Fritchey) (the Act was established to "create a parallel state remedy to . . . the federal cases that were brought under [the Federal] Civil Rights Act"). Accordingly, this Court should look to federal cases awarding fees under section 1988. *Cf. Hamer v. Lentz*, 132 Ill. 2d 49, 58 (1989) (interpreting fee provision of Illinois Freedom of Information Act drawing on case law interpreting the federal Freedom of Information Act).

As discussed above, it is well established that attorneys' fees are available under Section 1988 when an attorney represents a client *pro bono*. *See, e.g.*, *Blanchard*, 489 U.S. at 95 ("That a nonprofit legal services organization may contractually have agreed not to charge *any* fee of a civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way"); *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community,

regardless of whether plaintiff is represented by private or nonprofit counsel.").[4] Of course, this interpretation of Section 1988 fits with that statute's overriding purpose of encouraging private enforcement of civil rights laws by allowing a private plaintiff in a civil rights suit to act as a "private attorney general." *Gibson v. City of Chicago*, 873 F. Supp. 2d 975, 994 (N.D. Ill. 2012) (citation omitted).

Consistent with this longstanding federal precedent, this Court should construe the Act to require fee awards to prevailing parties regardless of whether their attorneys represent them *pro bono*. Unquestionably, Plaintiffs' *pro bono* representation in this case would not bar them from recovering reasonable attorneys' fees under Section 1988. It thus defies the General Assembly's intent to deny a fee award under the Act where it would have been available under Section 1988. This Court should find that the Act does not require courts to deny prevailing parties their reasonable attorneys' fees because their attorneys represent them *pro bono*. This is the only result consistent with the plain language of the statute.

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[4] *See also Moore v. Townsend*, 525 F.2d 482, 486 (7th Cir. 1975) (Award of attorney fees was not improper, in fair housing action under Federal Civil Rights Act, by reason of fact that the fees were not paid by plaintiff, but were furnished by an organization for metropolitan open communities); *Hairston v. R & R Apartments*, 510 F.2d 1090, 1092-93 (7th Cir. 1975) (An award of attorney fees under Fair Housing Act was not precluded by fact that plaintiff, who was unable to bear expense of litigation, was not obligated to pay such fees); *Witherspoon*, 507 F. Supp. at 669-70 (Fact that large law firm that represented prevailing indigent plaintiff in civil rights suit would provide services *pro bono* even if they did not recover a fee award, while the defendant state agency suffered budgetary limitations, did not provide such "special circumstances" as to warrant denial of attorney fees to law firm; law firm had no burden of demonstrating that its ability to work *pro bono* for prisoner clients would be significantly reduced by failure to obtain attorney fees).

See 740 ILCS 23/5(c) ("a court *shall* award reasonable attorneys' fees . . . to a plaintiff who is a prevailing party . . . .").

D. An Award Of Attorneys' Fees To Plaintiffs Is Consistent With The Purpose Of The Fee-Shifting Provision.

The Circuit Court's decision to deny Plaintiffs their attorneys' fees because they are represented *pro bono* also is at odds with the very rationale for fee-shifting in the civil rights context. If plaintiffs represented *pro bono* cannot recover fees then plaintiffs only can avail themselves of the Act's fee-shifting statute if they can afford to pay their attorney or if the plaintiff has a sufficiently lucrative claim for damages so as to incentivize an attorney to agree to a contingent fee agreement.[5]

If the purpose of creating a fee-shifting provision is to incentivize lawyers to pursue civil rights claims, *see* C707, then declining to make attorneys' fees available to *pro bono* counsel undercuts that purpose. Public interest legal organizations, like RBF (and the firms with which they partner, like Jenner & Block) play a critical role in advancing the purpose of the Act's fee-shifting provision by representing clients *pro bono* when they seek to protect their clients' civil rights. Public interest legal organizations often have limited resources, and

[5] *See* Black's Law Dictionary (11th ed. 2019) (Westlaw) (defining "contingent fee" as "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. • Contingent fees are usu. calculated as a percentage of the client's net recovery (such as 25% of the recovery if the case is settled, and 33% if the case is won at trial)"); *see also* 23 Williston on Contracts § 62:4 (4th ed.) ("under a contingency fee contract, the attorney is not entitled to receive payment for services rendered unless the client succeeds in recovering money damages").

the availability of court-awarded fees affects their ability to represent civil rights plaintiffs. Without fees, these organizations have fewer resources for representing clients in cases where fees are available under the Act. As one court observed, it is "undoubtedly true" that "any award of fees [to a nonprofit legal assistance foundation] will serve to promote the [] purpose [of Sec. 1988], because any award of fees [the foundation] receives will enable it to expand its representation in civil rights cases beyond what is provided for in the budget." *Custom v. Quern*, 482 F. Supp. 1000, 1005 (N.D. Ill. 1980).

II. The Circuit Court's Reasoning And Legal Analysis Are Flawed.

Notwithstanding the text of the Act, its legislative history, the clear and settled practice under the federal analog to the Act, and the General Assembly's very purpose for enacting a fee-shifting provision, the Circuit Court held that the Act does not permit the award of attorneys' fees when representation has been *pro bono*. C989-90, A7-8. The Circuit Court offered two justifications for that anomalous result. Both are meritless. First, the Circuit Court wrongly relied on precedents that simply have no bearing on the question presented. They all deal with whether *pro se* lawyers or lawyers representing their own employers have "incurred" fees they may recover under entirely different fee-shifting statutes. Second, the Circuit Court incorrectly concluded that an award of fees in this case would provide Plaintiffs a "windfall." *See* C990, A8.

A. The Cases Relied On By The Circuit Court Are Inapplicable.

The Circuit Court's opinion wrongly claims that a fee award would be "contrary to counsel's own determination to act *pro bono*." C990, A8. On its face, that is absurd. Lawyers take on cases *pro bono* in order to eliminate a barrier to their *clients'* ability to pursue litigation, not because the lawyers are opposed to being compensated for their time. *See, e.g.*, William A. Bradford, Jr., *Private Enforcement of Public Rights: The Role of Fee-Shifting Statutes in Pro Bono Lawyering*, *in* The Law Firm and the Public Good 125, 130 (Robert A. Katzmann ed., 1995) (*Pro bono* representation in cases involving fee shifting is not "another form of contingent fee practice . . . . because in a fee-shifting case the wrongdoer pays the fee rather than the contingent fee plaintiff paying it from his or her award[.]" In addition, there is "nothing antithetical to pro bono lawyering in such a reward for the pro bono lawyer . . . ." and "unlike traditional contingent fee cases, the right vindicated in a successful public interest fee-shifting case has been defined by the legislature as one in furtherance of the public interest.").

Nevertheless, the Circuit Court took the position that attorneys' fees cannot be awarded unless a litigant actually "incur[red]" the fees sought. C990, A8 ("plaintiffs cannot recover fees they did not incur"); *see Vill. of Johnsburg v. BCP Realty, LLC*, 2014 IL App (2d) 130486-U, ¶ 114 (Village "incur[red]" attorney fees because it was "legally responsible for the charges."). This reasoning suffers from an obvious flaw: it reads a word into the Act—the word "incurred"—that appears nowhere in its text. This runs afoul of the cardinal rule that "[a] court should not

read language into a statute that does not exist." *Grey v. Hasbrouck*, 2015 IL App (1st) 130267, ¶ 19 (citing *Lohr v. Havens*, 377 Ill. App. 3d 233, 236 (3d Dist. 2007)).

The Circuit Court purported to ground its rewriting in the Act in two cases: *Hamer v. Lentz*, 132 Ill. 2d 49 (1989) and *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161. *See* C989-90, A7-8. But because these cases are not about *pro bono* lawyers and involve different statutes, the legal and policy arguments in them do not apply here.

In *Hamer*, the Illinois Supreme Court denied fees to *pro se* lawyers under FOIA. 132 Ill. 2d at 63. It should go without saying that *Hamer* has nothing to do with the question presented here. First, at the time, attorneys' fees under the Illinois FOIA were discretionary. *See id.* at 57. That is not true here, where the Act provides for the *mandatory* award of attorneys' fees. *See* 740 ILCS 23/5(c). Second, *Hamer* dealt with the award of attorneys' fees to those proceeding *pro se*, not those with legal counsel who had agreed to *pro bono* representation. That is why the Court in *Hamer* emphasized that awarding fees to *pro se* plaintiffs could lead to "abusive fee generation," because "the fee provision might be used by lawyers with an inactive practice solely to generate fees." 132 Ill. 2d at 59, 62. Rather than "leave the door open for unscrupulous attorneys," the Court concluded "[t]he most effective way to deter potential abusive fee generation is to deny fees to lawyers representing themselves." *Id.* at 62-63. That cannot be said of *pro bono* legal counsel. Third, when the Court looked for a federal statutory analog in *Hamer*, it found that the federal precedent under the federal FOIA

statute had construed the text of that law to foreclose the award of attorneys' fees to *pro se* attorneys. 132 Ill. 2d at 58-60. As discussed above, the opposite is true here, where the federal statutory analog would award reasonable attorneys' fees under these circumstances. *See e.g.*, *Blanchard*, 489 U.S. at 95; *Blum*, 465 U.S. at 895.

As for *Uptown*, this Court extended *Hamer* to deny a FOIA fee award to a non-profit legal organization, where the organization was represented by two of its salaried employees and did not incur any attorneys' fees. Although the Court concluded that the organization was not *pro se*, the Court cited the same policy concerns at issue in *Hamer*. 2014 IL App (1st) 130161, ¶ 25 (noting a fee award "would encourage salaried employees working for a not-for-profit organization to engage in fee generation on the organization's behalf"). But that policy concern is not present in the instant case. Counsel here represent independent clients who sought independent legal advice and pursued bona fide constitutional and statutory claims. Counsel could not have "generated" those claims to benefit themselves. Nor is there any incentive for counsel to provide anything but "objective" advice to their clients.

The Circuit Court also cited *State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, to show that *Hamer* "has been applied not only to FOIA cases but in numerous other contexts as well." 2018 IL 122487, ¶¶ 27-28. But all the cases cited in *My Pillow* involved either *pro se* plaintiffs seeking fees or enterprising lawyers who were representing their own firms. Put another way, none of the

cases cited in *My Pillow* involved the Act (or any analogous fee-shifting provision). *See Kehoe v. Saltarelli*, 337 Ill. App. 3d 669 (1st Dist. 2003) (common law claim for attorney fees); *In re Marriage of Pitulla*, 202 Ill. App. 3d 103 (1st Dist. 1990) (sanctions and fees under predecessor to Rule 137); *In re Marriage of Tantiwongse*, 371 Ill. App. 3d 1161 (3d Dist. 2007) (retainer agreement allowing attorney to recover fees for collecting client's debt); *McCarthy v. Abraham Lincoln Reynolds, III, 2006 Declaration of Living Trust*, 2018 IL App (1st) 162478 (fees under Rule 137), *aff'd in part, rev'd in part sub nom. McCarthy v. Taylor*, 2019 IL 123622 (holding court is authorized under Rule 137 to impose sanctions in the form of attorney fees).

Plaintiffs' *pro bono* representation in this case is entirely different from the *pro se* representation discussed in *Hamer*, *Uptown*, and *My Pillow*. This Court need look no further than the Latin terms themselves to appreciate the distinction: *pro bono* attorneys act for the public good; *pro se* attorneys act for themselves. When clients obtain *pro bono* counsel—often because they cannot afford to pay an attorney—they have no obligation to pay the attorneys for their services. This does not mean, however, that the client wants his lawyer "to serve without payment" or that the attorney has agreed to do so. *See* C983-84, A1-2. Instead, *pro bono* lawyers agree that in order to advance some public good, they will not charge *the client* for their fees. The client may still agree, however—as in this case—to pursue compensation for their attorney under a fee-shifting statute.

The Circuit Court's opinion further misunderstands contingent fee cases. C989, A7. While it is true that "[i]n a *pro bono* case . . . the client does not expect to incur, and does not agree to pay, any legal fees," *id.*, that does not mean the lawyer must enter into a contingent fee agreement in order to be compensated. Fee-shifting statutes provide another way for lawyers to be compensated for their time. This is clear from the plethora of Section 1988 cases confirming plaintiffs can recover fees for their *pro bono* lawyers. *See* Section II.B., *supra*. And "unlike traditional contingent fee cases, the right vindicated in a successful public interest fee-shifting case has been defined by the legislature as one in furtherance of the public interest." Bradford, *supra*, at 130.

In short, *Hamer* and its progeny provide no support for the Circuit Court's denial of fees in this case.

B. Awarding Plaintiffs Their Attorneys' Fees Would Not Result In A Windfall.

The Circuit Court also explained it was denying Plaintiffs attorneys' fees to avoid "a windfall." C990, A8. This analysis lacks any support in law or in fact.

Although federal courts recognize a duty to prevent windfalls under fee-shifting statutes, s*ee e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983), this duty "involve[s] only the determination of whether the hours requested and the rate requested are reasonable." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 643 (7th Cir. 2011). Whether an award of fees amounts to a windfall has nothing to do with whether a plaintiff is responsible for their own legal fees or to

whom the plaintiff provides those funds.[6] Accordingly, the Circuit Court's labeling of this award as a "windfall" is a red herring.

In support of its "windfall" argument, the Circuit Court highlighted that Jenner & Block had informed the Court that it planned to donate its portion of the fee award to RBF. C983-84, A1-2. According to the Circuit Court, this meant RBF would receive an unjustified "gift" based upon the work of another legal entity. C990, A8. But Jenner & Block's decision to donate all or part of their court-awarded fees to partner organizations, allows nonprofit organizations to use those donations to expand their own capacity to enforce civil rights laws. *See* Part. I. C., *supra*. It is for this very reason that the making of such donations has long been not only common practice, but is an ethically recommended best practice for private law firms. *See e.g.*, Bradford, *supra*, at 130-31 (*pro bono* lawyers should "donate all or part of the fee award to the public interest group that referred the case or, if there was no such referral, to a public interest organization linked to the issue that was litigated."). Indeed, ethics rules specifically contemplate such agreements. *See* Ill. R. Prof'l Conduct (2010) R. 5.4(a)(4) ("a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or

[6] Indeed, some federal courts have required awards of attorneys' fees to go directly to *pro bono* counsel in order to avoid a windfall to the *plaintiff*. *See e.g.*, *Hairston*, 510 F.2d at 1093 ("[t]o avoid any windfall" by the prevailing plaintiff who received free legal services from a private legal services organization in an action under the Fair Housing Act, the fee award pursuant to 42 U.S.C. § 3612 "should go directly to the organization providing the services"). *See also Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1263 (9th Cir. 1993) (stating in an action brought under the Truth in Lending Act where the plaintiff was represented by a legal aid society that the losing party is to pay attorney's fee award *directly* to the society).

recommended employment of the lawyer in the matter"); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 374 (1993) ("[i]t is not ethically improper for a lawyer who undertakes a *pro bono* litigation to . . . agree in advance to share . . . court-awarded fees" with the referring nonprofit organization). The Circuit Court's decision upends this well-established practice. *See e.g.*, *Brewington v. Dep't of Corr.*, 161 Ill. App. 3d 54, 70 (1st Dist. 1987) ("That an attorney does not exact a fee or has agreed that the organization employing him will receive any attorney fees awarded are not grounds on which to deny or reduce the fee.").

In all events, even assuming *arguendo* that Jenner & Block's intent to donate its portion of the fee award justifies the denial of its fees, the Circuit Court's opinion ignores that Plaintiffs' counsel at RBF also worked on the case. For example, attorney John Knight logged nearly 200 hours on the case, over forty percent of the total hours for which Plaintiffs seek fee recovery. Therefore, at a minimum, this Court should hold that a private law firm's intent to donate fees does not justify the denial of fees incurred by other legal organizations.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court reverse the order of the Circuit Court and remand the case to the Circuit Court for the Court to enter an order in the amount of Plaintiffs' reasonable attorneys' fees.

Dated: October 30, 2019

Respectfully submitted,

/s/ Clifford W. Berlow
One of their attorneys

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rule 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) 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, is 5,808 words.

October 30, 2019

/s/ Clifford W. Berlow
Clifford W. Berlow

INDEX TO APPENDIX

52467

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 09 CH 3226**
	)	
DAMON T. ARNOLD, M.D.,	)	
	)	
Defendant.	)	

ORDER

This cause comes before the Court on plaintiffs' Petition for Attorneys' Fees, Costs, and Expenses.

Background

Plaintiffs filed this suit in January 2009 against defendant, the Illinois State Registrar of Vital Records ("the Registrar"), invoking *Ill. Const. 1970,* Art. I, §§ 6, 12 and the Illinois Civil Rights Act of 2003, 740 ILCS 23/1 *et seq.* ("ICRA"). Plaintiffs sought relief with respect to their birth certificates.

The Court's notes indicate that there was only one actual Court appearance (brief, if not routine), and no substantive motion practice, from the filing of the suit until June 25, 2009, when the Registrar moved to dismiss the suit as moot because the Registrar had given plaintiffs the relief they sought, based on a change in policy. On October 1, 2009 the Court dismissed the case as moot. Plaintiffs then moved for an award of fees and costs pursuant to ICRA, 740 ILCS 23/5(c). ICRA expressly embodies the "catalyst" basis for an award of fees and costs, by including in the definition of a "prevailing party" one "whose pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing party relative to the relief sought." *See* 740 ILCS 23/5(d)(3).

The Registrar does not dispute plaintiffs' "catalyst" contention. But the Registrar does oppose the fee petition on the ground that (*i*) it is barred by sovereign immunity and (*ii*) even if not barred, it is excessive in amount.

A further issue arose at the hearing on the fee petition. Plaintiffs were (and are) represented both by the Roger Baldwin Foundation of ACLU, Inc. ("RBF") and by Jenner & Block ("J&B"). Both are acting *pro bono.* At the January 27th hearing, J&B announced that it would contribute to RBF any fee award J&B received. This raised the question whether ICRA authorizes a *pro bono* lawyer (*i.e.,* a lawyer who has already

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A1

agreed to serve without payment) to seek payment nevertheless, so that – to put it bluntly – the lawyer can force the State to make a gift of the State's money to someone the lawyer (not the State) unilaterally deems a suitable recipient. The Court invited supplemental memoranda on that point. Plaintiffs submitted a supplemental memorandum. The Registrar did not.

Another point arose following the decision of the Appellate Court, First District, in *Morawicz v. Hynes,* 401 Ill.App.3d 142 (1st Dist. 2010). *Morawicz* concerned, among other things, a petition for attorneys' fees in an action which granted the petitioning plaintiffs relief against State officers based on a finding of unconstitutionality of a portion of a State statute. *See Morawicz, supra,* 401 Ill.App.3d at 143-45. The *Morawicz* Court, observing that it had a "duty to consider whether the Court of Claims has exclusive jurisdiction over the fee claim," bluntly and broadly held: "This court has ruled that expenses in civil litigation against the State must be considered a subject matter in which the Court of Claims is given exclusive jurisdiction." *Id.* at 151. The Court invited the parties to address *Morawicz.* Both sides submitted supplemental memoranda.

More recently, however, the First District decided *Grey v. Hasbrouck,* 2015 IL App (1st) 130267. Like this suit, *Grey* involved the availability of an attorneys' fee award in an action against the Illinois Department of Public Health. Like this suit, *Grey* was resolved without adjudication on the merits (in this case, due to the Court's determination of mootness based on the Department's agreeing to plaintiffs' demands; in *Grey,* based on a consent decree). *Grey* held that section 5 of the Illinois Civil Rights Act, 740 ILCS 23/5, authorizes an award of attorneys' fees against the State notwithstanding the Immunity Act. *See* 2015 IL App (1st) 130267, ¶ 21. In addition, *Grey* held that the "state officer exception to sovereign immunity" applied, further validating the propriety of an otherwise appropriate attorneys' fee award. *Id.,* ¶¶ 27-28.

Discussion

---Sovereign Immunity

Before the *Grey* decision, the factual and legal differences between this case and *Morawicz, supra,* made supplemental briefing appropriate on the issue of whether *Morawicz* applies to this case. The Registrar argued that *Morawicz* applies. Undeterred by the breadth of *Morawicz*'s language, plaintiffs argued that it does not apply here.

For this Court, *Grey, supra,* resolves that debate. On the basic sovereign immunity/"state officer" issue, *Grey* is effectively indistinguishable from this case. As to that issue, *Grey* is accordingly binding on this Court. Nothing would be gained by briefing that point. Even without *Grey,* moreover, this Court concludes that the Registrar's sovereign immunity argument is unpersuasive, and supported neither by the language of the Illinois Civil Rights Act nor by its legislative history. As to language, the Act's fee-shifting provision, 740 ILCS 23/5(c), authorizes an award of fees to a plaintiff who is a prevailing party "in any action brought ... (2) to enforce a right arising under the Illinois Constitution." As the legislature surely knew when it wrote that language, a suit

to enforce a right arising under the Illinois Constitution can only be brought against the State or its sub-units. *See, e.g., Barr v. Kelso-Burnett Co.,* 106 Ill.2d 520, 526-27; *Chicago Commons Ass'n v. Hancock,* 346 Ill.App.3d 326, 330-31 (1st Dist. 2004). Thus if § 5(c) did not waive sovereign immunity as to fee awards, it would be an absurd self-contradiction. On its face, then, § 5(c)(2) necessarily contemplates a fee award against the State or its sub-units, and just as necessarily waives sovereign immunity to that extent. Though somewhat murky regarding sovereign immunity *per se*, the legislative history does make plain the drafters' intent that parties "whose litigation causes a reversal of policy *by the government*" (statement of Sen. Harmon; emphasis added) should be able to recover fees – which would obviously have to come from that same "government."

---Excessive Fee Request

It will be recalled that there was only one brief Court appearance in the case (lasting perhaps ten minutes; say a half hour, if we include waiting time), from the filing of the suit until its dismissal as moot. Yet RBF and J&B together seek compensation for a total of 489.2 hours of work, including 49.5 hours (slightly over 10% of the total) on the fee petition. *Corrected Pet.* at 16. The Registrar challenges the fee-petition part of the request, as well as asserting that the remainder of the request is too large in relation to the work done and tendering five specific objections to particular types of fee requests.

1. The Fee Petition Issue

The Registrar argues generally that the time spent on the fee petition is excessive, citing *Kelley v. City of Chicago,* 205 F.Supp.2d 930, 933 (N.D. Ill. 2002), and *Ustrak v. Fairman,* 851 F.2d 983, 986-88 (7th Cir. 1988). In *Kelley,* the District Court concluded that though the total time spent on the case was 158.1 hours, 14.6 hours spent on a fee petition was excessive, and reduced the 14.6 hours to 9 hours. In *Ustrak,* the Court reduced by two-thirds the compensable time (initially 108.5 hours) spent on a fee petition in a case involving 561.4 total hours of lawyer time.

In this case, which was resolved at (indeed almost *before*) the pleading stage, fee petition time amounting to an entire work week seems undue. Plaintiffs cite *Eirhart v. Libbey-Owens-Ford Co.,* 996 F.2d 846, 851 (7th Cir. 1993), approving 146.9 hours for a fee petition in a case involving 340.4 hours total fees. *Eirhart* is not strong authority: the Court, *Id.* at 851, approved the petition largely because the defendant "never explain[ed] why this fact warrants reversal of the lodestar figure, and we will not invent a reason." Plaintiffs also cite *Williams v. Z.D. Masonry Corp.,* 2009 U.S. Dist. LEXIS 11554 (N.D. Ill., Feb. 17, 2009), allowing 17.5 hours on a fee petition (in comparison to 109.8 hours on the merits); but in *Williams,* defendant failed to cooperate in addressing the fee issue, and, even so, the *Williams* Court actually reduced the fee-petition time by nearly a third (from 24 hours to 17.5 hours), noting that "24 hours of work on Plaintiff's fee petition is large relative to the time spent litigating." 2009 U.S. Dist. LEXIS 11554, at *11.

Preparing a fee petition is in the main a quasi-clerical task. It should not take an entire work week – let alone an entire work week by a lawyer – to assemble the necessary

time and expense information. Briefing adds time; but here, the 49.5 hours claimed (as stated in the Corrected Petition) was expended "up front" on assembling the information and preparing a more or less plain-vanilla memorandum. It would be surprising if counsel, adept in this sort of litigation, did not have a template for such memoranda ready to hand. To be sure, counsel did incur additional time in responding to the Registrar's objections (18 pages, plus exhibits), generating a 20-page Reply Memorandum, and in responding to the Court's concern over the *pro bono* donation issue (*see* pages 1-2 *supra*). That is not included in the 49.5 hours, however.[1]

As the cases cited above make painfully clear, there is no mechanical bright line in this area. The fee petition here may have taken longer to prepare and brief because there are three law firms on plaintiffs' side (the Roger Baldwin Foundation in Chicago, the American Civil Liberties Union Foundation in New York, and Jenner & Block in Chicago). But that does not improve matters. Over-lawyering is not a virtue. A similar response applies to plaintiffs' argument that they should be paid more because their fee petition – not the case, the fee petition – raises issues of "novelty and complexity." New issues on the merits may warrant extra compensation. Rewarding "novelty and complexity" in fee petitions is another matter, however. Getting paid extra for making outré fee demands would be counterproductive, would undercut "proportionality" principles (*see* note 1 below), and might encourage "abusive fee generation," an evil of which *Hamer v. Lentz,* 132 Ill.2d 49, 62-63 (1989), warned in a slightly different context.

Citing cases, the Registrar argues that fee petition hours should be based on some set percentage of the overall hours spent on the case. That seems to measure apples by oranges, though. Treating the matter in terms of the fee petition itself, the Court concludes, on balance, that the 49.5 fee-petition hours should be reduced by 20%, to 39.6 hours. Using an average hourly rate of $374.72 (*i.e.,* $183,315, the total sought, divided by the total 489.2 hours) – a more than adequate rate for Chicago practitioners as a whole – the compensation for the fee petition comes to $14,838.91. This computation does not take into account the *pro bono* donation issue, about which more later.

2. Other "Excessiveness" Challenges to the Fees Sought

In addition to a general claim that the fees sought are "excessive in light of the fact that Plaintiffs' claims became moot before Defendant even filed a responsive pleading," *Resp.* at 8, the Registrar challenges several categories of fees and costs. In particular, the Registrar objects to "hours related to press conferences and press releases" (approximately 5.7 hours); "hours for 'conferences' among attorneys" (approximately 64.5 hours); "hours for non-legal work" such as docketing or "administrative details" (roughly 4.4 hours); "hours regarding 'potential plaintiffs'" (roughly 38.6 hours); and "over 24 hours discussing experts and consulting with experts."

---

[1] Arguably it should not be. Compensating counsel for such responsive tasks, at defendant's expense, might dissuade defendants from raising otherwise legitimate concerns. On the other hand, allowing fees for responding to fee objections may help to deter defendants from raising not-so-legitimate concerns. The proportionality standard, *see* page 5 below, should apply to fee objections as much as to fee requests.

(b) Specific Objections to Fees Claimed

(*i*) Press Conferences and Press Releases

The Registrar complains that "time related to press releases and press conferences" is "clearly not compensable." Endeavoring to separate out such time from what the Registrar terms "block-billed entries," the Registrar asks to disallow 5.672 hours, a cost of $2690.61.

It is true, as the Registrar argues (quoting *Rum Creek Coal Sales, Inc. v. Caperton,* 31 F.3d 169, 176 (4th Cir. 1994)), that "[t]he legitimate goals of litigation are almost always attained in the courtroom, not the media." *See* Ill. RPC 3.6(a). But it is also true that publicity can be a proper means of catalyzing regulatory change, a primary goal in this dispute. The Court need not decide this point, however, because plaintiffs have deleted their press-related claims from their fee petition. *See Pl. Reply Mem.* at 14.

(*ii*) Hours for "Conferences" Among Attorneys

The Registrar challenges plaintiffs' fee requests for "dozens of telephone conferences, team meetings, and other meetings of the attorneys in this case," which add up to some 64.5 hours and almost $25,000 in requested fees. The Registrar complains of block-billing and inconsistent record-keeping among the lawyers involved, which makes it difficult to assess exactly what took place and whether it was necessary.

Plaintiffs correctly point out that there is "no hard-and-fast rule" about meetings or discussions among counsel. Yet that does not mean there is no review of such billings. Plaintiffs also point out that they have already reduced conferencing hours by removing all of the time of two lawyers. *Pl. Reply Mem.* at 14-15. To further address the Registrar's concerns, plaintiffs have made some further adjustments (*see Id.,* referencing Ex. B). It appears from Exhibit B that the Jenner & Block "time cut from initial fee petition" alone is at least 217.75 hours, representing $71,033.75 in claimed fees.

That is not all. The total Ex. B adjustment, which would include all adjustments for "conferences" and "multiple attorneys" and a variety of adjustments based on "billing judgment,"[3] reduces the hours claimed by almost 410 hours (actually, 409.957) and the corresponding fees and expenses by almost $145,000 (actually, $144,449.84, most of which – to be exact, $140,507.26 – is fees). Those are not small reductions. Simply to state them is to force one to raise one's eyebrows regarding the original requests. The end result is to lend empirical support to what the Court earlier suggested seems to be intuitive overbilling.

The Court has the inherent authority to reduce a fee petition, or a component thereof, on the ground of disproportion, which can refer either to a disparity between the fees sought and the amount at stake on the merits, or to a determination that even if

[3] This is an intriguing choice of words, given that the clients in this case incurred no bills.

actually incurred, the requested fees are excessive in terms of the legal work actually required in the case. The latter concern is more common. *See, e.g., Stark v. PPM America, Inc.,* 354 F.3d 666, 674 (7th Cir. 2004) (affirming a 30% reduction for "hours that were excessive, duplicative, or unnecessary"). As to the former concern, case law suggests that a court should not reduce a fee request "*solely* on proportionality" grounds (*i.e.,* based *solely* on how the requested fee award relates to "the monetary amount of an award" on the merits). *Crystal Lake Ltd. Partnership v. Baird & Warner Residential Sales, Inc.,* 2018 IL App (2d) 170714, ¶ 87; *J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership,* 325 Ill.App.3d 276, 283 (5th Dist. 2001).

Though merits-based proportionality may not be a standalone litmus test, however, in this Court's view it must be more than just a pious wish. Even *Crystal Lake* and *Esker* acknowledge that in evaluating a fee petition, merits-related proportionality is a (though not *the*) pertinent factor, and a legitimate concern. As traditionally framed, the pertinent factors explicitly include "the reasonable connection between the fees sought and the amount involved in the litigation." *See Esker, supra,* 325 Ill.App.3d at 283. For one thing, a fee petition which seems excessive in light of the amount at stake in the case may for that reason alone suggest unnecessary or inefficient lawyering.

Also, the importance of the proportionality factor depends to some degree on context. It cannot be given much weight, for instance, in the context of a statute, such as the Consumer Fraud Act, 815 ILCS 505/10a(c), which uses fee-shifting as an incentive to "private attorneys general" to bring suits which otherwise would cost the plaintiff more than the harm done. *Cf. Kinkel v. Cingular Wireless,* 223 Ill.2d 1, 29 (2006) (unconscionability analysis includes a "cost-price disparity" factor, requiring comparison of plaintiff's costs to sue with her recoverable damages). By contrast, when a private contract contains a fee-shifting provision, it seems reasonable to consider what the parties likely had in mind. For example, *Esker, supra,* 325 Ill.App.3d at 284-88, held that an expert witness fee of $20,000 was proper under a contractual fee-shifting provision. The As the Appellate Court noted, *Id.* at 285, we should ask "what was contemplated by the parties." The contract involved well over $200,000; it was likely that expert testimony would be needed if there was a dispute; and both sides were sophisticated. *Id.* at 278, 287. Would the same be true, however, if the contract was for only $1,500?

In this case, there is no bargained-for fee-shifting provision. The statutory basis for a fee award here, unlike the Consumer Fraud Act, does not demonstrate a legislative intent to mulct a defendant (which under 740 ILCS 23/5 will always be a "unit of government") by decoupling litigation cost from the value of the underlying claim; if anything, the statute points the other way by directing us to "consider the degree to which the relief obtained relates to the relief sought." Despite its "catalyst" provision, nothing in the statute suggests that a claim the State accepts after only a single, brief, non-substantive court appearance should be the basis for what the Corrected Fee Petition says is almost $200,000 ($183,315 in fees and $6,168 in costs and expenses).[4]

[4] Plaintiffs' post-briefing adjustments indicate that this itself is a drastic reduction: after briefing, plaintiffs cut almost $145,000 ($140,507.26 in fees and $3,942.58 in expenses) from the initial amount sought.

The Court acknowledges plaintiffs' showing that they made significant efforts to resolve the dispute before filing this suit. Even so, however, the Court finds the amount sought ineluctably out of line with the near nonexistence of this litigation itself (well over 90% of which has concerned fees, not substance). In the Court's view, that determination does not necessarily require an evidentiary hearing. Though an evidentiary hearing would seem more scientific, under these circumstances the added cost of such a hearing would seem more to rub salt in the wound than to serve the interests of justice. If there is to be any fee award here – a point addressed below – in this Court's view it should be reduced by 50% across the board, after giving effect to the other adjustments noted previously in this Memorandum Order.

3. Is Any Fee Award Appropriate In This *Pro Bono* Case?

In the unusual circumstances of this case, the foregoing discussion, though responsive to the parties' dispute, seems more academic than practical. On reflection, the Court concludes that in this instance no fee award is proper here, for two reasons.

In a *pro bono* case such as this (*see* page 1 *supra*), the client does not expect to incur, and does not agree to pay, any legal fees. That is the difference between a *pro bono* case and a contingent fee case (which is subject to strict regulation; *see, e.g.,* Ill. R.P.C. Rule 1.5(c)). Our courts have grappled with the question of whether statutory attorneys' fees can be awarded in a case in which no such fees are actually incurred. The tendency is to disallow them. In *Hamer v. Lentz,* 132 Ill.2d 49, 62-63 (1989), for example, our Supreme Court held that a lawyer proceeding *pro se* could not recover fees under FOIA because the lawyer did not actually incur any such fees. As noted in *Uptown People's Law Center v. Department of Corrections,* 2014 IL App (1st) 130161, ¶ 24, *Hamer* is broadly applied "in contexts other than FOIA." *See, e.g., State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.,* 2018 IL 122487, ¶¶ 24-28, 37. In *Uptown* itself, the *Hamer* principle was extended to bar a FOIA fee award to Uptown, a not-for-profit "artificial entity." Even though Uptown "was represented by attorneys," it employed those attorneys anyway. Thus it "was not required to spend additional funds" to benefit from their services in the FOIA action. Accordingly, "legal fees were never a burden that Uptown was required to overcome in order to pursue its FOIA requests." *Uptown, supra,* 2014 IL App (1st) 130161, ¶ 25, citing *In re Marriage of Tantiwongse,* 371 Ill.App.3d 1161, 1164-65 (3d Dist. 2007) ("attorneys ... representing themselves in a collection action against a client incurred no legal fees on their own behalf and thus, were not entitled to attorney fees for their collection action"), and *Label Printers v. Pflug,* 246 Ill.App.3d 435, 439 (2d Dist. 1993) (where a party's "representation was provided as a gratuity, he cannot recover the fees as damages").

In this Court's view, the logic of those cases is unassailable here. As in *Uptown, supra,* 2014 IL App (1st) 130161, ¶ 27, plaintiffs here "[are] not entitled to receive attorney fees that were never incurred." As in *Label Printers, supra,* 246 Ill.App.3d at 439, plaintiffs who have not "paid the fee or ... become liable to pay the fees" cannot

recover them.[5] That this case involves the Illinois Civil Rights Act fee-shifting provision makes no difference. Like the Illinois False Claims Act *qui tam* provisions at issue in *Schad, supra,* the Illinois Civil Rights Act provision is "in derogation of the common law" and "must be strictly construed." *Schad, supra,* 2018 IL 122487, ¶ 18. Under the case law noted above, plaintiffs cannot recover fees they did not incur.

Nor *should* they, in this situation. The efforts of the unsuccessful fee claimant in *Schad* resulted in "revenues ... recovered for the State." *Schad, supra,* at ¶ 37. That did not justify a windfall for the claimant. Here, plaintiffs wish actually to charge the State (or the taxpayers) for amounts plaintiffs did not themselves incur. That would be even more a windfall. Perhaps still more significantly, plaintiffs do not, strictly speaking, wish to charge the State for legal fees. What they propose to do is to charge the taxpayers for a *gift,* in the amount of the legal fees plaintiffs did not incur, to recipients *plaintiffs' counsel* will select. The potential precedent of thus ignoring the case law discussed above is not encouraging. That the recipient in this instance is expected to be the ACLU's Roger Baldwin Foundation does not eliminate the difficulty. Suppose some future *pro bono* counsel decides to present taxpayer funds to – say – a church, or an organization which is controversial.

That prospect should not be encouraged. It is contrary to the case law discussed above. It is contrary to counsel's own determination to act *pro bono.* Just as inefficiency in support of a good cause is still inefficiency, *see* page 5 n.2 *supra,* so a bad rule is not justified because the underlying cause is perceived to be good.

Accordingly, **IT IS HEREBY ORDERED** as follows:

1. For the reasons stated above, plaintiffs' Corrected Petition for Attorneys' Fees, Costs, and Expenses is DENIED, except that plaintiffs may recover $6,168 in costs and expenses.

DATED: March 18, 2019

ENTER:

ENTERED
JUDGE PETER FLYNN-1784
MAR 18 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Circuit Judge

[5] *Label Printers* – though not *Uptown* or the other cases cited in the text on this point – cited, among other authorities, *Peterson v. Lou Bachrodt Chevrolet Co.,* 76 Ill.2d 373 (1979). For "collateral source rule" reasons not implicated in the present discussion, *Peterson* was overruled in *Wills v. Foster,* 229 Ill.2d 393, 404, 415 (2008). *Wills* has no bearing on the present discussion.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK and KARISSA ROTHKOPF,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	09CH03226
	)	
Defendant.	)	
	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs Victoria Kirk and Karissa Rothkopf, by their attorneys, complain against Damon T. Arnold, M.D., in his official capacity as State Registrar of Vital Records, as follows:

Preliminary Statement

1. Plaintiffs bring this action seeking declaratory and injunctive relief for violations of the Vital Records Act, 410 ILCS §§ 535/1-29, and in the alternative for violations of the following provisions of the Illinois Constitution: Article I, § 2 (the rights to equal protection and due process) and Article I, §§ 6 and 12 (the right to privacy).

2. Plaintiffs are transsexual individuals who were born in Illinois and have Illinois birth certificates. Plaintiffs have undergone medical treatment, including surgeries, to conform their bodies to their internal sense of gender (their gender identities). They have transitioned from male to female.

3. Defendant is the State Registrar of Vital Records who is responsible for administering the Vital Records Act (VRA).

CLERK OF THE CIRCUIT COURT - COOK COUNTY
00055612 Chancery-01 1/27/2009 8:38AM
ATTY: 05003 022 KFORREST
AD DAMNUM: $0.00
CASE NO: 2009CH03226 CALENDAR: 04
COURT DATE: 0/0/0000 12:00AM
CASE TOTAL: $319.00

Base Filing Fee 6	$240.00
Document Storage	$15.00
Automation	$15.00
Law Library	$13.00
Arbitration	$10.00
Dispute Resolution	$1.00
Court Services	$25.00
CHECK NO: 20745	
CHECK AMOUNT:	$319.00
CHANGE	$0.00

RECEIPT 0001 OF 0001
TRANSACTION TOTAL: $319.00

THANK YOU

4. When an individual who was born in Illinois has a form of gender confirmation surgery, Defendant routinely changes the gender marker on Illinois birth certificates so that the certificates accurately reflect the person's gender identity.

5. Nevertheless, Defendant has refused to change the gender marker on Plaintiffs' birth certificates for the sole reason that Plaintiffs chose to have some of their surgeries performed by a doctor licensed in another country, rather than in Illinois or in another state of the United States.

6. Denying Plaintiffs accurate birth certificates prevents them from complying with the advice of medical experts in the treatment of transsexuals who recommend that transsexual individuals ensure that all aspects of their lives reflect their gender identity.

7. Denying Plaintiffs accurate birth certificates places them at risk of physical or emotional harm if their identity as a transsexual is disclosed to a person who did not know they were transsexual or who harbors hostility towards transsexuals.

8. It is psychologically and emotionally harmful for Plaintiffs to have government-issued birth certificates that state incorrectly that they are male.

9. Plaintiffs seek a declaration that Defendant's refusal violates the VRA, because nothing in that Act requires surgery by a U.S.-licensed doctor before a change in the gender marker on a birth certificate is allowed. Plaintiffs also seek an injunction ordering Defendant to issue them accurate birth certificates.

10. In the alternative, Plaintiffs seek a declaration that the VRA, as interpreted and administered by Defendant, violates the equal protection, due process, and privacy protections found in the Illinois Constitution, and an injunction ordering Defendant to issue Plaintiffs accurate birth certificates.

11. Defendant's interpretation of the VRA violates equal protection because, without justification, it treats Plaintiffs differently from other transsexual persons based on Plaintiffs' choice of surgeons. The distinction drawn by Defendant is arbitrary and fails to rationally further any legitimate state interest.

12. Defendant's interpretation of the VRA also violates Plaintiffs' due process and privacy rights by, without justification, burdening their right to make decisions about their medical care, including what surgeon to use for their gender confirmation surgeries. Defendant places an unconstitutional burden on those rights by preventing Plaintiffs from obtaining a birth certificate that accurately lists their gender solely because they chose a surgeon who is licensed abroad rather than in Illinois or another state of the United States.

13. Plaintiffs seek declaratory and injunctive relief to ensure that transsexual persons who have chosen or would like to choose a surgeon licensed abroad rather than in Illinois or another state of the United States are afforded their rights under the VRA, or alternatively, that their rights to equal treatment under the law and their due process and privacy rights to make their own decisions about medical care are fully respected.

Jurisdiction

14. This Court has jurisdiction over the subject matter pursuant to Article VI, § 9 of the Illinois Constitution. This Court has personal jurisdiction over the defendant pursuant to 735 ILCS § 5/2-209(a).

Venue

15. Venue is proper pursuant to 735 ILCS § 5/2-101, because the defendant resides in Cook County.

The Plaintiffs

16. Plaintiff Victoria Kirk lives in Chicago, Illinois and was born in Aurora, Illinois in 1980. At birth, she was assigned the male gender, but she became aware of her female gender identity in early childhood. Her gender identity has been female her entire life.

17. Victoria has a medical condition termed gender identity disorder which means that her female gender identity does not match the sex she was assigned at birth and that this conflict causes her severe psychological distress and intense feelings of discomfort. Under the care and direction of mental health professionals and physicians, Victoria underwent sex reassignment as treatment for her gender identity disorder.

18. Victoria first took sex reassignment steps to make her body and her gender expression conform to her female gender identity in 2003. She began hormone therapy in around February of 2003, and in August 2005, she legally changed her name to a traditionally female one and also changed the name on her driver's license and social security records. In September 2005, Victoria's name was changed on her birth certificate and in her school records, and she started to dress and present herself at all times as a woman. In November 2006, she underwent gender confirmation surgeries, including both genital reconstruction and breast augmentation.

19. Plaintiff Karissa Rothkopf lives in a small town in southern Wisconsin, but was born in Dixon, Illinois in 1972 and spent her childhood years in Rockford, Illinois. At birth, she was assigned the male gender, but she became aware of her female gender identity in early childhood. Her gender identity has been female her entire life.

20. Karissa has a medical condition termed gender identity disorder, which means that her female gender identity does not match the sex she was assigned at birth and that this conflict causes her severe psychological distress and intense feelings of discomfort. Under the

care and direction of mental health professionals and physicians, Karissa underwent sex reassignment as treatment for her gender identity disorder.

21. Karissa first took sex reassignment steps to make her body and her gender expression conform to her female gender identity in 2003. She began hormone therapy for sex reassignment in 2003 and started to dress and present herself at all times as a woman in March 2007. In April 2007, Karissa changed her name to a traditionally female one and changed her name and gender marker on her driver's license and social security records, and in August of the same year, she changed the name on her birth certificate. She underwent breast augmentation surgery along with various feminizing procedures on her face and neck in October 2007. In November, Karissa changed her name and gender on her passport, and in December 2007, she had genital reconstruction surgery.

The Defendant

22. Defendant Damon T. Arnold is the Director of the Illinois Department of Public Health and the State Registrar of Vital Records, whose official responsibilities and duties include directing, supervising, and issuing instructions necessary to the efficient administration of a statewide system of vital records, the state Office of Vital Records, and acting as the custodian of Illinois' vital records. 410 ILCS § 535/5. Defendant implements and administers the statutory provision, 410 ILCS § 535/17(1)(d), at issue in this case.

Facts
Gender Identity Disorder and Its Treatment

23. Gender identity disorder is a medically recognized condition in which a person's gender identity does not match his or her anatomical sex at birth and the conflict between the person's gender identity and anatomy causes psychological distress and intense feelings of discomfort. This psychological distress and discomfort is called gender dysphoria.

24. "Gender identity" is a person's internal personal identification as a man or a woman. It is distinct from sexual orientation in that it does not involve or dictate to whom an individual is romantically, emotionally, and physically attracted.

25. Medical specialists in gender identity agree that gender identity establishes itself very early – sometimes as early as three years of age – and is not the result of conscious choice.

26. A person's gender identity cannot be changed. In the past, some therapists tried to "cure" people with gender identity disorder through aversion therapies, electro-shock treatments, medication, and other therapeutic techniques. These efforts were not successful and often caused severe psychological damage. Based on contemporary medical knowledge and practice, attempts to change a person's core gender identity are considered to be futile and unethical.

27. The term "transsexual" describes persons, such as the Plaintiffs, who have the most severe form of gender identity disorder. Typically, transsexuals have undergone, or plan to undergo, medical treatment in the form of hormone therapy or gender confirmation surgeries or both so that their bodies conform more closely to their gender identity. "Transgender" describes a larger group made up of persons whose gender identity, appearance or mannerisms do not conform to societal expectations about the sex they were assigned at birth. That larger group includes transsexuals as well as others who have not undergone either hormone therapy or gender confirmation surgeries.

28. Standards of care have been established for administering sex reassignment treatment to patients with gender identity disorder based on decades of clinical experience and a substantial body of research. Sex reassignment is treatment that changes a person's physical anatomy, behavior, clothing, and other manifestations of gender from the gender they were

assigned at birth to the one that fits their gender identity. Changing a person's legal name and correcting the gender and name on one's identity documents are parts of sex reassignment treatment.

29. It is the standard of care to treat gender identity disorder with sex reassignment. Sex reassignment treatment is not, however, the same for every transsexual person, but is determined by the exercise of individualized medical judgment to achieve the goal of reducing a patient's gender dysphoria.

30. Sex reassignment often consists of three components: hormone therapy, living full-time "presenting" in the gender corresponding with the person's gender identity (known as the "real-life" experience), and gender confirmation surgeries.

31. Gender confirmation surgeries may include breast augmentation or reduction surgery, genital reconstruction surgery (sometimes also called sex reassignment surgery), and other surgeries to feminize or masculinize a person's appearance.

32. To begin hormone therapy, it is the standard of care for a patient to either have lived full-time presenting as the gender that matches his or her gender identity for a minimum of three months or to have had a therapeutic relationship with a mental health specialist for a minimum of three months. The hormones are prescribed by a physician, and the mental health provider must write a letter recommending the hormone therapy to the physician.

33. Real-life experience is the adoption of a gender role and gender presentation that is congruent with a person's gender identity. Consequently, a female transsexual will act and present herself as female in all aspects of her life. A legal name change to one that is traditionally associated with women is a part of the real-life experience.

34. It is the standard of care to require someone to complete a full year of continuous hormone therapy and continuous real-life experience, among other requirements, prior to genital reconstruction surgery.

35. Changing the name and gender on a person's identity documents is another important aspect of sex reassignment, since those documents are crucial to that person's ability to function successfully in the new gender. A person may need a birth certificate to prove eligibility to work when starting a new job; to obtain other identity documents that allow her to vote, to travel, or to enter buildings; or to gain access to other government services or employment benefits.

36. Plaintiffs have been able to obtain government identity documents listing the correct gender without having corrected birth certificates. However, transsexual persons born in Illinois who now live in states such as New Jersey and Virginia are unable to even correct the gender on their driver's licenses, because those states require an amended birth certificate before changing the gender on a transgender person's driver's license.

37. Identity documents listing a gender that fails to match up to one's current gender presentation can often lead to harassment, discrimination, or groundless accusations of fraud. Additionally, for a person who has struggled for years to live life in the correct gender, the knowledge that one's identity documents label her or him with the wrong gender can, by itself, cause serious psychological injury.

Victoria Kirk

38. Victoria Kirk extensively researched possible surgeons to perform her genital reconstruction surgery and breast augmentation by reviewing their credentials and photos of their patients' surgical results. Different surgeons offer diverse techniques, and a particular technique

may offer some persons a better result or reduce the risks of the surgery. Additionally, Victoria communicated with many other transsexual women about their satisfaction with particular surgeons and the results they were able to achieve. Finally, she spoke to her therapist about her decision.

39. Victoria chose Dr. Suporn Watanyusakul because she concluded that his technique would achieve the most anatomically correct result for her with the least amount of scarring. She also preferred his practice of completing genital reconstruction surgery in one step, as opposed to the two-step process other surgeons followed.

40. Dr. Suporn is licensed by the Medical Council of Thailand, but he is not licensed in any state of the United States.

41. Victoria has been permitted to change the gender on all of her government-issued identity documents to accurately reflect her female gender identity, except for her birth certificate. The governmental agencies that have allowed her to correct her documents include the United States Social Security Administration, the United State Department of State, and the Illinois Secretary of State.

42. As stated in Paragraphs 58-61, Victoria applied for and Defendant denied her a corrected birth certificate. Her birth certificate still lists her gender as male, despite her transition, her surgeries, and the change in the gender marker on her other government documents.

43. Victoria completed a certificate in digital animation in September 2005 and has worked as a web developer and animator for the past eight years in Raleigh, North Carolina, Tampa, Florida and the Chicago area. In her work and all other aspects of her life, Victoria has lived fully as a woman for more than three years, since September 2005.

44. Victoria's current birth certificate fails to reflect who she is. She wants and needs the sex designation on her birth certificate to match her body and mind. Moreover, she has seen how much more restrictive the government has become about identity documents since September 11th, so she is concerned that, unless her birth certificate is corrected, more invasive and restrictive laws or government practices in the future may prevent her from obtaining a passport or driver's license with her correct gender on it, or may make her inaccurate birth certificate more accessible to strangers. She reasonably fears the embarrassment and potential for violence that result from being forced to show an identity document which identifies her as male.

45. Victoria knows how traumatic and embarrassing it can be to have to show an identity document that lists her gender as male, since she was stopped a few years ago by a state trooper in South Carolina. At that time, she presented as a woman, but the gender on her driver's license had not been changed. It is psychologically and emotionally harmful for Victoria to have a government-issued birth certificate that states incorrectly that she is male.

Karissa Rothkopf

46. Karissa Rothkopf extensively researched possible surgeons to perform her genital reconstruction surgery by reviewing their credentials and photos of their patients' surgical results.

47. Karissa communicated with surgeons and their staff about their techniques and recommendations for her, and she asked a number of transsexual women about their satisfaction with particular surgeons and the results they were able to achieve. Finally, she spoke to her physician and therapist about her decision.

48. Karissa chose Dr. Suporn Watanyusakul, because she believed, based on her research, that his surgical procedure was the most effective technique for her.

49. Karissa has been permitted to change the gender on all of her government-issued forms of identification, except for her birth certificate. The governmental agencies that have allowed her to correct her documents include the United States Social Security Administration, the United States Department of State, and the Wisconsin Department of Transportation.

50. As stated in Paragraphs 58-61, Karissa applied for and Defendant denied her a corrected birth certificate. Her birth certificate still lists her gender as male, despite her transition, her surgeries, and the change in the gender marker on her other government documents.

51. Karissa has a master's degree in business administration and is a Supervisor/Project Leader at a large non-profit health care provider in Wisconsin, where she and the six employees she supervises maintain the medical records computer system for all the hospitals owned by her employer. Since March 2007, Karissa has presented full-time at work and in all other aspects of her life as a woman.

52. Karissa lost health insurance coverage of approximately $10,000 in health care expenses because she was unable to get a birth certificate with her female gender on it. Her employer had a policy that the gender reflected in an employment record would not be changed from what it was when the employee started work unless the employee presented a birth certificate showing the new gender. Because her employer's insurance coverage for certain medical expenses requires that she be classified in her employment records as a woman, Karissa was required to repay bills for previous years of medical treatments, such as hormone level blood tests, because she was unable to present a birth certificate to prove that she is female.

53. Finally, after numerous complaints from Karissa to her employer, the employer changed the proof it required her to show of her female gender and her insurer paid for the medical expenses it had previously rejected. However, Karissa lost the use and benefit of the money she used to pay for uninsured medical expenses until her employer's policy was changed. In addition, Karissa's credit rating was seriously damaged because of the delay in payment of these medical bills and that harm continues to the present. Karissa worries that this harm could occur again if she changes employers and her new employer has a policy requiring her to show a birth certificate before she can be treated as a woman for insurance purposes.

54. Karissa's current birth certificate fails to reflect who she is. She wants and needs the sex designation on her birth certificate to match her body and mind. Moreover, she has seen how much more restrictive the government has become about identity documents since September 11th, so she is concerned that, unless her birth certificate is corrected, more invasive and restrictive laws or government practices in the future may prevent her from obtaining a passport or driver's license with her correct gender on it, or may make her inaccurate birth certificate more accessible to strangers. She reasonably fears the embarrassment and potential for violence that result from being forced to show an identity document which identifies her as male.

55. She knows how traumatic and embarrassing it can be to have to show an identity document that lists her gender as male, since she was stopped a few years ago by a police officer or sheriff in a small Wisconsin town after she began to present as a woman but before the gender on her driver's license had been changed. After discovering that the sex on her driver's license did not match her female appearance, the officer detained her and questioned her for approximately an hour and a half before finally allowing her to leave. It is psychologically and

emotionally harmful for Karissa to have a government-issued birth certificate that states incorrectly that she is male.

The Illinois Vital Records Act

56. The State of Illinois establishes laws governing vital records for persons born in Illinois. It has set out in the Vital Records Act (VRA), 410 ILCS § 535/17, a process for obtaining a new sex designation on a birth certificate. Under the VRA, the State Registrar of Vital Records shall establish a new certificate of birth when the Registrar receives an affidavit from a physician providing that he or she has performed an operation on a person, and that by reason of the operation, the sex designation on such person's birth records should be changed. *Id.* at § 535/17(1)(d). After the new certificate is established, the new certificate is substituted for the original certificate of birth. *Id.* at § 535/17(2).

57. The VRA defines physician as "a person licensed to practice medicine in Illinois or any other State." *Id.* at § 535/1(9).

58. Plaintiffs Victoria Kirk and Karissa Rothkopf applied for a new birth certificate with the correct gender listed on it at the Office of Vital Records.

59. They submitted to the Office of Vital Records a medical certificate from the Thailand-licensed surgeon who performed their genital reconstruction surgery listing the surgeries he performed and concluding that their genitalia had been permanently changed from male to female.

60. They also provided to the Office of Vital Records an affidavit from a doctor licensed in Illinois who examined them and certified that they have undergone gender confirmation surgeries and that by reason of the surgeries their sex designation should be changed from male to female on their birth certificates.

61. Notwithstanding the medical certificate from the surgeon who performed their surgeries and the affidavit from a U.S.-licensed doctor who confirmed that the surgeries had been performed, their requests for accurate birth certificates were denied solely because the physician who performed some of their surgeries was not U.S. licensed.

Harm to Plaintiffs

62. Plaintiffs have suffered and will continue to suffer irreparable harm as a result of being denied a birth certificate with the correct sex on it. Plaintiffs have no adequate remedy at law.

Count One:
Violation of the Vital Records Act

63. Plaintiffs re-allege paragraphs 1 through 62 as though fully set forth herein.

64. The VRA states that "[a]s used in this Act, unless the context otherwise requires: . . . 'Physician' means a person licensed to practice medicine in Illinois or any other State." 410 ILCS § 535/1. It does not define the term "State."

65. The ordinary and popularly understood meaning of "state" is "[t]he political system of a body of people who are politically organized." Black's Law Dictionary 1443 (8th ed. 2004). Alternatively, "state" is defined as "a body of people occupying a territory and organized under one government" or "one of the constituent units of a nation having a federal government." The Merriam-Webster Dictionary 480 (11th ed. 2005).

66. Other Illinois statutes have explicitly defined "state" to include foreign countries, *see, e.g.,* 35 ILCS § 5/1501(22) and 750 ILCS § 22/102, including Illinois statutes that address licensing requirements for physicians, 225 ILCS § 60/22(A)(34); podiatrists, *id.* at § 100/24(29); and nurses, *id.* at § 65/70-5(16).

67. With the exception of § 535/17(1)(d) of the VRA, the provision at issue here, all other uses of the word "physician" in the VRA refer to an event, such as a birth or death, that took place in the State of Illinois. In contrast, the change of a gender marker allowed by § 535/17(1)(d) may take place anywhere where there is a surgeon with the specialized expertise to complete some type of gender confirmation surgery.

68. For many years Defendant interpreted Section 17 of the VRA to allow physicians licensed in foreign countries to complete the required affidavit, an interpretation in which the Illinois General Assembly acquiesced. Notwithstanding the many years that the Department of Vital Records applied the VRA to allow physicians licensed in foreign countries to sign the affidavit, the Department abruptly changed its practice and started refusing to accept such affidavits in or about 2005.

69. Section 17 of the VRA is a remedial statute that should be construed liberally to fulfill its purposes and should, therefore, be read to allow physicians licensed in foreign countries to complete the required affidavit.

WHEREFORE, Plaintiffs request the following relief:

(A) entry of a declaratory judgment that Defendant violates the Illinois Vital Records Act by refusing to issue a birth certificate with the correct gender listed on it to Plaintiffs because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Two:
Violation of Equal Protection

70. Plaintiffs re-allege paragraphs 1 through 62 as though fully set forth herein.

71. Article I, § 2 of the Illinois Constitution provides that "No person shall . . . be denied the equal protection of the laws."

72. Defendant will issue a new birth certificate with a corrected gender marker only to persons whose surgeon for their gender confirmation surgeries was licensed in Illinois or another state of the United States.

73. Even when presented with an affidavit from a U.S.-licensed physician who examined the person and certified that she had undergone gender confirmation surgeries and that by reason of the surgeries her sex designation should be changed from male to female on their birth certificates, Defendant refuses to issue a corrected birth certificate.

74. There is no legally adequate justification for the denial of an accurate birth certificate to persons whose surgeon for some of their gender confirmation surgeries was not licensed in Illinois or another state of the United States, especially when those persons have provided affidavits from a U.S.-licensed physician certifying that the gender confirmation surgeries have been performed and that their sex designation should be changed accordingly.

75. The Vital Records Act, or, in the alternative, Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiffs, violates the equal protection clause in Article I, § 2 of the Illinois Constitution.

WHEREFORE, Plaintiffs request the following relief:

(A) entry of a declaratory judgment that Defendant violates the equal protection clause in Article I, § 2 of the Illinois Constitution by refusing to issue a birth certificate with the

correct gender listed on it to Plaintiffs because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Three:
Violation of Due Process

76. Plaintiffs re-allege paragraphs 1 through 62 as though fully set forth herein.

77. Article I, § 2 of the Illinois Constitution provides that "No person shall be deprived of life, liberty or property without due process of law . . . ."

78. The due process clause of the Illinois Constitution protects the fundamental right to make decisions regarding one's medical treatment.

79. Defendant burdens Plaintiffs' fundamental right to make decisions regarding their medical treatment, since he refuses to issue them a birth certificate with the correct gender listed on it because they chose a surgeon who is not licensed in Illinois or another state of the United States.

80. There is no legally adequate justification for burdening Plaintiffs' due process right to make decisions regarding their medical treatment, especially since Plaintiffs have provided affidavits from a U.S.-licensed physician certifying that their gender confirmation surgeries have been performed and that their sex designation should be changed accordingly.

81. The Vital Records Act, or, in the alternative, Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiffs, violates the due process clause in Article I, § 2 of the Illinois Constitution.

WHEREFORE, plaintiffs request the following relief:

(A) entry of a declaratory judgment that Defendant violates the due process clause in Article I, § 2 of the Illinois Constitution by refusing to issue a birth certificate with the correct gender listed on it to Plaintiffs because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Four:
Violation of Privacy

82. Plaintiffs re-allege paragraphs 1 through 62 as though fully set forth herein.

83. Article I, § 6 of the Illinois Constitution provides that: "The people shall . . . be secure in their persons . . . against . . . unreasonable invasions of privacy . . . ."

84. Article I, § 12 of the Illinois Constitution provides that: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

85. The right to privacy protected by the Illinois Constitution, Article I, §§ 6 and 12, protects individual autonomy, including the right to make personal choices about one's own medical treatment free from government interference.

86. Defendant burdens Plaintiffs' privacy right to make decisions regarding their medical treatment, since he refuses to issue them a birth certificate with the correct gender listed on it because they chose a surgeon who is not licensed in Illinois or another state of the United States.

87. There is no legally adequate justification for burdening Plaintiffs' right to make decisions regarding their medical treatment, especially since Plaintiffs have provided affidavits from a U.S.-licensed physician certifying that their gender confirmation surgeries have been performed and that their sex designation should be changed accordingly.

88. The Vital Records Act, or, in the alternative, Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiffs, violates the privacy protections in Article I, §§ 6 and 12 of the Illinois Constitution.

WHEREFORE, plaintiffs request the following relief:

(A) entry of a declaratory judgment that Defendant violates Article I, §§ 6 and 12 of the Illinois Constitution by refusing to issue a birth certificate with the correct gender listed on it to Plaintiffs because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

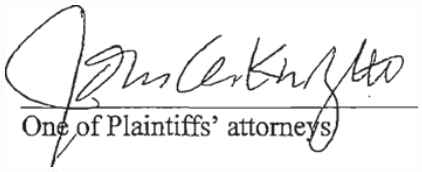
(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees; and

(D) entry of such other and further relief as deemed appropriate by the Court.

DATED: 1-27-09

Respectfully submitted,



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON	)	
Plaintiffs,	)	No. 09-CH-3226
	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	
Defendant.	)	

FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

Plaintiffs Victoria Kirk, Karissa Rothkopf, and Riley Johnson, by their attorneys, complain against Damon T. Arnold, M.D., in his official capacity as State Registrar of Vital Records, as follows:

Preliminary Statement

1. Plaintiffs bring this action seeking declaratory and injunctive relief for violations of the Vital Records Act, 410 ILCS §§ 553/1-29, and in the alternative for violations of the following provisions of the Illinois Constitution: Article I, § 2 (the rights to equal protection and due process) and Article I, §§ 6 and 12 (the right to privacy).

2. Plaintiffs are transsexual individuals who were born in Illinois and have Illinois birth certificates. Plaintiffs have undergone medical treatment, including surgeries, to conform their bodies to their internal sense of gender (their gender identities). They have transitioned from the sex they were assigned at birth to the sex that matches their gender identity, male to female (Victoria Kirk and Karissa Rothkopf) or female to male (Riley Johnson).

3. Defendant is the State Registrar of Vital Records who is responsible for administering the Vital Records Act (VRA).

4. When an individual who was born in Illinois has a form of gender confirmation surgery, Defendant routinely changes the gender marker on Illinois birth certificates so that the certificates accurately reflect the person's gender identity.

5. Nevertheless, Defendant maintains two policies that unconstitutionally restrict who may correct their birth certificates:

a. Defendant refuses to make such changes for persons who have chosen to have their gender confirmation surgeries performed by doctors licensed in another country, rather than in Illinois or in another state of the United States;

b. Defendant refuses to make such changes for female-to-male transsexuals who have not completed a specific type of surgery – "surgery to attempt to create/attach/form a viable penis."

6. Denying Plaintiffs accurate birth certificates makes it impossible for them to conform all aspects of their lives to their gender identity as is required to comply with the standard of care for transsexual medical treatment.

7. Denying Plaintiffs accurate birth certificates places them at risk of physical or emotional harm if their identity as a transsexual is disclosed to a person who did not know they were transsexual or who harbors hostility towards transsexuals.

8. It is psychologically and emotionally harmful for Plaintiffs to have government-issued birth certificates that identify them by the wrong gender.

Victoria Kirk and Karissa Rothkopf

9. Plaintiffs Kirk and Rothkopf seek a declaration that Defendant's refusal violates the VRA, because nothing in that Act requires surgery by a U.S.-licensed doctor before a change in the gender marker on a birth certificate is allowed. They also seek an injunction ordering Defendant to issue them accurate birth certificates.

10. In the alternative, Plaintiffs Kirk and Rothkopf seek a declaration that the VRA, as interpreted and administered by Defendant, violates the equal protection, due process, and privacy protections found in the Illinois Constitution, and an injunction ordering Defendant to issue Plaintiffs accurate birth certificates.

11. Defendant's interpretation of the VRA violates equal protection because, without justification, it treats Plaintiffs Kirk and Rothkopf differently from other transsexual persons based on Plaintiffs' choice of surgeons. The distinction drawn by Defendant is arbitrary and fails to rationally further any legitimate state interest.

12. Defendant's interpretation of the VRA also violates Plaintiffs Kirk and Rothkopf's due process and privacy rights, without justification, by burdening their right to make decisions about their medical care, including what surgeon to use for their gender confirmation surgeries. Defendant places an unconstitutional burden on those rights by preventing Plaintiffs Kirk and Rothkopf from obtaining a birth certificate that accurately lists their gender solely because they chose a surgeon who is licensed abroad rather than in Illinois or another state of the United States.

Riley Johnson

13. Plaintiff Johnson seeks a declaration that Defendant's policy refusing to change the gender on his birth certificate violates the VRA, because nothing in that Act requires surgery

to create a "viable" penis before a change in the gender marker on a birth certificate from female to male is allowed. Plaintiff also seeks an injunction ordering Defendant to issue him an accurate birth certificate.

14. In the alternative, Plaintiff Johnson seeks a declaration that the VRA, as interpreted and administered by Defendant, violates the due process and privacy protections found in the Illinois Constitution, and an injunction ordering Defendant to issue Plaintiff an accurate birth certificate.

15. Defendant's interpretation of the VRA violates Plaintiff Johnson's due process and privacy rights by, without justification, burdening his right to refuse surgery that he does not want to have, is not medically necessary for him, is extremely risky, and is not effective treatment for him. Plaintiff Johnson has no medical need for surgery to create a penis, and his gender identity disorder has been successfully treated without such surgery. Further, his transition to the male gender is complete. Defendant places an unconstitutional burden on Plaintiff Johnson by preventing him from obtaining a birth certificate that accurately lists his gender solely because he has not undergone surgery to create a penis, even though he has completed other medical treatment – including hormone therapy, a bilateral mastectomy, and a hysterectomy – that has aligned his body to his male gender identity.

Relief

16. Plaintiffs seek declaratory and injunctive relief to ensure that Plaintiffs Kirk and Rothkopf are afforded their rights under the VRA, or alternatively, that their rights to equal treatment under the law and their due process and privacy rights to make their own decision about medical care are fully respected. Plaintiffs also seek declaratory and injunctive relief to

ensure that Plaintiff Johnson is afforded his rights under the VRA, or alternatively, that his due process and privacy right to personal inviolability is respected.

Jurisdiction

17. This Court has jurisdiction over the subject matter pursuant to Article VI, § 9 of the Illinois Constitution. This Court has personal jurisdiction over the defendant pursuant to 735 ILCS § 5/2-209(a).

Venue

18. Venue is proper pursuant to 735 ILCS § 5/2-101, because the defendant resides in Cook County.

The Plaintiffs

19. Plaintiff Victoria Kirk lives in Chicago, Illinois and was born in Aurora, Illinois in 1980. At birth, she was assigned the male gender, but she became aware of her female gender identity in early childhood. Her gender identity has been female her entire life.

20. Victoria has a medical condition termed gender identity disorder, which means that her female gender identity does not match the sex she was assigned at birth and that this conflict causes her severe psychological distress and intense feelings of discomfort. Under the care and direction of mental health professionals and physicians, Victoria underwent sex reassignment as treatment for her gender identity disorder.

21. Victoria first took sex reassignment steps to make her body and her gender expression conform to her female gender identity in 2003. She began hormone therapy in around February of 2003, and in August 2005, she legally changed her name to a traditionally female one and also changed the name on her driver's license and social security records. In September 2005, Victoria's name was changed on her birth certificate and in her school records, and she

started to dress and present full-time as a woman. In November 2006, she underwent gender confirmation surgeries, including both genital reconstruction and breast augmentation.

22. Plaintiff Karissa Rothkopf lives in a small town in southern Wisconsin, but was born in Dixon, Illinois in 1972 and spent her childhood years in Rockford, Illinois. At birth, she was assigned the male gender, but she became aware of her female gender identity in early childhood. Her gender identity has been female her entire life.

23. Karissa has a medical condition termed gender identity disorder, which means that her female gender identity does not match the sex she was assigned at birth and that this conflict causes her severe psychological distress and intense feelings of discomfort. Under the care and direction of mental health professionals and physicians, Karissa underwent sex reassignment as treatment for her gender identity disorder.

24. Karissa first took sex reassignment steps to make her body and her gender expression conform to her female gender identity in 2003. She began hormone therapy for sex reassignment in 2003 and started to dress and present herself at all times as a woman in March 2007. In April 2007, Karissa changed her name to a traditionally female one and changed her name and gender marker on her driver's license and social security records. In August, she changed the name on her birth certificate. She underwent breast augmentation surgery along with various feminizing procedures on her face and neck in October 2007. In November, Karissa changed her name and gender on her passport, and in December 2007, she had genital reconstruction surgery.

25. Plaintiff Riley Johnson lives in Chicago, Illinois and was born in Galesburg, Illinois in 1979. At birth, he was assigned the female gender, but he became aware his male gender identity in early childhood. His gender identity has been male his entire life.

26. Riley has a medical condition called gender identity disorder, which means that his male gender identity does not match the sex he was assigned at birth and that this conflict causes him psychological distress and feelings of discomfort. Under the care and direction of mental health professionals and physicians, Riley underwent sex reassignment as treatment for his gender identity disorder.

27. Riley first took sex reassignment steps to make his body and his gender expression conform to his male gender identity in 2000, when he began to bind his breasts to masculinize his appearance. In January 2003, Riley changed his name to a traditionally male one and changed his name on his driver's license and social security records. He started to dress and present himself at all times as a man in February 2003. He began hormone therapy for sex reassignment in April 2003, had a bilateral mastectomy in December 2003, and underwent a hysterectomy three months later in March 2004. In June 2004, Riley changed the gender marker on his driver's license. In December 2008, Riley was issued a passport reflecting both the correct name and gender marker; and in March 2009, the gender was changed in his social security records. Riley has completed all sex reassignment treatment that has been prescribed for him. Riley has no medical need for additional reassignment treatment and his transition to male is complete.

The Defendant

28. Defendant Damon T. Arnold is the Director of the Illinois Department of Public Health and the State Registrar of Vital Records, whose official responsibilities and duties include directing, supervising, and issuing instructions necessary to the efficient administration of a statewide system of vital records, the state Office of Vital Records, and acting as the custodian of

Illinois' vital records. 410 ILCS § 535/5. Defendant implements and administers the statutory provision, 410 ILCS § 535/17(1)(d), at issue in this case.

Facts
Gender Identity Disorder and Its Treatment

29. Gender identity disorder is a medically recognized condition in which a person's gender identity does not match his or her anatomical sex at birth and the conflict between the person's gender identity and anatomy causes psychological distress and intense feelings of discomfort. This psychological distress and discomfort is called gender dysphoria.

30. "Gender identity" is a person's internal personal identification as a man or a woman. It is distinct from sexual orientation in that it does not involve or dictate to whom an individual is romantically, emotionally, and physically attracted.

31. Medical specialists in gender identity agree that gender identity establishes itself very early – sometimes as early as three years of age – and is not the result of conscious choice.

32. A person's gender identity cannot be changed. In the past, some therapists tried to "cure" people with gender identity disorder through aversion therapies, electro-shock treatments, medication, and other therapeutic techniques. These efforts were not successful and often caused severe psychological damage. Based on contemporary medical knowledge and practice, attempts to change a person's core gender identity are considered to be futile and unethical.

33. The term "transsexual" describes persons, such as the Plaintiffs, who have the most severe form of gender identity disorder. Typically, transsexuals have undergone, or plan to undergo, medical treatment in the form of hormone therapy or gender confirmation surgeries or both so that their bodies conform more closely to their gender identity. "Transgender" describes a larger group made up of persons whose gender identity, appearance or mannerisms do not

conform to societal expectations about the sex they were assigned at birth. That larger group includes transsexuals as well as others who have not undergone either hormone therapy or gender confirmation surgeries.

34. Standards of care have been established for administering sex reassignment treatment to patients with gender identity disorder based on decades of clinical experience and a substantial body of research. Sex reassignment is treatment that changes a person's physical anatomy, behavior, clothing, and other manifestations of gender from the gender they were assigned at birth to the one that fits their gender identity. Changing a person's legal name and correcting the gender and name on one's identity documents are parts of sex reassignment treatment.

35. It is the standard of care to treat gender identity disorder with sex reassignment. Sex reassignment treatment is not, however, the same for every transsexual person, but is determined by the exercise of individualized medical judgment to achieve the goal of reducing a patient's gender dysphoria.

36. Sex reassignment often consists of three components: hormone therapy, living full-time "presenting" in the gender corresponding with the person's gender identity (known as the "real-life" experience), and gender confirmation surgeries.

37. Gender confirmation surgeries may include breast augmentation or reduction surgery, genital reconstruction surgery, and other surgeries to feminize or masculinize a person's body or appearance.

38. To begin hormone therapy, it is the standard of care for a patient to either have lived full-time presenting as the gender that matches his or her gender identity for a minimum of three months or to have had a therapeutic relationship with a mental health specialist for a

minimum of three months. The hormones are prescribed by a physician, and the mental health provider must write a letter recommending the hormone therapy to the physician.

39. Real-life experience is the adoption of a gender role and gender presentation that is congruent with a person's gender identity. For example, a female transsexual will act and present herself as female in all aspects of her life. A legal name change to one that is traditionally associated with women is a part of the real-life experience.

40. It is the standard of care to require someone to complete a full year of continuous hormone therapy and continuous real-life experience, among other requirements, prior to genital reconstruction surgery.

41. Changing the name and gender on a person's identity documents is another important aspect of sex reassignment, since those documents are crucial to that person's ability to function successfully in the new gender. A person may need a birth certificate to prove eligibility to work when starting a new job; to obtain other identity documents that allow her to vote, to travel, or to enter buildings; or to gain access to other government services or employment benefits.

42. Plaintiffs have been able to obtain government identity documents listing the correct gender without having corrected birth certificates. However, transsexual persons born in Illinois who now live in states such as New Jersey and Virginia are unable to even correct the gender on their driver's licenses, because those states require an amended birth certificate before changing the gender on a transgender person's driver's license.

43. Identity documents listing a gender that fails to match up to one's current gender presentation can often lead to harassment, discrimination, or groundless accusations of fraud. Additionally, for a person who has struggled for years to live life in the correct gender, the

knowledge that one's identity documents label her or him with the wrong gender can, by itself, cause serious psychological injury.

Gender Identity Disorder Treatment for Female-to-Male Transsexuals

44. There are differences in the standard of care for gender confirmation surgeries for female-to-male transsexuals ("transsexual males") as compared to male-to-female transsexuals ("transsexual females"). In comparison to the importance genital reconstruction surgery plays in the treatment of many transsexual females, a mastectomy procedure is usually the first and most important surgical treatment provided to males because it allows them to present successfully as men. Transsexual males also often complete a hysterectomy to remove their female reproductive organs, but they rarely have the genital reconstruction surgery required by Defendant's policy. Most transsexual males resolve, or at least minimize, their gender dysphoria without having this surgery.

45. The fact that none of the surgical techniques currently available for creating a penis is fully satisfactory is at least part of the reason why genital surgery is so rarely offered as treatment for gender identity disorder for transsexual males. One procedure for creating a penis, a phalloplasty, requires several separate stages of surgery, often results in complications that require additional operations, and always results in significant donor-site scarring. The other form of genital surgery, the metoidioplasty, creates a microphallus that fails to conform closely enough to the typical male anatomy to be effective treatment for many transsexual males.

46. The lack of fully satisfactory genital surgery options is evidenced by the small number of these men having the surgery. One study reported that only three percent of the transsexual males studied had had genital surgery, only sixteen percent were planning to do so,

and twenty-nine percent had decided definitely not to have it. K. Rachlin, "Transgender Individuals' Experience of Psychotherapy," *Int'l J. of Transgenderism*, Vol. 6, No. 1 (2002).

Victoria Kirk

47. Victoria Kirk extensively researched possible surgeons to perform her genital reconstruction surgery and breast augmentation by reviewing their credentials and photos of their patients' surgical results. Different surgeons offer diverse techniques, and a particular technique may offer some persons a better result or reduce the risks of the surgery. Additionally, Victoria communicated with many other transsexual women about their satisfaction with particular surgeons and the results they were able to achieve. Finally, she spoke to her therapist about her decision.

48. Victoria chose Dr. Suporn Watanyusakul because she concluded that his technique would achieve the most anatomically correct result for her with the least amount of scarring. She also preferred his practice of completing genital reconstruction surgery in one step, as opposed to the two-step process other surgeons followed.

49. Dr. Suporn is licensed by the Medical Council of Thailand, but he is not licensed in any state of the United States.

50. Victoria has been permitted to change the gender on all of her government-issued identity documents to accurately reflect her female gender identity, except for her birth certificate. The governmental agencies that have allowed her to correct her documents include the United States Social Security Administration, the United State Department of State, and the Illinois Secretary of State.

51. As stated in Paragraphs 74-77, Victoria applied for and Defendant denied her a corrected birth certificate. Her birth certificate still lists her gender as male, despite her

transition, her surgeries, and the change in the gender marker on her other government documents.

52. Victoria completed a certificate in digital animation in September 2005 and has worked as a web developer and animator for the past eight years in Raleigh, North Carolina, Tampa, Florida and the Chicago area. In her work and all other aspects of her life, Victoria has lived fully as a woman for more than three years, since September 2005.

53. Victoria's current birth certificate fails to reflect who she is. She wants and needs the sex designation on her birth certificate to match her body and mind. Moreover, she has seen how much more restrictive the government has become about identity documents since September 11th, so she is concerned that, unless her birth certificate is corrected, more invasive and restrictive laws or government practices in the future may prevent her from obtaining a renewed passport or driver's license with her correct gender on it, or may make her inaccurate birth certificate more accessible to strangers. She reasonably fears the embarrassment and potential for violence that result from being forced to show an identity document which identifies her as male.

54. Victoria knows how traumatic and embarrassing it can be to have to show an identity document that lists her gender as male, since she was stopped a few years ago by a state trooper in South Carolina. At that time, she presented as a woman, but the gender on her driver's license had not been changed. It is psychologically and emotionally harmful for Victoria to have a government-issued birth certificate that states incorrectly that she is male.

Karissa Rothkopf

55. Karissa Rothkopf extensively researched possible surgeons to perform her genital reconstruction surgery by reviewing their credentials and photos of their patients' surgical results.

56. Karissa communicated with surgeons and their staff about their techniques and recommendations for her, and she asked a number of transsexual women about their satisfaction with particular surgeons and the results they were able to achieve. Finally, she spoke to her physician and therapist about her decision.

57. Karissa chose Dr. Suporn Watanyusakul, because she believed, based on her research, that his surgical procedure was the most effective technique for her.

58. Karissa has been permitted to change the gender on all of her government-issued forms of identification, except for her birth certificate. The governmental agencies that have allowed her to correct her documents include the United States Social Security Administration, the United States Department of State, and the Wisconsin Department of Transportation.

59. As stated in Paragraphs 74-77, Karissa applied for and Defendant denied her a corrected birth certificate. Her birth certificate still lists her gender as male, despite her transition, her surgeries, and the change in the gender marker on her other government documents.

60. Karissa has a master's degree in business administration and is a Supervisor/Project Leader at a large non-profit health care provider in Wisconsin, where she and the six employees she supervises maintain the medical records computer system for all the hospitals owned by her employer. Since March 2007, Karissa has presented full-time at work and in all other aspects of her life as a woman.

61. Karissa lost health insurance coverage of approximately $10,000 in health care expenses because she was unable to get a birth certificate with her female gender on it. Her employer had a policy that the gender reflected in an employment record would not be changed from what it was when the employee started work unless the employee presented a birth certificate showing the new gender. Because her employer's insurance coverage for certain medical expenses requires that she be classified in her employment records as a woman, Karissa was required to repay bills for previous years of medical treatments, such as hormone level blood tests, because she was unable to present a birth certificate to prove that she is female.

62. Finally, after numerous complaints from Karissa to her employer, the employer changed the proof it required her to show of her female gender and her insurer paid for the medical expenses it had previously rejected. However, Karissa lost the use and benefit of the money she used to pay for uninsured medical expenses until her employer's policy was changed. In addition, Karissa's credit rating was seriously damaged because of the delay in payment of these medical bills and that harm continues to the present. Karissa worries that this harm could occur again if she changes employers and her new employer has a policy requiring her to show a birth certificate before she can be treated as a woman for insurance purposes.

63. Karissa's current birth certificate fails to reflect who she is. She wants and needs the sex designation on her birth certificate to match her body and mind. Moreover, she has seen how much more restrictive the government has become about identity documents since September 11th, so she is concerned that, unless her birth certificate is corrected, more invasive and restrictive laws or government practices in the future may prevent her from obtaining a renewed passport or driver's license with her correct gender on it, or may make her inaccurate birth certificate more accessible to strangers. She reasonably fears the embarrassment and

potential for violence that result from being forced to show an identity document which identifies her as male.

64. She knows how traumatic and embarrassing it can be to have to show an identity document that lists her gender as male, since she was stopped a few years ago by a police officer or sheriff in a small Wisconsin town after she began to present as a woman but before the gender on her driver's license had been changed. After discovering that the sex on her driver's license did not match her female appearance, the officer detained her and questioned her for approximately an hour and a half before finally allowing her to leave. It is psychologically and emotionally harmful for Karissa to have a government-issued birth certificate that states incorrectly that she is male.

Riley Johnson

65. Riley Johnson considered in depth possible gender confirmation surgeries. For him, the most important surgery to assist in resolving his gender dysphoria was a mastectomy, because having breasts made it extremely difficult for Riley to pass as male in public and conflicted, even in the privacy of his home, with Riley's core understanding of who he is. Riley also completed a hysterectomy, in part, to further masculinize his body.

66. Riley's extensively researched the available surgical techniques to create a penis. After careful consideration of the available surgical options and the risks and costs associated with these surgeries, Riley concluded that he did not desire nor need genital surgery to resolve his gender dysphoria.

67. Riley has also been examined by a psychologist and expert in the treatment of gender identity disorder who has concluded that Riley has no medical need for genital reconstructive surgery as treatment for his gender identity disorder, that he has completed all

reassignment treatment that is medically necessary for him, and that his reassignment to the male gender is complete.

68. Riley has been permitted to change the gender on all of his government-issued forms of identification, except for his birth certificate. The governmental agencies that have allowed him to correct his documents include the United States Social Security Administration, the United States Department of State, and the Illinois Secretary of State. His birth certificate still lists his gender as female, despite his transition, his surgery, and the change in the gender marker on his other government documents.

69. Riley lives his life fully as a man. He has obtained a bachelor's degree in Sociology and Anthropology from Knox College and is currently completing his master's degree at DePaul University. Riley also works full-time at DePaul, where he assists with the administration of their undergraduate core curriculum. He is the co-founder of Trans Gynecology Access Program (TGAP), a social service provider in Chicago for transsexual males and other gender variant individuals.

70. Riley's current birth certificate fails to reflect who he is. He wants and needs the sex designation on his birth certificate to match his body and mind. Moreover, he has seen how much more restrictive the government has become about identity documents since September 11th, so he is concerned that, unless his birth certificate is corrected, more invasive and restrictive laws or government practices in the future may prevent him from obtaining a renewed passport or driver's license with his correct gender on it, or may make his inaccurate birth certificate more accessible to strangers. He fears the embarrassment and chance of violence that result from being forced to show an identity document which identifies him as female.

71. Riley knows how traumatic and embarrassing it can be if some aspect of his gender expression, such as his appearance, is not consistent with his male gender identity. Prior to his mastectomy and before he had began hormone therapy, Riley was followed by a group of at least four young men who surrounded him, asked him whether he was a man or woman, and then threatened to kill him. Although he evaded physical injury, this traumatic experience underscores for Riley how important it is to make sure that all aspects of his gender presentation, including his identity documents, identify him as male. It is psychologically and emotionally harmful for Riley to have a government-issued birth certificate that states incorrectly that he is female.

The Illinois Vital Records Act

72. The State of Illinois establishes laws governing vital records for persons born in Illinois. It has set out in the Vital Records Act (VRA), 410 ILCS § 535/17, a process for obtaining a new sex designation on a birth certificate. Under the VRA, the State Registrar of Vital Records shall establish a new certificate of birth when the Registrar receives an affidavit from a physician providing that he or she has performed an operation on a person, and that by reason of the operation, the sex designation on such person's birth records should be changed. *Id.* at § 535/17(1)(d). After the new certificate is established, the new certificate is substituted for the original certificate of birth. *Id.* at § 535/17(2).

73. The VRA defines physician as "a person licensed to practice medicine in Illinois or any other State." *Id.* at § 535/1(9).

74. Plaintiffs Victoria Kirk and Karissa Rothkopf applied for a new birth certificate with the correct gender listed on it at the Office of Vital Records.

75. They submitted to the Office of Vital Records a medical certificate from the Thailand-licensed surgeon who performed their genital reconstruction surgery listing the surgeries he performed and concluding that their genitalia had been permanently changed from male to female.

76. They also provided to the Office of Vital Records an affidavit from a doctor licensed in Illinois who examined them and certified that they have undergone gender confirmation surgeries and that by reason of the surgeries their sex designation should be changed from male to female on their birth certificates.

77. Notwithstanding the medical certificate from the surgeon who performed their surgeries and the affidavit from a U.S.-licensed doctor who confirmed that the surgeries had been performed, their requests for accurate birth certificates were denied solely because the physician who performed some of the surgeries was not U.S. licensed.

78. Plaintiff Riley Johnson applied for a new birth certificate with the correct gender listed on it at the Office of Vital Records on January 15, 2009.

79. He submitted to the Office of Vital Records affidavits from surgeons licensed in the United States who performed his bilateral mastectomy and hysterectomy and affirmed that Riley's sex designation on his birth certificate should, as a result of these surgeries, be changed to male.

80. Riley's application is still pending, but based on the Defendant's stated policy his application will surely be denied.

Harm to Plaintiffs

81. Plaintiffs have suffered and will continue to suffer irreparable harm as a result of being denied a birth certificate with the correct sex on it. Plaintiffs have no adequate remedy at law.

Count One:
Violation of the Vital Records Act – Plaintiffs Kirk and Rothkopf

82. Plaintiffs re-allege paragraphs 1-12, 16-24, 28-43, 47-64, 72-77, and 81 as though fully set forth herein.

83. The VRA states that "[a]s used in this Act, unless the context otherwise requires: . . . 'Physician' means a person licensed to practice medicine in Illinois or any other State." 410 ILCS § 535/1. It does not define the term "State."

84. The ordinary and popularly understood meaning of "state" is "[t]he political system of a body of people who are politically organized." Black's Law Dictionary 1443 (8th ed. 2004). Alternatively, "state" is defined as "a body of people occupying a territory and organized under one government" or "one of the constituent units of a nation having a federal government." The Merriam-Webster Dictionary 480 (11th ed. 2005).

85. Other Illinois statutes have explicitly defined "state" to include foreign countries, *see, e.g.,* 35 ILCS § 5/1501(22) and 750 ILCS § 22/102, including Illinois statutes that address licensing requirements for physicians, 225 ILCS § 60/22(A)(34); podiatrists, *id.* at § 100/24(29); and nurses, *id.* at § 65/70-5(16).

86. With the exception of § 535/17(1)(d) of the VRA, the provision at issue here, all other uses of the word "physician" in the VRA refer to an event, such as a birth or death, that took place in the State of Illinois. In contrast, the change of a gender marker allowed by §

535/17(1)(d) may take place anywhere where there is a surgeon with the specialized expertise to complete some type of gender confirmation surgery.

87. For many years Defendant interpreted Section 17 of the VRA to allow physicians licensed in foreign countries to complete the required affidavit, an interpretation in which the Illinois General Assembly acquiesced. Notwithstanding the many years that the Department of Vital Records applied the VRA to allow physicians licensed in foreign countries to sign the affidavit, the Department abruptly changed its practice and started refusing to accept such affidavits in or about 2005.

88. Section 17 of the VRA is a remedial statute that should be construed liberally to fulfill its purposes and should, therefore, be read to allow physicians licensed in foreign countries to complete the required affidavit.

WHEREFORE, Plaintiffs Kirk and Rothkopf request the following relief:

(A) entry of a declaratory judgment that Defendant violates the Illinois Vital Records Act by refusing to issue a birth certificate with the correct gender listed on it to Plaintiffs Kirk and Rothkopf because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Two:
Violation of Equal Protection – Plaintiffs Kirk and Rothkopf

89. Plaintiffs re-allege paragraphs 1-12, 16-24, 28-43, 47-64, 72-77, and 81 as though fully set forth herein.

90. Article I, § 2 of the Illinois Constitution provides that "No person shall . . . be denied the equal protection of the laws."

91. Defendant will issue a new birth certificate with a corrected gender marker only to persons whose surgeon for their gender confirmation surgeries was licensed in Illinois or another state of the United States.

92. Even when presented with an affidavit from a U.S.-licensed physician who examined the person and certified that she had undergone gender confirmation surgeries and that by reason of the surgeries her sex designation should be changed from male to female on their birth certificates, Defendant refuses to issue a corrected birth certificate.

93. There is no legally adequate justification for the denial of an accurate birth certificate to persons whose surgeon for their gender confirmation surgeries was not licensed in Illinois or another state of the United States, especially when those persons have provided affidavits from a U.S.-licensed physician certifying that the gender confirmation surgeries have been performed and that their sex designation should be changed accordingly.

94. The Vital Records Act, or, in the alternative, Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiffs, violates the equal protection clause in Article I, § 2 of the Illinois Constitution.

WHEREFORE, Plaintiffs Kirk and Rothkopf request the following relief:

(A) entry of a declaratory judgment that Defendant violates the equal protection clause in Article I, § 2 of the Illinois Constitution by refusing to issue a birth certificate with the

correct gender listed on it to Plaintiffs Kirk and Rothkopf because they chose a surgeon for their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action as well as reasonable attorneys' fees pursuant to 740 ILCS § 23/5; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Three:
Violation of Due Process – Plaintiffs Kirk and Rothkopf

95. Plaintiffs re-allege paragraphs 1-12, 16-24, 28-43, 47-64, 72-77, and 81 as though fully set forth herein.

96. Article I, § 2 of the Illinois Constitution provides that "No person shall be deprived of life, liberty or property without due process of law . . . ."

97. The due process clause of the Illinois Constitution protects the fundamental right to make decisions regarding one's medical treatment.

98. Defendant burdens Plaintiffs Kirk and Rothkopf's fundamental right to make decisions regarding their medical treatment, since he refuses to issue them a birth certificate with the correct gender listed on it because they chose a surgeon who is not licensed in Illinois or another state of the United States.

99. There is no legally adequate justification for burdening Plaintiffs Kirk and Rothkopf's right to make decisions regarding their medical treatment, especially since Plaintiffs have provided affidavits from a U.S.-licensed physician certifying that their gender confirmation surgeries have been performed and that their sex designation should be changed accordingly.

100. The Vital Records Act, or, in the alternative, Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiffs Kirk and Rothkopf, violates the due process clause in Article I, § 2 of the Illinois Constitution.

WHEREFORE, plaintiffs Kirk and Rothkopf request the following relief:

(A) entry of a declaratory judgment that Defendant violates the due process clause in Article I, § 2 of the Illinois Constitution by refusing to issue a birth certificate with the correct gender listed on it to Plaintiffs Kirk and Rothkopf because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees pursuant to 740 ILCS § 23/5; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Four:
Violation of Privacy Right – Plaintiffs Kirk and Rothkopf

101. Plaintiffs re-allege paragraphs 1-12, 16-24, 28-43, 47-64, 72-77, and 81 as though fully set forth herein.

102. Article I, § 6 of the Illinois Constitution provides that: "The people shall . . . be secure in their persons . . . against . . . unreasonable invasions of privacy . . . ."

103. Article I, § 12 of the Illinois Constitution provides that: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

104. The right to privacy protected by the Illinois Constitution, Article I, §§ 6 and 12, protects individual autonomy, including the right to make personal choices about one's own medical treatment free from government interference.

105. Defendant burdens Plaintiffs Kirk and Rothkopf's privacy right to make decisions regarding their medical treatment, since he refuses to issue them a birth certificate with the correct gender listed on it because they chose a surgeon who is not licensed in Illinois or another state of the United States.

106. There is no legally adequate justification for burdening Plaintiffs Kirk and Rothkopf's right to make decisions regarding their medical treatment, especially since Plaintiffs have provided affidavits from a U.S.-licensed physician certifying that their gender confirmation surgeries have been performed and that their sex designation should be changed accordingly.

107. The Vital Records Act, or, in the alternative, Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiffs Kirk and Rothkopf, violates the privacy protections in Article I, §§ 6 and 12 of the Illinois Constitution.

WHEREFORE, Plaintiffs Kirk and Rothkopf request the following relief:

(A) entry of a declaratory judgment that Defendant violates Article I, §§ 6 and 12 of the Illinois Constitution by refusing to issue a birth certificate with the correct gender listed on it to Plaintiffs Kirk and Rothkopf because they chose a surgeon for some of their gender confirmation surgeries who is licensed in a foreign state rather than in a state of the United States;

(B) entry of a permanent injunction ordering Defendant to grant new birth certificates to Plaintiffs with their correct gender listed on them;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees pursuant to 740 ILCS § 23/5; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Five:
Violation of the Vital Records Act – Plaintiff Johnson

108. Plaintiffs re-allege paragraphs 1-8, 13-18, 25-46, 65-73, and 78-81 as though fully set forth herein.

109. The VRA requires "[a]n affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed," 410 ILCS § 535/17(1)(d), but does not define "operation" or specify which operations are required for the sex designation on a person's birth record to be changed.

110. Defendant counsels applicants who have questions about whether they have completed gender reassignment surgery to contact their physician for clarification. *See* Birth Records, Gender Reassignment, Frequently Asked Questions, Vital Records, IDPH, *available at* http://www.idph.state.il.us/vitalrecords/gender_faq.htm#gr.

111. The ordinary and popularly understood meaning of "operation" includes "a surgical procedure." The Merriam-Webster Dictionary 348 (11th ed. 2005). Alternatively, *Merriam-Webster Online Dictionary*[1] defines "operation" as "a procedure performed on a living body usually with instruments especially for the repair of damage or the restoration of health." Medical professional and researchers in the transgender health field define gender confirmation surgeries to include surgeries other than surgery to create a penis, such as mastectomies and hysterectomies. Plaintiff Riley Johnson's surgeons concluded that the mastectomy and

hysterectomy performed on him were operations that should result in the change of the sex designation on his birth certificate to male.

112. For many years, Defendant interpreted Section 17 of the VRA to allow transsexual males who had completed gender confirmation surgeries, such as mastectomies and hysterectomies, but who had not undergone surgeries to create a penis, to obtain birth certificates identifying them by the correct gender, an interpretation in which the Illinois General Assembly acquiesced. Notwithstanding the many years that the Department of Vital Records applied the VRA to allow these persons to obtain an accurate birth certificate, the Department abruptly changed its practice and started refusing to provide birth certificates to these transsexual males in or about 2005.

WHEREFORE, Plaintiff Johnson requests the following relief:

(A) entry of a declaratory judgment that Defendant violates the Illinois Vital Records Act by refusing to issue a birth certificate with the correct gender listed on it to Plaintiff Johnson solely because he has not had surgery to create a penis, even though he has completed all sex reassignment treatment that is medically necessary for him and his reassignment to the male gender is complete;

(B) entry of a permanent injunction ordering Defendant to grant a new birth certificate to Plaintiff Johnson with his correct gender listed on it;

(C) award of Plaintiffs' costs and expenses of this action; and

(D) entry of such other and further relief as deemed appropriate by the Court.

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[1] *Available at* http://www.merriam-webster.com/dictionary/status (last visited January 16, 2009).

Count Six:
Violation of Due Process – Plaintiff Johnson

113. Plaintiffs re-allege paragraphs 1-8, 13-18, 25-46, 65-73, and 78-81 as though fully set forth herein.

114. Article I, § 2 of the Illinois Constitution provides that "No person shall be deprived of life, liberty or property without due process of law . . . ."

115. The due process clause of the Illinois Constitution protects the fundamental right to make decisions regarding one's medical treatment, including the right to refuse unwanted treatment.

116. The Defendant State Registrar of Vital Records burdens Plaintiff Johnson's fundamental right to make decisions regarding whether to undergo medical treatment, since the Registrar will refuse to issue him a birth certificate with the correct gender listed on it because Plaintiff has not undergone a specific type of surgery – surgery to create a penis – that he does not want to have, is not medically necessary for him, is extremely risky, and is unlikely to be effective treatment for him.

117. There is no legally adequate justification for burdening Plaintiff Johnson's right to make decisions regarding whether to undergo medical treatment, especially since Plaintiff Johnson has provided affidavits from U.S.-licensed physicians certifying that they performed gender confirmation surgeries on him and that his sex designation should be changed to male on his birth certificate.

118. Defendant's interpretation and administration of the Vital Records Act to refuse to grant a birth certificate with the correct gender on it to Plaintiff Johnson violates the due process clause in Article I, § 2 of the Illinois Constitution.

WHEREFORE, Plaintiff Johnson requests the following relief:

(A) entry of a declaratory judgment that Defendant violates the due process clause in Article I, § 2 of the Illinois Constitution by refusing to issue a birth certificate with the correct gender listed on it to Plaintiff Johnson, who has completed all sex reassignment treatment that is medically necessary for him and whose reassignment to the male gender is complete, solely because he has not undergone a specific type of surgery – surgery to create a penis – that he does not want to have, is not medically necessary for him, is extremely risky, and is unlikely to be effective treatment for him;

(B) entry of a permanent injunction ordering Defendant to grant a new birth certificate to Plaintiff Johnson with his correct gender listed on it;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees pursuant to 740 ILCS § 23/5; and

(D) entry of such other and further relief as deemed appropriate by the Court.

Count Seven:
Violation of Privacy Right – Plaintiff Johnson

119. Plaintiffs re-allege paragraphs 1-8, 13-18, 25-46, 65-73, and 78-81 as though fully set forth herein.

120. Article I, § 6 of the Illinois Constitution provides that: "The people shall . . . be secure in their persons . . . against . . . unreasonable invasions of privacy . . . ."

121. Article I, § 12 of the Illinois Constitution provides that: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

122. The right to privacy protected by the Illinois Constitution, Article I, §§ 6 and 12, protects individual autonomy, including the right to make personal choices about whether to undergo medical treatment free from government interference.

123. The Defendant State Registrar of Vital Records burdens Plaintiff Johnson's fundamental right to make decisions regarding whether to undergo medical treatment, since the Registrar's policy prevents it from providing a birth certificate with the correct gender listed on it, because Plaintiff has not undergone a specific type of surgery – surgery to create a penis – that he does not want to have, is not medically necessary for him, is extremely risky, and is unlikely to be effective treatment for him.

124. There is no legally adequate justification for burdening Plaintiff Johnson's right to make decisions regarding whether to undergo medical treatment, especially since Plaintiff Johnson has provided affidavits from U.S.-licensed physicians certifying that they performed gender confirmation surgeries on him and that his sex designation should be changed to male on his birth certificate.

125. Defendant's interpretation and administration of the Act to refuse to grant a birth certificate with the correct gender on it to Plaintiff Johnson violates the privacy protections in Article I, §§ 6 and 12 of the Illinois Constitution.

WHEREFORE, Plaintiff Johnson requests the following relief:

(A) entry of a declaratory judgment that Defendant violates Article I, §§ 6 and 12 of the Illinois Constitution by refusing to issue a birth certificate with the correct gender listed on it to Plaintiff Johnson, who has completed all sex reassignment treatment that is medically necessary for him and whose reassignment to the male gender is complete, solely because he has not undergone a specific type of surgery – surgery to create a penis – that he does not want to have, is not medically necessary for him, is extremely risky, and is unlikely to be effective treatment for him;

(B) entry of a permanent injunction ordering Defendant to grant a new birth certificate to Plaintiff Johnson with his correct gender listed on it;

(C) award of Plaintiffs' costs and expenses of this action together with reasonable attorneys' fees pursuant to 740 ILCS § 23/5; and

(D) entry of such other and further relief as deemed appropriate by the Court.

DATED: 4-7-09

Respectfully submitted,

One of Plaintiffs' attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON	)	
	)	No. 09-CH-3226
Plaintiffs,	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I, Kyle A. Palazzolo, hereby certify that I am a member of the bar of this Court, and that I have this 7th day of April 2009, caused one copy of the First Amended Complaint to be hand-delivered to:

Meghan O. Maine
Peter C. Koch
Assistant Attorney General
General Law Bureau
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601

Kyle A. Palazzolo

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK and KARISSA ROTHKOPF, and RILEY JOHNSON, Plaintiffs, v. DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records; Defendant.	)	No. 09-CH-3226 Hon. Peter Flynn

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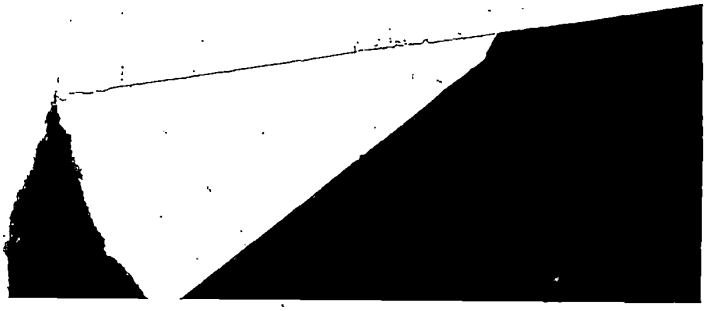
PLAINTIFFS' PETITION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

Plaintiffs Victoria Kirk, Karissa Rothkopf, and Riley Johnson, by and through their attorneys, respectfully move for an award of attorneys' fees, costs and expenses against Defendant Damon T. Arnold, in his official capacity, pursuant to the Illinois Civil Rights Act of 2003, 740 ILCS § 23(c). In support of this motion, Plaintiffs state as follows:

1. On January 27, 2009, Plaintiffs filed a complaint for declaratory and injunctive relief against Defendant for violations of the Illinois Constitution and the Illinois Vital Records Act ("VRA"), 410 ILCS §§ 553/1-29. (*See* Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "Compl."), ¶ 1).

2. On April 7, 2009, Plaintiffs filed an amended Complaint against Defendant to add additional claims related to the statute and policies at issue in this case. (*See* First Amended Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "First Amended Compl."), ¶ 1.



3. Plaintiffs put Defendant on notice in the Complaint and the First Amended Complaint that they would be requesting an award of attorneys' fees, costs and expenses in connection with this action. (*See, e.g.,* Compl, p. 18; First Amended Compl., pp. 23, 26).

4. On June 26, 2009, Defendants moved pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure to dismiss Plaintiffs' action on the grounds of mootness. (*See* Defendant's Combined Memorandum Replying in Further Support of Motion to Dismiss and Opposing Motion for Leave to Amend the Complaint (hereinafter "Def.'s Mem."), 1). In support of Defendant's claim of mootness, Defendant asserted that, since the filing of this action, Plaintiffs had received the requested amended birth certificates and that the Illinois Department of Public Health's Division of Vital Records had announced the termination of, or intention to terminate, the practices Plaintiffs challenged as violations of the Illinois Constitution and the VRA. (*See* Def.'s Mem., 2).

5. On October 1, 2009, this Court advised the parties that it would enter an order on October 19 granting Defendant's motion to dismiss for the reasons stated on the record on October 1, including that Defendants had provided to Plaintiffs the complete relief sought in this action. (*See* Order of October 1, 2009, attached as Ex. M. to the Memorandum of Law in Support of Plaintiffs' Petition for An Award of Attorneys' Fees, Costs and Expenses ("Plaintiffs' Fee Memor.")).

6. The Illinois Civil Rights Act of 2003 ("CRA") provides, "Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought...to enforce a right arising under the Illinois Constitution." 740 ILCS § 23/5(c). For the purposes of this provision of the CRA, a prevailing party is, among other things, one "whose pursuit of a non-

frivolous claim was a catalyst for a unilateral change in position by the opposing party relative to the relief sought." 740 ILCS § 23/5(d)(3).

7. Plaintiffs are prevailing parties under the fee-shifting provision of the CRA because their lawsuit catalyzed Defendant to grant the relief requested by Plaintiffs and brought about Defendant's changes, or announced changes, in practices that previously violated the Illinois Constitution.

8. Plaintiffs are therefore entitled to $183,315 in attorneys' fees and $6,168 in costs and expenses arising from services rendered by counsel in connection with this action.

9. The affidavits of Plaintiffs' counsel are attached as Exhibits A, M and N to the Plaintiffs' Fee Memorandum. The affidavits set forth a description of the time expended, hourly rates charged, and justifications for the hourly rates charged.

WHEREFORE, for the foregoing reasons, Plaintiffs pray that this Court grant this Motion for Attorneys' Fees, Costs and Expenses.

Respectfully submitted,

One of Plaintiffs' attorneys
October 16, 2009

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON	)	
Plaintiffs,	)	No. 09-CH-3226
	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PETITION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

Plaintiffs respectfully submit this Memorandum in support of its Motion for An Award of Attorneys' Fees, Costs and Expenses against Defendant pursuant to the Illinois Civil Rights Act of 2003 ("CRA"), 740 ILCS § 23/5. As a direct consequence of this litigation, Defendant has granted Plaintiffs their requested relief by providing Plaintiffs with amended birth records and announcing their end of, or intention to change, the practices Plaintiffs challenge as violative of the Illinois Constitution. Consequently, Plaintiffs are prevailing parties for the purposes of the CRA and are entitled to $183,315 in attorneys' fees and $6,168 in costs and expenses arising from the services rendered in this case by counsel.

I. BACKGROUND

After several tries at solving this dispute without litigation set out in more detail below, on April 4, 2009, Plaintiffs brought this action seeking declaratory and injunctive relief against the Defendant, the Illinois Department of Public Health's Division of Vital

Records ("Defendant"). (*See* First Amended Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "Compl."), ¶ 1). Plaintiffs alleged that Defendant maintained practices that violated Article I, §§ 6 and 12 of the Illinois Constitution. (Compl. ¶ 1, 5). Specifically, Plaintiffs alleged that the Defendant unconstitutionally restricted access to accurate birth certificates by (1) refusing to amend the gender listed for persons who had sex reassignment surgery performed by a physician licensed in another country rather than the United States, and (2) by refusing to amend the birth records of female-to-male transsexuals who declined to undergo a medically unnecessary "surgery to attempt to create/attach/form a viable penis." (Compl. ¶ 5).

Defendant did not file a responsive pleading disputing the veracity of Plaintiffs' allegations or contesting the merits of Plaintiffs' claims. Instead, Defendant provided Plaintiffs birth certificates with the correct genders listed on them to Plaintiffs and on September 14, 2009 petitioned the Court to dismiss Plaintiffs' claims as moot. (*See* Defendant's Combined Memorandum Replying in Further Support of Motion to Dismiss and Opposing Motion for Leave to Amend the Complaint (hereinafter "Def.'s Mem."), 2) ("Plaintiffs have all received amended birth records reflecting their new respective gender identities. This is the relief that Plaintiffs sought and now have obtained.").

Defendant also contends that he no longer maintains the two practices that resulted in the denial of accurate birth certificates to the Plaintiffs. With respect to the practice of denying accurate birth certificates to persons whose gender confirmation surgery was completed by physicians licensed in another country, Defendant states that the Illinois Department of Public Health's Division of Vital Records ("IDPH") "has terminated its prior practice," (Def.'s Mem. 4), and has a new policy for changing the

gender designation on a birth certificate after gender confirmation surgery that can be found on the IDPH website. (Def.'s Mem. 2). Second, at the time that Plaintiffs brought suit, Defendant's practice was to deny amended birth certificates to female-to-male transgender persons. According to Defendant's Memorandum, this practice is also being reevaluated. (Def's Mem. 2, 3) ("IDPH is in the process of formulating written standards for evaluating sex designation on birth records, which will address whether a female-to-male transgendered [sic] person must undergo genital reconstruction surgery to obtain a male gender designation on an amended birth certificate."). Defendant strongly suggests that the genital surgery requirement will be abandoned. (Def's Mem. 4) ("that IDPH has amended Mr. Johnson's birth certificate without requiring that he undergo genital-reconstruction surgery demonstrates that it is actually unlikelihood [sic] that the issue raised by Mr. Johnson's allegations will recur.").

Each of the Plaintiffs sought and were *denied* birth certificates by Defendant prior to or during this lawsuit. *See* Affidavit of John A. Knight in Support of Plaintiffs' Petition for Attorneys' Fees ("Knight Aff."), attached hereto as Exhibit A, and the letters attached as Exhibits 2 to 6 thereto. Other transgender persons born in Illinois had sought and were denied birth certificates because of the practice of refusing birth certificates to persons whose surgeons were not U.S. licensed challenged by this case. *See* Affidavits of Aydene Miletello, M.P., Towana Lewis and Lindsey Lewis attached hereto as Exhibits B, C and D and E. Aydene Miletello provided both a letter from a U.S. licensed doctor who had examined her and a medical certificate from her Thai surgeon, and still she was denied an amended birth certificate. (Ex. B). Because of the futility of doing so, Pamela

Anders did not apply for an amended birth certificate after reviewing IDPH's former practice described on its website. (Ex. F).

Defendant's practice of refusing amended birth certificates to female-to-male transgender persons who had not completed genital reconstruction surgery resulted in the denial of birth certificates listing the male gender marker to Victor Williams and Kristian Maul, *See* Affidavits of Victor L. Williams and Kristian A. Maul, attached hereto as Exhibits G and H. Others did not apply when they learned of Defendant's practice because of the futility of doing so. *See* Affidavits of Cody Feldt, Oliverio Rodriguez and Jacob MacGregor, attached hereto as Exhibits I, J, and K. Counsel for Plaintiffs, John Knight, asked counsel for Defendant, Holly Turner, about its practices and Ms. Turner confirmed that Defendant's practice was to refuse to amend the birth certificates of persons who had chosen a surgeon who was not licenses in the United States and that genital surgery to create a penis was required before Defendant would change the gender on the birth certificate of female-to-male transsexual persons. She sent Mr. Knight an e-mail on May 23, 2008 stating that "[t]he Department requires documentary evidence of an operation or surgery that attempts to change the form of sex of the individual. In the case of changing a female to male gender, surgery to attempt to create/attach/form a viable penis is required" (See Ex. A at ¶ 16 and Ex. 1 thereto.)

On October 1, 2009, this Court advised the parties orally that it would enter an order on October 19 granting Defendant's motion to dismiss for the reasons stated on the records on October 1. (*See* Order of October 1, 2009, attached as Ex. M). The Court agreed with Defendant's assertions that its remedial actions, taken after Plaintiffs brought

this action, granted Plaintiffs the relief sought in the Complaint and set the case over until a transcript of the Court's reasons could be prepared.

II. STATUTORY FRAMEWORK

The fee-shifting provision of the CRA provides that "[u]pon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought...to enforce a right arising under the Illinois Constitution." 740 ILCS § 23/5(c). To determine the amount of reasonable attorneys' fees under the CRA, courts "shall consider the degree to which the relief obtained relates to the relief sought." 740 ILCS § 23/5(d)(3). Finally, for the purposes of this mandatory fee-shifting provision, a prevailing party is, among other things, one "whose pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing party relative to the relief sought." *Id.* Accordingly, a party is entitled to reasonable fees, costs and expenses under the CRA if the party demonstrates both causality and non-frivolity. This subsection of the CRA codifies the pre-*Buckhannon* judicial practice of awarding attorneys' fees and costs to plaintiffs under federal fee shifting statutes such as the Civil Rights Attorney's

Fees Awards Act of 1976, 42 U.S.C. § 1988 whose lawsuit catalyzed a defendant's remedial action.

Prior to the United States Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), which rejected the application of the catalyst theory to federal fee statutes, the catalyst theory was widely accepted by federal courts as a basis for according civil rights plaintiffs "prevailing party" status even where the claims were mooted by voluntary settlement or the defendant's unilateral cessation of unlawful conduct. *See e.g.*, *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541 (3d Cir.1994); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21(5th Cir.1993); *Little Rock School Dist. v. Pulaski County Special School Dist., No. 1*, 17 F.3d 260, 263 n. 2 (8th Cir.1994); *American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 250-51.(10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184, 126 L.Ed.2d 143 (1993); *see also*, *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994).

In *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564 (7th Cir. 1983), the Seventh Circuit set forth its framework for determining whether a civil rights plaintiff was entitled to attorneys' fees as a prevailing party under the catalyst theory. In the Seventh Circuit, "[a] plaintiff [could] prevail even if the defendant provide[d] relief voluntarily, as long as the lawsuit [was] [1] 'casually linked to the achievement of the relief obtained' and [2] the defendants did not act 'wholly gratuitously, *i.e.*, the plaintiff[s'] claim[s], if pressed, cannot have been frivolous, unreasonable or groundless.'" *Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *see also Ill. Welfare Rights Org.*, 723 F.2d at 566; *Stewart v. McGinnis*, 5 F.3d 1031, 1039 (7th Cir. 1994).

Thus, in the Seventh Circuit, a plaintiff claiming attorneys' fees and costs under a federal fee-shifting statute was entitled to those fees and costs if the plaintiff demonstrated both causality and non-frivolity. This framework mirrors the fee-shifting provision of the CRA. *See* 740 ILCS § 23/5(d) (""prevailing party' includes any party: ... (3) whose pursuit of a *non-frivolous claim* was a *catalyst for a unilateral change in position* by the opposing party relative to the relief sought.") (emphasis added). Because there are no Illinois cases discussing the fee-shifting provision of the CRA, pre-*Buckhannon* federal case law interpreting federal fee-shifting statutes such as 42 U.S.C. § 1988 provide persuasive authority to guide this Court's interpretation of the CRA. *See Brewington v. Dep't of Corrections*, 161 Ill.App.3d 54, 62, 513 N.E.2d 1056, 1062 (1st Dist. 1987) (noting that in the absence of Illinois cases interpreting the fee-shifting provision of an Illinois state statute, in that case, the Illinois Human Rights Act, analogous federal caselaw provides the applicable standards) (citation omitted).[2]

III. PLAINTIFFS HAVE PREVAILED

A. Plaintiffs' Lawsuit Catalyzed Defendant's Cessation of Unlawful Practices

The facts of this case show that Plaintiffs received their amended birth certificates, because they sued Defendant to get them. In addition, Defendant has been following two practices through which it denied accurate birth certificates to many

[2] Illinois courts may award fees under 42 U.S.C. § 1988 and other federal fee-shifting statutes to prevailing parties. *See, e.g., Blount v. Stroud*, 232 Ill.2d 302, 904 N.E.2d 1(Ill. 2009) (affirming award of attorney's fees under 42 U.S.C. § 1988); *Shepard v. Hanley*, 274 Ill.App.3d 442, 654 N.E.2d 1079 (3d Dist. 1995) (upholding award of attorneys' fees under 42 U.S.C. § 1988); *Beverly Bank v. Bd. of Review of Will County*, 193 Ill.App.3d 130, 550 N.E.2d 567 (3d Dist. 1989) (finding that trial court improperly reduced the lodestar amount of a prevailing plaintiff's attorney's fees under 42 U.S.C. § 1988). There are, however, a limited number of state law cases interpreting these federal fee-shifting provisions in comparison to those from the federal courts.

transgender persons until, as a result of this lawsuit, he terminated the IDPH practice of denying birth certificates to persons whose surgeon was not U.S. licensed and announced that IDPH would pursue rule-making to decide what the rule should be for deciding what surgery is required before a female-to-male transgender person can obtain a new birth certificate. If not the sole cause of these changes, the lawsuit was a significant precipitating factor in the Defendant's cessation of its unlawful conduct. Courts in the Seventh Circuit routinely held that to establish a causal link, plaintiffs needed only to prove that the lawsuit was a significant factor – *not* the sole factor – in causing defendants to act remedially. *See e.g.*, *Harrington v. DeVito*, 656 F.2d 264, 267 (7th Cir. 1981) (explaining that a plaintiff prevails as a catalyst where plaintiff's lawsuit "in some way" played a "provocative role" in defendant's voluntary change in conduct), *Nanetti v. University of Ill. at* Chicago, 867 F.2d 990, 993 (7th Cir. 1989) (reasoning that a plaintiff prevails where the lawsuit was a "material factor" in obtaining a favorable outcome from the defendant).[3]

In addition, when assessing whether a plaintiff's lawsuit had a provocative effect on relief obtained, courts in the Seventh Circuit bestowed significant weight on the chronological sequence of events. *See Harrington v. Devito*, 656 F.2d 264, 267-68 (7th

[3] Other federal circuit courts recognized and applied these same principles. *See, e.g.*, *Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1299 (1st Cir. 1997) "The lawsuit need not be the sole cause of the fee-target's remedial actions, but it must be a competent producing cause of those actions, or play a provocative role in the calculus of relief."); *N.A.A.C.P. v. Wilmington Med. Ctr., Inc.*, 689 F.2d 1161, 1169 (3d Cir. 1982) ("the plaintiffs' lawsuit need not be the sole cause of the ultimate relief...Where there is more than one cause, the plaintiff is a prevailing party if the action was a material factor..."); *Luethje v. Peavine Sch. Dist. of Adair County*, 872 F.2d 352, 354 (10th Cir. 1989) ("The plaintiff's suit need not have been the sole reason for the defendant's action: it is enough that plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act.").

Cir. 1981) (concluding that "because all of these actions followed soon after the institution of this lawsuit, it is not unreasonable to suppose that they were causally related to the lawsuit."); *see also Johnson v. LaFayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 731 (7th Cir. 1995) (determining that findings of causality were "supported by the fact that the Union failed to comply with [federal law] for six years and only modified its procedures after the commencement of the lawsuit"); *Zinn*, 35 F.3d at 276 n.7 ("The timing of the rule change – one day prior to a scheduled status conference in this case – certainly suggests a causal relationship with this suit."). The Seventh Circuit was not alone in this approach. For example, in addressing the relevance of chronology, the Eleventh Circuit astutely noted that "[b]ecause 'defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways,' courts often look to other evidence, such as the chronology of events, to determine whether a given lawsuit caused the defendant to provide the requested relief." *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999) (citation omitted). *Accord Heath v. Brown*, 858 F.2d 1092, 1094 (5th Cir. 1988) ("Clues to the provocative effects of the plaintiffs' legal efforts are best gleaned from the chronology of events...").

Here, the chronological relationship between the institution of Plaintiffs' lawsuit and Defendant's change in its policies regarding the issuance of birth records proves a causal link to the achievement of the relief obtained. As of 2005, Defendant was refusing to issue corrected birth records to person whose completed gender confirmation surgeries were performed by physicians licensed in countries other than the United States. (Exs. A-F). Defendant was also at that time denying birth certificates to female-to-male transsexual persons who had not completed genital reconstruction surgery. (Exhibits G-

K.) Despite having no justification for this policy, Defendant maintained this impermissible practice for several years. (Exs. B-K).

Plaintiffs' counsel made several attempts to persuade Defendant to change these practices and to at least explain them as set out in more detail in the Affidavit of John Knight. (Ex. A, ¶¶ 8-10.) Prior to commencing this lawsuit, Knight made phone calls to the General Counsel of IDPH as well as several calls to another attorney in that office, but he was repeatedly told that the IDPH practices at issue in this case would not change. His phone calls to lawyers at IDPH in May, June and July 2008 included several to Assistant Chief Counsel, Holly Turner, who confirmed that IDPH would not amend the birth certificate of a person whose surgeon was not U.S.-licensed and that IDPH had specific requirements for surgery for female-to-male transgender persons. On May 23, 2008, Ms. Turner faxed him an e-mail stating that IDPH requires "surgery to attempt to create/attach/form a viable penis" before it will change the gender on a birth certificate for a female-to-male transgender person. (See Ex. 1 attached hereto.) On June 4, 2008, Knight wrote a letter to Ms. Turner asking a detailed set of questions about IDPH's practices regarding changing the sex designation on birth certificates and the reasons for them, but he never received a response.

Plaintiffs applications for new birth records with the correct listed were denied under Defendant's unlawful regime, even though Plaintiffs Kirk and Rothkopf presented Defendant both with an affidavit or certificate from their Thai surgeon and with affidavits from a U.S.-licensed physician who examined them and certified the completion of the gender confirmation surgeries by reason of which the sex designation should be changed on their birth certificates. (Exhibit 2 to Exhibit A). The form of the affidavits offered by

Plaintiffs Kirk and Rothkopf have been adopted verbatim by the Defendant as the affidavits required under its new policy. *Compare* Ex. and 2 to Ex. A with Def.'s Mem., Exhibit 1:A, p. 3, attached hereto as Exhibit P). Still, when Plaintiffs provided these documents to Defendant prior to suing Defendant, their requests for birth certificates with the correct gender on them were denied. (Exs. 4 and 5 to Ex. A). Plaintiffs request for an amended birth certificate for Riley Johnson was also denied. (Exs. 3 and 6 to Ex. A.)

Based on the foregoing unlawful practices, Plaintiffs filed the Complaint against Defendant with this Court on January 21, 2009 and amended it on April 7, 2009. Within three months of the filing of the amended complaint, Defendant reversed course on its unlawful birth record policies, provided Plaintiffs their birth certificates, and Moved to Dismiss this action. (*See* Defendant's Section 2-619 Motion to Dismiss Plaintiffs' First Amended Complaint and Def.'s Mem.). This timing supports the conclusion that Plaintiffs' lawsuit impelled Defendant (1) to grant corrected birth records to each of the Plaintiffs, (2) change its unlawful position on the requirement that transgender persons use a U.S.-licensed surgeon before they can obtain an amended birth record, and (3) decide to conduct rule-making to determine what surgery a female-to-male transsexual person must complete before obtaining an amended birth record with the correct gender marker listed on it. Had Plaintiffs not brought suit in January 2009, Defendant would have likely indefinitely continued its unconstitutional policies.

Accordingly, there is a proven causal link between Plaintiffs' requested relief and the relief obtained.[4]

B. Plaintiffs' Claims Were Not Frivolous

[4] Should Defendant contest the fact that Plaintiffs' suit was a significant cause for the relief granted, Plaintiffs reserve the right to engage in discovery targeted to that issue.

Plaintiffs easily satisfy the second requirement of the CRA's two-pronged catalyst theory test. As previously noted, the second requirement of the catalyst theory test is satisfied if a plaintiff shows non-frivolity. *See* 740 ILCS § 23/5(d)(3) (a prevailing party is one "whose pursuit of a *non-frivolous* claim was a catalyst for [defendant's] unilateral change in position...") (emphasis added). The Seventh Circuit has explained that a lawsuit is frivolous "if it has no reasonable basis, whether in fact or in law." *Roger Whitmore's Auto. Svcs, Inc. v. Lake County, Ill.*, 424 F.3d 659, 675 (7th Cir. 2005). *Accord Zinn*, 35 F.3d at 273-74 (explaining that the second element of the catalyst test was satisfied if plaintiffs demonstrate that defendants have not "acted wholly gratuitously, *i.e.*, the plaintiff's claim, if pressed, cannot have been frivolous, unreasonable, or groundless.").

Plaintiffs' constitutional claims are factually and legally sound. *See, e.g., Best v. Taylor Mach. Works*, 179 Ill.2d 367, 394 (Ill. 1997) ("...[W]e must determine whether the classifications ... are based on reasonable differences in kind or situation, and whether the basis for the classifications is sufficiently related to the evil to be obviated by the statute."); *Crocker v. Finley*, 99 Ill.2d 444 (1984) (finding equal protection violation); *In re Estate of Longeway*, 133 Ill.2d 33, 44 (1990) (recognizing common law right to refuse treatment based on a right of "personal inviolability."); *In re C.E.*, 161 Ill.2d 200 (1994) (recognizing a federal Constitutional liberty right to refuse medical treatment). Plaintiffs' Complaint clearly and reasonably states the basis for its allegations of Defendant's violations of Illinois constitutional law. In response, Defendant altered its unlawful conduct to comply with the mandates of Illinois law. (Def.'s Mem. 2). Tellingly, Defendant never filed a responsive pleading challenging the truthfulness of Plaintiffs'

allegations or the merits Plaintiffs' claims. Rather, Defendant waited to file its motion to dismiss until *after* Defendant had granted Plaintiffs the relief sought in the Complaint and until *after* Defendant either completed or began the process of complying with the various mandates of Illinois constitutional law. The strategic timing of Defendant's motion to dismiss indicates that its actions towards constitutional compliance were driven by Plaintiffs' lawsuit. Thus it is clear that Defendant did not act "wholly gratuitously" and that Plaintiffs' claims are not "frivolous, unreasonable, or groundless." *See Roger Whitmore*, 424 F.3d at 675.

Plaintiffs meet both requirements of the catalyst theory under the Act and are therefore entitled to reasonable attorneys' fees.

IV. PLAINTIFFS ARE ENTITLED TO REASONABLE ATTORNEYS' FEES, COSTS AND EXPENSES

As shown above, Plaintiffs are prevailing parties for purposes of the CRA and are entitled to attorneys' fees. Pursuant to the mandatory language of the CRA, "[u]pon motion, a court *shall* award reasonable attorneys' fees and costs...to a plaintiff who is a prevailing party." 740 ILCS § 23/5. (emphasis added). Consequently, Defendant must pay Plaintiffs' reasonable attorneys' fees. *See Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill.App.3d 231, 235, 671 N.E.2d 768, 771 (1st Dist. 1996) (explaining that the requirement that the State pay the prevailing party's fees under the relevant civil rights act was "mandatory as evidenced by the legislature's use of the word 'shall' in the statute.").

A. Plaintiffs Obtained the Relief Sought through Defendant's Unilateral Acts

The CRA provides that "[i]n awarding reasonable attorneys' fees, the court shall consider the degree to which the relief obtained relates to the relief sought." 740 ILCS § 23/5(c). Here, the relief obtained by Plaintiffs directly relates to the relief sought in the Complaint. In the Complaint, Plaintiffs sought an injunction ordering Defendant to issue Plaintiffs amended birth records. (Compl. ¶ 8). As previously discussed, Defendant readily acknowledged that "Plaintiffs have all received amended birth records reflecting their new respective gender identities. This is the relief that Plaintiffs sought and have now obtained." (Def's Mem. 2). Plaintiffs sought and have also obtained relief as to Defendant's now defunct policy refusing to change the birth record gender designation of persons who obtained gender confirmation surgeries by physicians licensed in another country. (Def's Mem. 2). Finally, Defendant has announced IDPH's intention to conduct rule-making for the purpose of deciding how much surgery will be required before a female-to-male transsexual will be able to obtain a corrected birth certificate and suggests that the genital surgery requirement will be abandoned. (Def's Mem. 4) ("that IDPH has amended Mr. Johnson's birth certificate without requiring that he undergo genital-reconstruction surgery demonstrates that it is actually unlikelihood [sic] that the issue raised by Mr. Johnson's allegations will recur.").

Accordingly, the fact that the relief obtained is exactly the relief sought for plaintiffs and also included changes in the challenged practices strongly supports Plaintiffs' motion for reasonable attorneys' fees.

B. The Attorneys' Fees Sought Are Reasonable

Courts in Illinois also generally require that the petitioner for attorneys' fees for plaintiffs "present the court with detailed records containing facts and computations upon

which the charges are predicated and specifying the services provided, by whom they were performed, the time expended, and the hourly rate charged." *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill.App.3d 841, 867, 864 N.E.2d 288, 315 (5th Dist. 2007) (1994) (citation omitted). Trial courts consider a number of factors when assessing the reasonableness of fees, "including the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." *Chicago Title & Trust Co. v. Chicago Title & Trust Co.*, 248 Ill.App.3d 1065, 1072, 618 N.E.2d 949, 954 (1st Dist.1993). Finally, a trial court is entitled "to use its own knowledge and experience to assess the time required to complete particular activities..." *Olsen v. Staniak*, 260 Ill.App.3d 856, 866, 632 N.E.2d 168 (1st Dist. 1994).

To determine the amount of reasonable attorneys' fees under similarly constructed fee-shifting statutes, federal courts in Illinois simplify the consideration of the above factors by applying the "lodestar" method, multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate. *See People Who Care v. Rockford Bd. of Educ., School Dist. No. 25*, 90 F.3d 1307, 1310 (7th Cir. 1996) (noting that the lodestar method provides clear guidelines for determining the amount of reasonable fees in § 1988 cases) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An examination of these factors supports Plaintiffs' request for fees in the amount of $189,608

1. Hours Reasonably Expended

Plaintiffs' counsel at the ACLU and Jenner & Block seek compensation for 489.20 hours of work in this litigation.[5] A detailed description of she specific hours for which Plaintiffs seek compensation is set forth below in Exhibits A, M, N, O and P. Plaintiffs' counsel exercised billing judgment, including a careful review of every entry in these time records.

2. Reasonable Hourly Rates

Reasonable hourly rates under fee-shifting statutes such as the CRA are based on "the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Applicants for attorneys' fees bear the burden of establishing the market rate. *Gautreaux v. Chicago Housing Authority*, 491 F.3d 649, 659 (7th Cir. 2007) (citations omitted). The market rate for an attorney's services is "the rate that lawyers of similar ability and experience in the community normally charge their clients for the work in question." *Id.* The party requesting attorneys' fees meet its initial burden of establishing the market rate "either by submitting affidavits from similarly experienced attorneys attesting to the rates they charge paying clients for similar work or by submitting evidence of fee awards the attorney has received in similar cases." *Batt v. Microwarehouse, Inc.*, 241 F.3d 891, 894 (7th Cir. 2001) (approving plaintiff's hourly rate upon submission of plaintiff's counsel's affidavits and affidavits of other attorneys because the hourly was similar to awards plaintiff's counsel had received from other courts in similar Fair Labor Standard Act cases); *see also Heriaud v. Ryder Transp. Svcs*, No. 03 C 0289, 2006 WL 681041, at *1, 6-7 (N.D. Ill. Mar. 14, 2009) (explaining that plaintiffs "should have proffered a

[5] This figured includes 49.5 hours spent pursuing this award of fees and expenses. *See Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980) (explaining that a federal remedial fee-shifting statute, prevailing plaintiffs "are properly entitled to fee awards for time spent litigating their claim to fees").

affidavits from attorneys other than those seeking the fee award or produce evidence of fee awards in similar cases in order to establish a market rate for their services" rather than just a "self-serving affidavit" and biographies) (*citing Batt*, 241 F.3d at 894). Attorneys are entitled to their market rate and courts may not determine their own "medieval just price". *Small v. Richard Wolf*, 264 F.3d 702 (7th Cir. 2001). "[O]nce an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." *Id.* (*citing Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 407 (7th Cir. 1999)).

For Plaintiffs' public interest counsel – the attorneys at the ACLU – for whom there are no true billing rates, courts "look to the next best evidence – the rate charged by lawyers in the community of 'reasonably comparable skill, experience and reputation.'" *People Who Care*, 90 F.3d at 1310 (*quoting Blum*, 465 U.S. at 892, 895 n. 11). The hourly rates sought for Plaintiffs' counsel at the ACLU are such rates. (*See* Ex. A (Afifdavit of John A. Knight); Ex. N (Affidavit of Roger Pascal). As previously explained, hourly rates established in similar litigation are "clearly evidence of an attorney's market rate." *People Who Care*, 90 F.3d at 1312.

For Plaintiffs' private counsel – the cooperating attorneys at Jenner & Block – the "actual billing rate for comparable work is considered to be the presumptive market rate." *Small*, 264 F.3d at 707 (citation omitted). This presumption reflects the fact that "the market rate of legal time is the opportunity costs of that time, the income foregone by representing this plaintiff." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993). Thus, as Judge Easterbrook explained, "[a]n attorney who ordinarily works 2,000 hours in a year [and] sells 1,900 of those hours to clients who pay $250 per hour and

devotes the other 100 hours to civil rights litigation in which the court will fix the fee" is presumptively entitled to an hourly rate of $250 as an accurate reflection of the "opportunity cost of the civil rights case." *Id.* at 1150 (reiterating the importance of market valuation in establishing a private attorney's "reasonable hourly rates"). In the lodestar calculation delineated below, Plaintiffs use the hourly rates charged by counsel at Jenner & Block to paying clients. (*See* Ex. M (Affidavit of Margaret J. Simpson). The lodestar calculation is also supported by "affidavits from similarly experienced attorneys attesting to the rates they charge paying clients for similar work." *Batt*, 241 F.3d at 894. (*See* Ex. N (Affidavit of Roger Pascal).

Finally, the hourly rates sought by Plaintiffs are consistent with hourly rates commonly held reasonable by courts in Illinois. *See, McNiff v. Mazda Motor of America, Inc.*, 384 Ill.App.3d 401, 407, 892 N.E.2d 598, 604 (4th Dist. 2008) ($275); *see also People Who Care*, 90 F.3d at 1311 n.2 ($275 per hour); *Catalan v. RBC Mortgage*, No. 05 cv 6920, 2009 WL 2986122, at *1, *6 n.8 (N.D. Ill. Sept. 16, 2009) ($400 per hour); *Robinson v. City of Harvey*, No. 99 C 3696, 2008 WL 4534158, at *1, *7 (N.D. Ill. Oct. 7, 2008) (approving rates from $270 for junior-level plaintiff's counsel up to $470 for the more experienced counsel); *Barnett v. City of Chicago*, No. 92 c 1683 et seq., 2000 WL 263982, at *1, *2 (N.D. Ill. Feb. 29, 2000) ($325 per hour).

3. Calculating the Lodestar

Accordingly, the lodestar for the work performed by Plaintiffs' attorneys and paralegals at the ACLU and Jenner & Block is . This figure is the product of the number of hours reasonably expended in this litigation by Plaintiffs' counsel multiplied by the reasonable hourly rates of Plaintiffs' counsel[6]:

[6] Time and expense records for RBF and Jenner & Block are attached hereto as Exhibits O and P.

TIMEKEEPER	HOURS	RATE	FEE
John Knight	198.55	375.00	74,456.25
Kendra Thompson	26.9	150.00	4,035.00
Terrance Pitts	17.5	75.00	1,312.50
Margaret Simpson	64	525.00	33,600.00
Kyle Palazzolo	165.75	375.00	62,156.25
Nada Djordjevic	16.5	470	7,755.00
Total	489.20		$183,315.00

V. PLAINTIFFS ARE ENTITLED TO COSTS AND EXPENSES

The mandatory fee-shifting provision of the CRA directs this court to award costs to Plaintiffs as the prevailing party, "including expert witness fees and other litigation expenses". 740 ILCS 23/1.

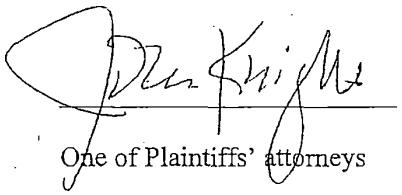
Here, the out-of-pocket costs and other litigation expenses incurred in this case total $6,168. The specific expenses for which Plaintiffs seek compensation are set forth below in exhibits O and P.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this court award Plaintiffs $183,315 in attorneys' fees and $6,168 in costs and expenses arising from the legal work performed in this case by their counsel.

DATED: October 16, 2009

Respectfully submitted,



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON	)
Plaintiffs,	)
v.	)
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)
Defendant.	)

AFFIDAVIT OF JOHN KNIGHT IN SUPPORT OF PLAINTIFFS' PETITION FOR ATTORNEY FEES

John Knight, being duly sworn state as follows:

1. I submit this affidavit in support of the petition filed by the plaintiffs for an award of attorney fees and costs arising from the work performed in analyzing the law and facts prior to filing the above-captioned case and during the pendency of the case by plaintiffs' counsel at the Roger Baldwin Foundation of ACLU, Inc. ("RBF"). RBF is the legal and educational wing of the ACLU of Illinois, which is a state affiliate of the national organization, the American Civil Liberties Union.

Personal Background

2. In 1988, I graduated from the University of Chicago Law School. I received a bachelor's degree in history from Stanford University in 1983, where I was a member of Phi Beta Kappa.

3. I am licensed as an attorney in the State of Illinois and admitted to practice in the United States District Courts for the Northern District of Illinois and for the Eastern District of Wisconsin. I am a member of the trial bar of the United States District Court for the Northern District of Illinois. I have had principal responsibility for litigation of matters before each of these courts.

4. Since March 2004, I have served as the Director of the Lesbian Gay Bisexual Transgender ("LGBT") Project of the RBF. I am also a Senior Staff Attorney for the LGBT Project of the American Civil Liberties Union Foundation, which is the legal and educational arm of the national organization, the American Civil Liberties Union. My responsibilities include the development and litigation of cases involving discrimination against LGBT persons in Illinois and other Midwest states. I provide direct representation and consultation in these cases. I was employed as a trial attorney by the Equal Employment Opportunity Commission from 2000 to 2004. From 1995 until 2000, I was a clinical lecturer at the Edwin F. Mandel Legal Aid Clinic of the University of Chicago, where I supervised law students working on cases for persons who were homeless or at imminent risk of becoming homeless. I worked as an associate at the law firm of Rothschild, Barry & Myers from 1990 until 1995. Before that, I worked for two years as a law clear for United States District Court Judge Hubert L. Will.

5. Since 1995, I have developed litigation specialties in the areas of civil rights and civil liberties law. Over the past 14 years, I have provided trial and appellate representation in numerous complex civil actions involving federal and state statutory and constitutional issues arising in several areas including employment discrimination, government benefits, housing discrimination, parental rights, corrections, and health insurance and family leave benefits for lesbian and gay male state employees.

6. I have lectured on the civil liberties and civil rights of LGBT persons in seminars sponsored by educational institutions and legal organizations.

Management of this Litigation

7. I have served as lead counsel for this litigation, setting the overall strategy for discovering the nature of the restrictive practices of the Illinois Department of Public Health's Division of Vital Records ("IDPH"), the ways in which these practices effect persons born in Illinois, and analyzing the many complex factual and legal questions

raised by implicated by these practices. The research that led to the filing, in January of 2009, of this case began at least a year prior. I describe below the year of pre-filing factual and legal research and continued until its conclusion.

8. Prior to commencing this lawsuit, I made substantial efforts on multiple occasions to resolve the issues without litigation. Those include phone calls to the General Counsel of IDPH as well as several calls to another attorney in that office. I was repeatedly told that the IDPH practices at issue in this case would not change. I wrote to IDPH asking for details about the practice and IDPH's reasons for it. In addition, I wrote on behalf of the Plaintiffs in this case asking for amended birth certificates for them. I spoke to several other attorneys who had contacted IDPH on behalf of clients asking the Department to provide amended birth certificates to their clients and asking them to change their practices. However, the attorneys had all been unsuccessful.

9. My phone calls to lawyers at IDPH in May, June and July 2008 included several to Assistant Chief Counsel, Holly Turner, who confirmed the IDPH practices others had told me about – that IDPH would not amend the birth certificate of a person whose surgeon is not U.S.-licensed and that IDPH had specific requirements for surgery for female-to-male transgender persons. On May 23, 2008, Ms. Turner faxed to me an e-mail advising me that IDPH requires "surgery to attempt to create/attach/form a viable penis" before it will change the gender on a birth certificate for a female-to-male transgender person. (See Ex. 1 attached hereto.) On June 4, 2008, I wrote a letter to Ms. Turner following up on an earlier conversation I had had with her asking a detailed set of questions regarding IDPH's practices regarding changing the sex designation on birth certificates and the reasons for them. (See Ex. 2 attached hereto.) I never received a response to this inquiry.

10. I wrote to Defendant at IDPH on behalf of the Plaintiffs asking that IDPH change the gender on the Plaintiffs' birth certificates. (See Letter of John Knight to

Damon Arnold, M.D., dated October 30, 2008, attached hereto as Ex. 3, and Letter of John Knight to Damon Arnold, M.D., dated January 15, 2009, attached hereto as Ex. 4.) Defendant denied that request based on the policies challenged in this case. (See Letters of George Rudis, Deputy State Registrar, Division of Vital Records, to Karissa Rothkopf, Victoria Kirk, and Riley Johnson attached hereto as Exs. 5-7.)

11. In summary, our factual analysis involved the review of the following areas of inquiry among others: A. The IDPH's current and past administration of the Vital Records Act; B. The medical and psychological research and clinical practices regarding Gender Identity Disorder, its treatment, and the role amending identity documents plays in its treatment; C. The medical and psychological research findings regarding the meaning of sex and gender; and D. The available research findings about the ways in which having inconsistent identity documents can harm a transgender individual, including by placing him or her at increased risk of violence.

12. Our investigation in these areas involved calls and e-mails to lawyers at IDPH; interviews of multiple transgender persons who have requested amended birth certificates from IDPH; phone conferences and meetings with medical and psychological experts in the treatment of gender identity disorder, sex, and gender; calls to numerous attorneys and others who have conducted research and prepared reports and data compilations about the issues noted above.

13. The legal, medical, and factual issues in this case are novel and complex. The legal rights of transgender persons are largely undefined and the development of appropriate legal frameworks for the protection of their interests requires the synthesis of

doctrines from other areas of the law. None of those cases presented a challenge to restrictive practices such as those at issue in this case. Consequently, we undertook an extensive analysis of federal and state due process, Illinois privacy, and federal and state equal protection jurisprudence prior to the filing of this case.

14. Our legal research also included review of the amendments to the Vital Records Act, the legislative history of the Act, and the version of the Model Vital Records Act that was used as a template for the Illinois Vital Records Act. We reviewed the birth certificate statutes, policies and practices from other states that address the amendment of the gender marker; and the laws, policies, and practices of other state and federal agencies with respect to amending one's gender marker on government documents other than birth certificates. Additionally, we examined the laws and practices that require the gender marker to be changed on one's birth certificate as a prerequisite to correcting the gender marker on another document. For example, we reviewed the practices of other states' departments of motor vehicles to discover which ones require an amended birth certificate before the department will correct the gender listed on a transgender person's driver's license. We also examined voter registration rules to assess the degree to which an incorrect gender marker listed on a government document would create a barrier to voting. In short, we looked comprehensively at the various ways that incorrect identity documents could harm a transgender person.

15. Because of the risks of violence and discrimination to transgender persons, our search for persons who were willing to act as plaintiffs was extensive. Consequently, after non-legal staff at the ACLU located an conducted initial interviews of possible plaintiffs, I and my co-counsel interviewed several possible plaintiffs before we found persons who fit the criteria we set and who were willing and able to act as plaintiffs.

16. Co-counsel Margaret Simpson and Kyle Palazzolo at Jenner & Block ("Jenner") have supported RBF's investigation and litigation of this case by conducting a

substantial part of the legal research required for this case and investigating many of the factual issues at my direction. In addition, they have drafted some of the pleadings filed in this case, assisted in the drafting of the complaints by interviewing plaintiffs, and reviewing and editing the complaint. They have conducted or assisted in the conduct of interviews of potential clients, met with potential experts, and participated in conferences to devise strategy.

17. I have fulfilled my responsibilities as lead counsel for this case by adopting cost-efficient approaches to staffing and the assignment of tasks. I divided various tasks in order to avoid duplication of work. In many instances, it was most efficient to have law clerks such as Terrance Pitts or more junior lawyers – Mr. Palazzolo or Ms. Thompson – perform specific tasks under my supervision. These tasks included the interviews and drafting of affidavits filed along with the response to Defendant's motion to dismiss and legal research on a wide variety of constitutional and procedural issues. I asked Mr. Palazzolo or other junior attorneys at RBF to take on tasks based on their levels of experience and skill.

Personal Time

18. I have reviewed my files in this case, including the time sheets that I contemporaneously maintained throughout the course of my involvement in this case. The Schedule of Services attached as an exhibit to this fee petition is a true and accurate reflection of professional services reasonably rendered by me to the plaintiffs in this litigation, with details concerning the hours expended and the type of services provided, less the exclusions described below.

Preparation of this Fee Claim

19. I exercised reasonable billing judgment in determining the amount of the attorney fees that plaintiffs are requesting for their attorneys' services. I have reviewed all of the attorneys' contemporaneous time records for the services rendered in this case

on appeal. After reviewing those records, I eliminated all non-productive and non-essential time, as well as all duplicative time.

20. In performing the tasks described in the preceding paragraph, I eliminated approximately 8 hours incurred by RBF law clerk as duplicative. I eliminated 38.25 hours of those billed by attorneys at Jenner & Block as unnecessary or duplicative I also eliminated as unnecessary or duplicative 10.4 additional hours of work performed by me. All of these reductions are reflected in the individual time records at a zero dollar value. I wrote off all time performed by former RBF attorney, Sarah Scriber, the Legal Director of RBF, Harvey Grossman, the Legal Director of the ACLU's national LGBT Project, James Esseks, and law clerks, Alex Boni-Saenz and Rick Kienzler.

Hourly Rates

21. I request a rate of $375 per hour for my legal services. This rate is based on market rates and court awards for attorneys with similar experience in similar litigation in the Chicago legal market.

22. I request a rate of $150 per hour for legal services provided by Ms. Kendra Thompson. This rate is also based on market rates and courts award for attorney with similar experience in the Chicago legal market. Ms. Thompson is a staff attorney at RBF who is a 2008 graduate of Harvard Law School.

23. I request a rate of $75 per hour for legal services provided by Mr. Terrance Pitts, who was a third year last student from Northwestern University when he worked as a law clerk for RBF in 2008.

Dated this 16th day of October, 2009, at Chicago, Illinois.

John Knight

Subscribed and sworn to before me this
16th day of October, 2009.

Althea Thomas

ALTHEA THOMAS
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
September 21, 2012

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK and KARISSA ROTHKOPF, and RILEY JOHNSON,	)	
Plaintiffs,	)	No. 09-CH-3226
	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	
Defendant.	)	

PLAINTIFFS' CORRECTED PETITION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

Plaintiffs Victoria Kirk, Karissa Rothkopf, and Riley Johnson, by and through their attorneys, respectfully move for an award of attorneys' fees, costs and expenses against Defendant Damon T. Arnold, in his official capacity, pursuant to the Illinois Civil Rights Act of 2003, 740 ILCS § 23/5(c). In support of this motion, Plaintiffs state as follows:

1. On January 27, 2009, Plaintiffs filed a complaint for declaratory and injunctive relief against Defendant for violations of the Illinois Constitution. (*See* Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "Compl.")).

2. On April 7, 2009, Plaintiffs filed an amended complaint against Defendant to add an additional plaintiff and additional claims related to the statute at issue in this case. (*See* First Amended Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "First Amended Compl.").

3. Plaintiffs put Defendant on notice in the Complaint and the First Amended Complaint that they would be requesting an award of attorneys' fees, costs and expenses in connection with this action. (*See, e.g.*, Compl, p. 18; First Amended Compl., pp. 23, 26).

4. On June 26, 2009, Defendants moved pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure to dismiss Plaintiffs' action on the grounds of mootness. (*See* Defendant's Section 2-619 Motion to Dismiss). In support of Defendant's claim of mootness, Defendant asserted that, since the filing of this action, Plaintiffs had received the requested amended birth certificates and that the Illinois Department of Public Health's Division of Vital Records had announced the termination of, or intention to terminate, the practices Plaintiffs challenged as violations of the Illinois Constitution and the VRA. (*See* Defendant's Combined Memorandum Replying in Further Support of Motion to Dismiss and Opposing Motion for Leave to Amend the Complaint (hereinafter "Def.'s Mem."), 2).

5. On October 1, 2009, this Court advised the parties that it would enter an order on October 19 granting Defendant's motion to dismiss for the reasons stated on the record on October 1, including that Defendants had provided to Plaintiffs the complete relief sought in this action. (*See* Order of October 1, 2009, attached as Ex. L. to the Memorandum of Law in Support of Plaintiffs' Corrected Petition for An Award of Attorneys' Fees, Costs and Expenses ("Plaintiffs' Fee Memor.")) (*See also* pp. 1, 10, 49-52, Transcript of October 1, 2009 hearing, attached as Exhibit M to Plaintiffs' Fee Memor.)

6. The Illinois Civil Rights Act of 2003 ("CRA") provides, "Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought...to enforce a right arising under the Illinois Constitution." 740 ILCS § 23/5(c). For the purposes of this provision of the CRA, a prevailing party is, among other things, one "whose pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing party relative to the relief sought." 740 ILCS § 23/5(d)(3).

7. Plaintiffs are prevailing parties under the fee-shifting provision of the CRA because their lawsuit catalyzed Defendant to grant the relief requested by Plaintiffs and brought about Defendant's changes, or announced changes, in practices that previously violated the Illinois Constitution.

8. Plaintiffs are therefore entitled to $183,315 in attorneys' fees and $6,168 in costs and expenses arising from services rendered by counsel in connection with this action. A detailed description of the specific hours for which Plaintiffs seek compensation is set forth in Exhibits O and P to Plaintiffs' Fee Memorandum. Out-of-pocket expenses for which Plaintiffs seek compensation are also set forth in Exhibits O and P.

9. The affidavits of Plaintiffs' counsel are attached as Exhibits A, Q and R to the Plaintiffs' Fee Memorandum. The affidavits set forth a description of the time expended, hourly rates charged, and justifications for the hourly rates charged.

WHEREFORE, for the foregoing reasons, Plaintiffs pray that this Court grant this Petition for Attorneys' Fees, Costs and Expenses.

Respectfully submitted,

One of Plaintiffs' attorneys
October 21, 2009

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON	)	
Plaintiffs,	)	No. 09-CH-3226
	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CORRECTED PETITION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

Plaintiffs respectfully submit this Memorandum in support of their Corrected Petition for An Award of Attorneys' Fees, Costs and Expenses against Defendant pursuant to the Illinois Civil Rights Act of 2003 ("CRA"), 740 ILCS § 23/5. As a direct consequence of this litigation, Defendant has granted Plaintiffs their requested relief by providing Plaintiffs with amended birth records and announcing their end of, or intention to change, the practices Plaintiffs challenge as violative of the Illinois Constitution. Consequently, Plaintiffs are prevailing parties for the purposes of the CRA and are entitled to $183,315 in attorneys' fees and $6,168 in costs and expenses arising from the services rendered in this case by counsel.

I. BACKGROUND

After several tries at solving this dispute without litigation set out in more detail below, on January 27, 2009, Plaintiffs filed a complaint for declaratory and injunctive relief against Defendant for violations of the Illinois Constitution. On April 7, 2009,

Plaintiffs filed an amended complaint naming an additional plaintiff and making additional claims. (*See* First Amended Complaint for Declaratory Judgment and Injunctive Relief (hereinafter "First Amended Compl.")). Plaintiffs alleged that Defendant maintained practices that violated Article I, §§ 6 and 12 of the Illinois Constitution. (First Amended Compl. ¶¶ 1, 5). Specifically, Plaintiffs alleged that the Defendant unconstitutionally restricted access to accurate birth certificates by (1) refusing to amend the gender listed for persons who had sex reassignment surgery performed by a physician licensed in another country rather than the United States, and (2) by refusing to amend the birth records of female-to-male transsexuals who declined to undergo a medically unnecessary "surgery to attempt to create/attach/form a viable penis." (First Amended Compl. ¶ 5).

Defendant did not file a responsive pleading disputing the veracity of Plaintiffs' allegations or contesting the merits of Plaintiffs' claims. Instead, Defendant provided Plaintiffs birth certificates with the correct genders listed on them to Plaintiffs and on June 26, 2009 filed a motion asking this Court to dismiss Plaintiffs' claims as moot. (*See* Defendant's Section 2-619 Motion to Dismiss (hereinafter "Def.'s Motion")); (*see also* Defendant's Combined Memorandum Replying in Further Support of Motion to Dismiss and Opposing Motion for Leave to Amend the Complaint (hereinafter "Def.'s Mem."), 2) ("Plaintiffs have all received amended birth records reflecting their new respective gender identities. This is the relief that Plaintiffs sought and now have obtained.").

Defendant also contends that he no longer maintains the two practices that resulted in the denial of accurate birth certificates to the Plaintiffs. With respect to the practice of denying accurate birth certificates to persons whose gender confirmation

surgery was completed by physicians licensed in another country, Defendant states that the Illinois Department of Public Health's Division of Vital Records ("IDPH") "has terminated its prior practice," (Def.'s Mem. 4), and has a new policy for changing the gender designation on a birth certificate after gender confirmation surgery that can be found on the IDPH website. (Def.'s Mem. 2). Second, at the time that Plaintiffs brought suit, Defendant's practice was to deny amended birth certificates to female-to-male transgender persons who had not completed genital reconstruction surgery. According to Defendant's Memorandum, this practice is also being reevaluated. (Def.'s Mem. 2, 3) ("IDPH is in the process of formulating written standards for evaluating sex designation on birth records, which will address whether a female-to-male transgendered [sic] person must undergo genital reconstruction surgery to obtain a male gender designation on an amended birth certificate."). Defendant strongly suggests that the genital surgery requirement will be abandoned. (Def.'s Mem. 4) ("that IDPH has amended Mr. Johnson's birth certificate without requiring that he undergo genital-reconstruction surgery demonstrates that it is actually unlikelihood [sic] that the issue raised by Mr. Johnson's allegations will recur.").

Each of the Plaintiffs sought and were *denied* birth certificates by Defendant prior to or during this lawsuit. (*See* Affidavit of John Knight in Support of Plaintiffs' Petition for Attorneys' Fees ("Knight Aff."), attached hereto as Ex. A, and the letters attached as Exs. 3 to 7 thereto). Other transgender persons born in Illinois had sought and were denied birth certificates because of the practice of refusing birth certificates to persons whose surgeons were not U.S.-licensed challenged by this case. (*See* Affidavits of Aydene Miletello, M.P., Towana Lewis and Lindsey Lewis attached hereto as Exs. B, C,

D and E). Aydene Miletello provided both a letter from a U.S.-licensed doctor who had examined her and a medical certificate from her Thai surgeon, and still she was denied an amended birth certificate. (Ex. B). Because of the futility of doing so, Pamela Anders did not apply for an amended birth certificate after reviewing IDPH's former practice described on its website. (Ex.F).

Defendant's practice of refusing amended birth certificates to female-to-male transgender persons who had not completed genital reconstruction surgery resulted in the denial of birth certificates listing the male gender marker to Victor Williams and Kristian Maul. (*See* Affidavits of Victor L. Williams and Kristian A. Maul, attached hereto as Exs. G and H). Others did not apply when they learned of Defendant's practice because of the futility of doing so. (*See* Affidavits of Cody Feldt, Oliverio Rodriguez and Jacob MacGregor, attached hereto as Exs. I, J, and K). Counsel for Plaintiffs, John Knight, asked counsel for Defendant, Holly Turner, about its practices and Ms. Turner confirmed that Defendant's practice was to refuse to amend the birth certificates of persons who had chosen a surgeon who was not licensed in the United States and that genital surgery to create a penis was required before Defendant would change the gender on the birth certificate of female-to-male transsexual persons. She sent Mr. Knight an e-mail on May 23, 2008 stating that "[t]he Department requires documentary evidence of an operation or surgery that attempts to change the form of sex of the individual. In the case of changing a female to male gender, surgery to attempt to create/attach/form a viable penis is required." (See Ex. A at ¶ 16 and Ex. 1 thereto.)

On October 1, 2009, this Court advised the parties orally that it would enter an order on October 19 granting Defendant's motion to dismiss for the reasons stated on the

records on October 1. (*See* Order of October 1, 2009, attached as Ex. L). The Court agreed with Defendant's assertions that its remedial actions, taken after Plaintiffs brought this action, granted Plaintiffs the relief sought in the Complaint and set the case over until a transcript of the Court's reasons could be prepared. (*See* pp. 1, 10, 49-52, Transcript of October 1, 2009 hearing, attached hereto as Ex. M.).[1]

II. STATUTORY FRAMEWORK

The fee-shifting provision of the CRA provides that "[u]pon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought...to enforce a right arising under the Illinois Constitution." 740 ILCS § 23/5(c). To determine the amount of reasonable attorneys' fees under the CRA, courts "shall consider the degree to which the relief obtained relates to the relief sought." 740 ILCS § 23/5(d)(3). Finally, for the purposes of this mandatory fee-shifting provision, a prevailing party is, among other things, one "whose pursuit of a non-frivolous claim was a catalyst for a unilateral change in position by the opposing party relative to the relief sought." *Id.* Accordingly, a party is entitled to reasonable fees, costs and expenses under the CRA if the party demonstrates both causality and non-frivolity. This subsection of the CRA codifies the pre-*Buckhannon* judicial practice of awarding attorneys' fees and costs to plaintiffs under federal fee shifting statutes such as the Civil Rights Attorney's

[1] This fee petition is properly before the Court as a final order has yet to be entered in this case. Moreover, the issue of fees and costs is a collateral or supplemental matter that is incidental to the judgment, and can be reviewed and decided by the trial court even if the court no longer has jurisdiction over the merits of the case. *See Physicians Ins. Exch. v. Jennings*, 316 Ill. App. 3d 443, 453 (1st Dist. 2000); *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1072-73 (2d Dist. 1987).

Fees Awards Act of 1976, 42 U.S.C. § 1988, whose lawsuit catalyzed a defendant's remedial action.

Prior to the United States Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), which rejected the application of the catalyst theory to federal fee statutes, the catalyst theory was widely accepted by federal courts as a basis for according civil rights plaintiffs "prevailing party" status even where the claims were mooted by voluntary settlement or the defendant's unilateral cessation of unlawful conduct. *See e.g.*, *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541 (3d Cir.1994); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21(5th Cir.1993); *Little Rock School Dist. v. Pulaski County Special School Dist., No. 1*, 17 F.3d 260, 263 n. 2 (8th Cir.1994); *American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 250-51 (10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184, 126 L.Ed.2d 143 (1993); *see also, Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994).

In *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564 (7th Cir. 1983), the Seventh Circuit set forth its framework for determining whether a civil rights plaintiff was entitled to attorneys' fees as a prevailing party under the catalyst theory. In the Seventh Circuit, "[a] plaintiff [could] prevail even if the defendant provide[d] relief voluntarily, as long as the lawsuit [was] [1] 'casually linked to the achievement of the relief obtained' and [2] the defendants did not act 'wholly gratuitously, *i.e.*, the plaintiff[s'] claim[s], if pressed, cannot have been frivolous, unreasonable or groundless.'" *Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *see also Ill. Welfare Rights Org.*, 723 F.2d at 566; *Stewart v. McGinnis*, 5 F.3d 1031, 1039 (7th Cir. 1994).

Thus, in the Seventh Circuit, a plaintiff claiming attorneys' fees and costs under a federal fee-shifting statute was entitled to those fees and costs if the plaintiff demonstrated both causality and non-frivolity. This framework mirrors the fee-shifting provision of the CRA. *See* 740 ILCS § 23/5(d) ("'prevailing party' includes any party: ... (3) whose pursuit of a *non-frivolous claim* was a *catalyst for a unilateral change in position* by the opposing party relative to the relief sought.") (emphasis added). Because there are no Illinois cases discussing the fee-shifting provision of the CRA, pre-*Buckhannon* federal case law interpreting federal fee-shifting statutes such as 42 U.S.C. § 1988 provide persuasive authority to guide this Court's interpretation of the CRA. *See Brewington v. Dep't of Corrections*, 161 Ill. App. 3d 54, 62 (1st Dist. 1987) (noting that in the absence of Illinois cases interpreting the fee-shifting provision of an Illinois state statute, in that case, the Illinois Human Rights Act, analogous federal caselaw provides the applicable standards) (citation omitted).[2]

III. PLAINTIFFS HAVE PREVAILED

A. Plaintiffs' Lawsuit Catalyzed Defendant's Cessation of Unlawful Practices

The facts of this case show that Plaintiffs received their amended birth certificates, because they sued Defendant to get them. In addition, Defendant has been following two practices through which it denied accurate birth certificates to many

[2] Illinois courts may award fees under 42 U.S.C. § 1988 and other federal fee-shifting statutes to prevailing parties. *See, e.g., Blount v. Stroud*, 232 Ill.2d 302, 904 N.E.2d 1(Ill. 2009) (affirming award of attorney's fees under 42 U.S.C. § 1988); *Shepard v. Hanley*, 274 Ill. App. 3d 442, 654 N.E.2d 1079 (3d Dist. 1995) (upholding award of attorneys' fees under 42 U.S.C. § 1988); *Beverly Bank v. Bd. of Review of Will County*, 193 Ill. App. 3d 130, 550 N.E.2d 567 (3d Dist. 1989) (finding that trial court improperly reduced the lodestar amount of a prevailing plaintiff's attorney's fees under 42 U.S.C. § 1988). There are, however, a limited number of state law cases interpreting these federal fee-shifting provisions in comparison to those from the federal courts.

transgender persons until, as a result of this lawsuit, he terminated the IDPH practice of denying birth certificates to persons whose surgeon was not U.S.-licensed and announced that IDPH would pursue rule-making to decide what the rule should be for deciding the surgery required before a female-to-male transgender person can obtain a new birth certificate. If not the sole cause of these changes, the lawsuit was a significant precipitating factor in the Defendant's cessation of its unlawful conduct. Courts in the Seventh Circuit routinely held that to establish a causal link, plaintiffs needed only to prove that the lawsuit was a significant factor – *not* the sole factor – in causing defendants to act remedially. *See e.g.*, *Harrington v. DeVito*, 656 F.2d 264, 267 (7th Cir. 1981) (explaining that a a causal link exists where plaintiff's lawsuit "in some way" played a "provocative role" in defendant's voluntary change in conduct); *Nanetti v. University of Ill. at Chicago*, 867 F.2d 990, 993 (7th Cir. 1989) (reasoning that a plaintiff prevails where the lawsuit was a "material factor" in obtaining a favorable outcome from the defendant).[3]

In addition, when assessing whether a plaintiff's lawsuit had a provocative effect on relief obtained, courts in the Seventh Circuit bestowed significant weight on the chronological sequence of events. *See Harrington v. Devito*, 656 at 267 (concluding that

[3] Other federal circuit courts recognized and applied these same principles. *See, e.g., Williams v. Hanover Housing Auth.*, 113 F.3d 1294, 1299 (1st Cir. 1997) ("The lawsuit need not be the sole cause of the fee-target's remedial actions, but it must be a competent producing cause of those actions, or play a provocative role in the calculus of relief."); *N.A.A.C.P. v. Wilmington Med. Ctr., Inc.*, 689 F.2d 1161, 1169 (3d Cir. 1982) ("the plaintiffs' lawsuit need not be the sole cause of the ultimate relief...Where there is more than one cause, the plaintiff is a prevailing party if the action was a material factor..."); *Luethje v. Peavine Sch. Dist. of Adair County*, 872 F.2d 352, 354 (10th Cir. 1989) ("The plaintiff's suit need not have been the sole reason for the defendant's action: it is enough that plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act.").

"because all of these actions followed soon after the institution of this lawsuit, it is not unreasonable to suppose that they were causally related to the lawsuit."); *see also Johnson v. LaFayette Fire Fighters Ass'n Local 472*, 51 F.3d 726, 731 (7th Cir. 1995) (determining that findings of causality were "supported by the fact that the Union failed to comply with [federal law] for six years and only modified its procedures after the commencement of the lawsuit"); *Zinn*, 35 F.3d at 276 n.7 ("The timing of the rule change – one day prior to a scheduled status conference in this case – certainly suggests a causal relationship with this suit."). The Seventh Circuit was not alone in this approach. For example, in addressing the relevance of chronology, the Eleventh Circuit astutely noted that "[b]ecause 'defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways,' courts often look to other evidence, such as the chronology of events, to determine whether a given lawsuit caused the defendant to provide the requested relief." *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999) (citation omitted). *Accord Heath v. Brown*, 858 F.2d 1092, 1094 (5th Cir. 1988) ("Clues to the provocative effects of the plaintiffs' legal efforts are best gleaned from the chronology of events...").

Here, the chronological relationship between the institution of Plaintiffs' lawsuit and Defendant's change in its policies regarding the issuance of birth records proves a causal link to the achievement of the relief obtained. As of 2005, up until the filing of this lawsuit, Defendant was refusing to issue corrected birth records to person whose completed gender confirmation surgeries were performed by physicians licensed in countries other than the United States. (Exs. A and Exs. thereto, B-F). Defendant was also at that time denying birth certificates to female-to-male transsexual persons who had

not completed genital reconstruction surgery. (Exs. A, G-K.) Despite having no justification, Defendant maintained this impermissible practice for several years. (Exs. B-K).

Plaintiffs' counsel made several attempts to persuade Defendant to change these practices and to at least explain them as set out in more detail in the Affidavit of John Knight. (Ex. A, ¶¶ 8-10.) Prior to commencing this lawsuit, Knight made a phone call to the General Counsel of IDPH, who never returned his call, as well as several calls to another attorney in that office, but he was repeatedly told that the IDPH practices at issue in this case would not change. His phone calls to lawyers at IDPH in May, June and July 2008 included several to Assistant Chief Counsel, Holly Turner, who confirmed that IDPH would not amend the birth certificate of a person whose surgeon was not U.S.-licensed, a practice that was set out in the website at the time, (*see* Ex. 2 to Ex. A), and that IDPH had specific requirements for surgery for female-to-male transsexual persons. On May 23, 2008, Ms. Turner faxed him an e-mail stating that IDPH requires "surgery to attempt to create/attach/form a viable penis" before it will change the gender on a birth certificate for a female-to-male transgender person. (*See* Ex. 1 to Ex. A). On June 4, 2008, Mr. Knight wrote a letter to Ms. Turner asking a detailed set of questions about IDPH's practices regarding changing the sex designation on birth certificates and the reasons for them, but he never received a response. (*See* Ex. 2 to Ex. A).

Plaintiffs applications for new birth records with the correct gender listed on them were denied under Defendant's unlawful regime, even though Plaintiffs Kirk and Rothkopf presented Defendant both with an affidavit or certificate from their Thai surgeon and with affidavits from a U.S.-licensed physician who examined them and

certified the completion of the gender confirmation surgeries by reason of which the sex designation should be changed on their birth certificates. (Ex. 2 to Ex. A). The form of the affidavits offered by Plaintiffs Kirk and Rothkopf is very similar to the one adopted by the Defendant as the affidavit required under its new policy. (*Compare* Ex. 3 to Ex. A at p. 3 with Def.'s Mem., Ex. 1:A at p. 3, attached hereto as Ex. N). Still, when Plaintiffs provided these documents to Defendant prior to suing Defendant, their requests for birth certificates with the correct gender on them were denied. (Exs. 5 and 6 to Ex. A). Plaintiffs request for an amended birth certificate for Riley Johnson was also denied. (Exs. 4 and 7 to Ex. A.)

Based on the foregoing unlawful practices, Plaintiffs filed the Complaint against Defendant with this Court on January 21, 2009 and amended it on April 7, 2009. Within three months of the filing of the amended complaint, Defendant reversed course on its unlawful birth record policies, provided Plaintiffs their birth certificates, moved to dismiss this action, and announced their changes and intended changes to their practices. (*see* Defendant's Section 2-619 Motion to Dismiss Plaintiffs' First Amended Complaint and Def.'s Mem.). This timing supports the conclusion that Plaintiffs' lawsuit impelled Defendant to (1) grant corrected birth records to each of the Plaintiffs, (2) change its unlawful position on the requirement that transgender persons use a U.S.-licensed surgeon before they can obtain an amended birth record, and (3) decide to conduct rule-making to determine what surgery a female-to-male transsexual person must complete before obtaining an amended birth record with the correct gender marker listed on it. Had Plaintiffs not brought suit in January 2009, Defendant would have likely indefinitely continued his unconstitutional policies.

Accordingly, there is a causal link between Plaintiffs' requested relief and the relief obtained.[4]

B. Plaintiffs' Claims Were Not Frivolous

Plaintiffs easily satisfy the second requirement of the CRA's two-pronged catalyst theory test. As previously noted, the second requirement of the catalyst theory test is satisfied if a plaintiff shows non-frivolity. *See* 740 ILCS § 23/5(d)(3) (a prevailing party is one "whose pursuit of a *non-frivolous* claim was a catalyst for [defendant's] unilateral change in position...") (emphasis added). The Seventh Circuit has explained that a lawsuit is frivolous "if it has no reasonable basis, whether in fact or in law." *Roger Whitmore's Auto. Svcs, Inc. v. Lake County, Ill.*, 424 F.3d 659, 675 (7th Cir. 2005) (citation omitted). *Accord Zinn*, 35 F.3d at 273-74 (explaining that the second element of the catalyst test was satisfied if plaintiffs demonstrate that defendants have not "acted wholly gratuitously, *i.e.*, the plaintiff's claim, if pressed, cannot have been frivolous, unreasonable, or groundless.").

Plaintiffs' constitutional claims are factually and legally sound. *See, e.g.*, *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 394 (1997) (finding that Civil Justice Reform Act violated constitutional ban on special legislation) ("...[W]e must determine whether the classifications ... are based on reasonable differences in kind or situation, and whether the basis for the classifications is sufficiently related to the evil to be obviated by the statute."); *In re C.E.*, 161 Ill.2d 200 (1994) (recognizing a federal Constitutional liberty right to refuse medical treatment); *In re Estate of Longeway*, 133 Ill.2d 33, 44 (1990) (recognizing common law right to refuse treatment based on a right of "personal

[4] Should Defendant contest the fact that Plaintiffs' suit was a significant cause for the relief granted, Plaintiffs reserve the right to engage in discovery targeted to that issue.

inviolability."); *Crocker v. Finley*, 99 Ill.2d 444 (1984) (finding equal protection violation). Plaintiffs' Complaint clearly and reasonably states the basis for its allegations of Defendant's violations of Illinois constitutional law. In response, Defendant altered its unlawful conduct to comply with the mandates of Illinois law. (Def.'s Mem. 2). Tellingly, Defendant never filed a responsive pleading challenging the truthfulness of Plaintiffs' allegations or the merits Plaintiffs' claims. Rather, Defendant waited to file its motion to dismiss until *after* Defendant had granted Plaintiffs the relief sought in the Complaint and until *after* Defendant either completed or began the process of complying with the various mandates of Illinois constitutional law. The strategic timing of Defendant's motion to dismiss indicates that its actions towards constitutional compliance were driven by Plaintiffs' lawsuit. Thus it is clear that Defendant did not act "wholly gratuitously" and that Plaintiffs' claims are not "frivolous, unreasonable, or groundless." *See Roger Whitmore*, 424 F.3d at 675.

Plaintiffs meet both requirements of the catalyst theory under the Act and are therefore entitled to reasonable attorneys' fees.

IV. PLAINTIFFS ARE ENTITLED TO REASONABLE ATTORNEYS' FEES, COSTS AND EXPENSES.

As shown above, Plaintiffs are prevailing parties for purposes of the CRA and are entitled to attorneys' fees. Pursuant to the mandatory language of the CRA, "[u]pon motion, a court *shall* award reasonable attorneys' fees and costs...to a plaintiff who is a prevailing party." 740 ILCS § 23/5(c). (emphasis added). Consequently, Defendant must pay Plaintiffs' reasonable attorneys' fees. *See Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 235 (1st Dist. 1996) (explaining that the requirement

that the State pay the prevailing party's fees under the relevant civil rights act was "mandatory as evidenced by the legislature's use of the word 'shall' in the statute.").

A. Plaintiffs Obtained the Relief Sought through Defendant's Unilateral Acts

The CRA provides that "[i]n awarding reasonable attorneys' fees, the court shall consider the degree to which the relief obtained relates to the relief sought." 740 ILCS § 23/5(c). Here, the relief obtained by Plaintiffs directly relates to the relief sought in the Complaint. In the Complaint, Plaintiffs sought an injunction ordering Defendant to issue Plaintiffs amended birth records. (Compl. ¶ 8). As previously discussed, Defendant readily acknowledged that "Plaintiffs have all received amended birth records reflecting their new respective gender identities. This is the relief that Plaintiffs sought and have now obtained." (Def.'s Mem. 2). Plaintiffs sought and have also obtained relief as to Defendant's now defunct policy refusing to change the birth record gender designation of persons who obtained gender confirmation surgeries by physicians licensed in another country. (Def.'s Mem. 2). Finally, Defendant has announced IDPH's intention to conduct rule-making for the purpose of deciding how much surgery will be required before a female-to-male transsexual individual will be able to obtain a corrected birth certificate and suggests that the genital surgery requirement will be abandoned. (Def.'s Mem. 4) ("that IDPH has amended Mr. Johnson's birth certificate without requiring that he undergo genital-reconstruction surgery demonstrates that it is actually unlikelihood [sic] that the issue raised by Mr. Johnson's allegations will recur.").

Accordingly, the fact that the relief obtained is the relief sought for Plaintiffs and also included changes in the challenged practices strongly supports Plaintiffs' motion for reasonable attorneys' fees.

B. The Attorneys' Fees Sought Are Reasonable

Courts in Illinois also generally require that the petitioner for attorneys' fees "present the court with detailed records containing facts and computations upon which the charges are predicated and specifying the services provided, by whom they were performed, the time expended, and the hourly rate charged." *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 867 (5th Dist. 2007) (citation omitted). Trial courts consider a number of factors when assessing the reasonableness of fees, "including the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." *Chicago Title & Trust Co. v. Chicago Title & Trust Co.*, 248 Ill. App. 3d 1065, 1072 (1st Dist. 1993). Finally, a trial court is entitled "to use its own knowledge and experience to assess the time required to complete particular activities..." *Olsen v. Staniak*, 260 Ill. App. 3d 856, 866 (1st Dist. 1994).

To determine the amount of reasonable attorneys' fees under similarly constructed fee-shifting statutes, federal courts in Illinois simplify the consideration of the above factors by applying the "lodestar" method, multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate. *See People Who Care v. Rockford Bd. of Educ., School Dist. No. 25*, 90 F.3d 1307, 1310 (7th Cir. 1996) (noting that the lodestar method provides clear guidelines for determining the amount of reasonable fees in § 1988 cases) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

An examination of these factors supports Plaintiffs' request for fees in the amount of $183,315.

1. Hours Reasonably Expended

Plaintiffs' counsel at the ACLU and Jenner & Block seek compensation for 489.20 hours of work in this litigation.[5] A detailed description of the specific hours for which Plaintiffs seek compensation is set forth in Exhibits O and P, attached hereto. Plaintiffs' counsel exercised billing judgment, including a careful review of every entry in these time records. A detailed explanation for the hours for which compensation is sought is provided in the Affidavit of John Knight attached hereto as Exhibit A.

2. Reasonable Hourly Rates

Reasonable hourly rates under fee-shifting statutes such as the CRA are based on "the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Applicants for attorneys' fees bear the burden of establishing the market rate. *Gautreaux v. Chicago Housing Authority*, 491 F.3d 649, 659 (7th Cir. 2007) (citations omitted). The market rate for an attorney's services is "the rate that lawyers of similar ability and experience in the community normally charge their clients for the work in question." *Id.* The party requesting attorneys' fees meets its initial burden of establishing the market rate "either by submitting affidavits from similarly experienced attorneys attesting to the rates they charge paying clients for similar work or by submitting evidence of fee awards the attorney has received in similar cases." *Batt v. Microwarehouse, Inc.*, 241 F.3d 891,

[5] This figured includes 49.5 hours spent pursuing this award of fees and expenses. *See Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980) (explaining that under a federal remedial fee-shifting statute, prevailing plaintiffs "are properly entitled to fee awards for time spent litigating their claim to fees").

894 (7th Cir. 2001) (approving plaintiff's hourly rate upon submission of plaintiff's counsel's affidavits and affidavits of other attorneys because the hourly was similar to awards plaintiff's counsel had received from other courts in similar Fair Labor Standard Act cases); *see also Heriaud v. Ryder Transp. Svcs*, No. 03 C 0289, 2006 WL 681041, at *1, *6-7 (N.D. Ill. Mar. 14, 2009) (explaining that plaintiffs "should have submitted affidavits from attorneys other than those seeking the fee award or produce evidence of fee awards in similar cases in order to establish a market rate for their services" rather than just a "self-serving affidavit" and biographies) (*citing Batt*, 241 F.3d at 894). Attorneys are entitled to their market rate and courts may not determine their own "medieval just price." *Small v. Richard Wolf*, 264 F.3d 702, 707 (7th Cir. 2001). "[O]nce an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." *Uphoff v. Elegant Bath, Ltd.*, 176 F.3d 399, 407 (7th Cir. 1999).

For Plaintiffs' public interest counsel – the attorneys at the ACLU – for whom there are no true billing rates, courts "look to the next best evidence – the rate charged by lawyers in the community of 'reasonably comparable skill, experience and reputation.'" *People Who Care*, 90 F.3d at 1310 (*quoting Blum*, 465 U.S. at 892, 895 n. 11). The hourly rates sought for Plaintiffs' counsel at the ACLU are such rates. (*See* Ex. A (Affidavit of John Knight); Ex. Q (Affidavit of Roger Pascal). As previously explained, hourly rates established in similar litigation are "clearly evidence of an attorney's market rate." *People Who Care*, 90 F.3d at 1312.

For Plaintiffs' private counsel – the cooperating attorneys at Jenner & Block – the "actual billing rate for comparable work is considered to be the presumptive market rate."

Small, 264 F.3d at 707 (citation omitted). This presumption reflects the fact that "the market rate of legal time is the opportunity costs of that time, the income foregone by representing this plaintiff." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993). Thus, as Judge Easterbrook explained, "[a]n attorney who ordinarily works 2,000 hours in a year [and] sells 1,900 of those hours to clients who pay $250 per hour and devotes the other 100 hours to civil rights litigation in which the court will fix the fee" is presumptively entitled to an hourly rate of $250 as an accurate reflection of the "opportunity cost of the civil rights case." *Id.* at 1150 (reiterating the importance of market valuation in establishing a private attorney's "reasonable hourly rates"). In the lodestar calculation delineated below, Plaintiffs use the hourly rates charged by counsel at Jenner & Block to paying clients. (*See* Ex. R (Affidavit of Margaret J. Simpson). The lodestar calculation is also supported by "affidavits from similarly experienced attorneys attesting to the rates they charge paying clients for similar work." *Batt*, 241 F.3d at 894. (*See* Ex. Q (Affidavit of Roger Pascal)).

Finally, the hourly rates sought by Plaintiffs are consistent with hourly rates commonly held reasonable by courts in Illinois. *See, McNiff v. Mazda Motor of America, Inc.*, 384 Ill. App. 3d 401, 407, 892 N.E.2d 598, 604 (4th Dist. 2008) ($275); *see also People Who Care*, 90 F.3d at 1311 n.2 ($275 per hour); *Catalan v. RBC Mortgage*, No. 05 cv 6920, 2009 WL 2986122, at *1, *6 n.8 (N.D. Ill. Sept. 16, 2009) ($400 per hour); *Robinson v. City of Harvey*, No. 99 C 3696, 2008 WL 4534158, at *1, *7 (N.D. Ill. Oct. 7, 2008) (approving rates from $270 for junior-level plaintiff's counsel up to $470 for the more experienced counsel); *Barnett v. City of Chicago*, No. 92 c 1683 et seq., 2000 WL 263982, at *1, *2 (N.D. Ill. Feb. 29, 2000) ($325 per hour).

3. Calculating the Lodestar

Accordingly, the lodestar for the work performed by Plaintiffs' attorneys and paralegals at RBF and Jenner & Block is $183,315.00. Jenner & Block intends to donate any fees awarded for their work to RBF. This figure is the product of the number of hours reasonably expended in this litigation by Plaintiffs' counsel multiplied by the reasonable hourly rates of Plaintiffs' counsel:

TIMEKEEPER	HOURS	RATE	FEE
John Knight	198.55	$375.00	$74,456.25
Kendra Thompson	26.90	$150.00	$4,035.00
Terrance Pitts	17.50	$75.00	$1,312.50
Margaret Simpson	64.00	$525.00	$33,600.00
Kyle Palazzolo	165.75	$325.00	$62,156.25
Nada Djordjevic	16.50	$470.00	$7,755.00
Total	**489.20**		**$183,315.00**

V. PLAINTIFFS ARE ENTITLED TO COSTS AND EXPENSES

The mandatory fee-shifting provision of the CRA directs this court to award costs to Plaintiffs as the prevailing party, "including expert witness fees and other litigation expenses." 740 ILCS § 23/5(c).

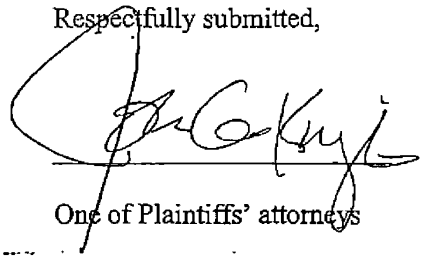
Here, the out-of-pocket costs and other litigation expenses incurred in this case total $6,168. The specific expenses for which Plaintiffs seek compensation are set forth below in Exhibits O and P.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this court award Plaintiffs $183,315 in attorneys' fees and $6,168 in costs and expenses arising from the legal work performed in this case by their counsel.

DATED: October 21, 2009

Respectfully submitted,



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05003

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

A D.H.

VICTORIA KIRK and KARISSA ROTHKOPF, and RILEY JOHNSON,

Plaintiffs,

v.

DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;

Defendant.

No. 09-CH-3226
Hon. Peter Flynn

3560

PLAINTIFFS' SUPPLEMENT TO THEIR CORRECTED PETITION FOR AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES

Plaintiffs Victoria Kirk, Karissa Rothkopf, and Riley Johnson, supplement their Corrected Petition for an Award of Attorneys' Fees, Costs and Expenses as follows:

1. On October 21, 2009, Plaintiffs filed their Corrected Petition for An Award of Attorneys' Fees, Costs and Expenses along with a supporting memorandum of law, affidavits, and exhibits ("Fee Petition").

2. Since the filing of this Fee Petition, Plaintiffs has received the final bill from Dr. Walter Bockting for the work he has performed in this case. Plaintiffs supplement their fee petition with a copy of that bill and seek payment of a portion of those expert expenses.

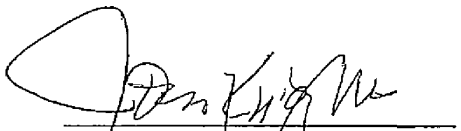
3. Dr. Bockting is one of the preeminent experts in the field of Gender Identity Disorder and transgender health who has over 20 years of direct clinical experience working with hundreds of transgender and transsexual patients and their families. He has conducted substantial research in the areas of sex and gender, transgenderism, and transsexualism. (*See* Affidavit Of Walter O. Bockting, PhD, and Curriculum Vitae of Walter O. Bockting, PhD,

attached as Exhibit L to Plaintiffs' Response to Defendant's Section 2-619 Motion to Dismiss Plaintiffs' First Amended Complaint).

4. Dr. Bockting advised Plaintiffs' counsel about the medical and psychological research and clinical practices regarding Gender Identity Disorder, its treatment, and the role amending identity documents plays in the treatment of Gender Identity Disorder. He examined Plaintiff Riley Johnson, as well as his medical records, to determine whether Riley had a medical need for genital reconstructive surgery as treatment for his gender identity disorder, he had completed all reassignment treatment that is medically necessary for him, and his reassignment to the male gender is complete. (See Supplemental Affidavit of John Knight in Support of Plaintiffs' Corrected Petition for Attorney's Fees ("Supp. Aff.) at ¶ 4, and exhibit thereto).

5. Plaintiffs seek only the portion of costs for Dr. Bockting's work prior to the filing of Defendant's motion to dismiss on June 26, 2009, or $1,049.99, bring the total for costs and expenses sought by Plaintiffs to $7,217.99. (Supp. Aff. At ¶ 3).

Respectfully submitted,



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November 3, 2009

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

99000

VICTORIA KIRK and KARISSA ROTHKOPF and RILEY JOHNSON,

Plaintiffs,

v.

DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,
Defendant,

Defendant.

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No. 09 CH 3226

Hon. Peter Flynn

3118

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' PETITION FOR FEES

NOW COMES Defendant DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records, by and through his attorney, LISA MADIGAN, Attorney General of Illinois, and responds to Plaintiffs' Corrected Petition for an Award of Attorneys' Fees, Costs and Expenses as follows:

Background

On October 21, 2009, following the Court's oral ruling on Defendant's motion to dismiss, Plaintiffs Victoria Kirk, Karissa Rothkopf, and Riley Johnson filed their corrected petition for attorneys' fees, costs and expenses, subsequently further amended by letter, seeking fees of $182,285 and costs of $7,217.99. Plaintiffs premise their petition on a provision of the Illinois Civil Rights Act of 2003 (ICRA), which in general terms allows reasonable attorneys' fees and costs "to a plaintiff who is a prevailing party in any action brought ... to enforce a right arising under the Illinois Constitution." 740 ILCS § 23/5(c). *See* Petition, ¶ 6; Memo. in Support, p. 5. This Court should deny Plaintiffs' petition on grounds that it asks the Court to assess monetary liability against the State in contravention of the State's sovereign immunity. A claim for

attorney fees and costs against defendant Damon T. Arnold in his official capacity is a claim against the State. *See City of Springfield v. Allphin*, 82 Ill. 2d 571, 580-81 (1980). Because the ICRA does not explicitly waive the State's statutory immunity from monetary liability, this Court must deny Plaintiffs' petition. In the alternative, if this Court finds that a claim for fees and costs is not barred by sovereign immunity, the Court should reduce Plaintiffs' fees and costs to a more reasonable amount along the lines set out in the second part of this memorandum.

A. The State is statutorily immune from fees and costs

As the Illinois Supreme Court has recognized, a monetary award against the State is barred by sovereign immunity unless the State has consented to liability and the consent is "clear and unequivocal." *In re Walker*, 131 Ill. 2d 300, 303 (1989). *See also City of Springfield v. Allphin*, 82 Ill. 2d 571, 577-78 (1980); *Department of Revenue v. Appellate Court*, 67 Ill. 2d 392, 395-96 (1977). Plaintiffs contend that such consent is set forth in the Illinois Civil Rights Act of 2003, but a close examination of that statute shows that the General Assembly has not provided the kind of clear and unequivocal consent to liability necessary to waive sovereign immunity. Section 5(c) of the ICRA states in pertinent part:

> Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought ... to enforce a right arising under the Illinois Constitution.

740 ILCS 23/5(c). Nothing in this provision, however, can reasonably be read to waive the State's sovereign immunity. As the Illinois Supreme Court noted in *Department of Revenue*, "[s]tatutes which in general terms authorize the imposition of costs in various actions or proceedings, but which do not *in express terms* refer to the State, are not adequate to authorize the imposition of costs against the State." 67 Ill. 2d at 396 (emphasis added). In *Walker*, the court held that the State's immunity to the imposition of statutory post-judgment interest under

Section 2-1303 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-1303, was not waived because there was doubt as to whether the legislature intended to impose liability upon the State in the circuit court. *Id.* at 304-306. The Court concluded that reference to "any other governmental entity" was not specific enough to constitute a waiver of the State's immunity. *In re Walker*, 131 Ill. 2d at 304-306. Similarly, in *Department of Revenue* the Court held that legislation which included terms such as "any person" or "either party" was not specific enough to impose fees and taxing costs against the Department of Revenue for the cost of printing excerpts from a record, since the State failed to be specifically referenced. *Department of Revenue*, 67 Ill. 2d at 396-398. Likewise in *People ex rel. Kalin v. Mathews*, 71 Ill. App. 3d 379 (1st Dist. 1979), the First District held that a provision of the Illinois Paternity Act stating "[i]f the defendant is unable to pay the costs of the testing procedure, it shall be provided at the expense of the court," was not specific enough to allow the cost of blood tests to be imposed upon the Department of Public Aid. 71 Ill. App. 3d at 381.

Because statutes which authorize costs against the State are in derogation of the common law they are to be strictly construed. *Walker*, 131 Ill. 2d at 304. As the Illinois Supreme Court stated in *Walker*, "[n]othing will be read into such statutes by intendment or implication." *Ibid.* *See also Martin v. Giordano*, 115 Ill. App. 3d 367, 369 (4th Dist. 1983) (stating legislature may consent to State's liability in circuit court by statute but consent must be clear and unequivocal and cannot be inferred or implied). Strict construction is appropriate given that the General Assembly plainly has shown that it knows how to explicitly provide for assessment of fees and costs against the State when it so wishes. For example, the Illinois Human Rights Act, 775 ILCS 5, explicitly allows imposition of costs and attorneys' fees against the State in cases brought in the circuit courts. *See* 775 ILCS 5/10-102(C) ("[t]he State of Illinois shall be liable for such fees

and costs to the same extent as a private person"). So does the Illinois Uniform Conviction Information Act. *See* 20 ILCS 2635/15(B) ("[f]or the purposes of this Act, the State of Illinois shall be liable for damages as provided in this Section and for attorneys' fees and litigation costs as provided in Section 16 of this Act").[1] In contrast to the clear and unequivocal consent to liability for attorneys' fees and costs exhibited in these statutory provisions, there is nothing in Section 5(c) of the ICRA that can be read to waive sovereign immunity from monetary liability.

Nor does the legislative history of the ICRA support a finding that the General Assembly intended to waive sovereign immunity from fees and costs. In *Illinois Native American Bar Association v. University of Illinois*, 368 Ill. App. 3d 321 (1st Dist. 2006), the First District concluded that the Act was not intended to create new substantive rights, but only a state venue for a right of action for disparate-impact discrimination previously recognized under Title VI of the federal Civil Rights Act of 1964 *Id.* at 327. The Appellate Court reached this conclusion after reviewing the legislative debates leading to passage of the Act, which was introduced as House Bill 2330. The Court looked to statements of Representative Fritchey, who sponsored the bill in the House.

> Fritchey: The Bill provides a venue for individuals to bring a cause of action alleging disparate impact of a government policy via the State Courts which they presently do not have.
>
> * * *
>
> Again, it's just by way of history, there was a Supreme Court case which limited the ability of individuals to bring actions pursuant to Title VI under the Federal Act and we are simply trying to reinstate the ability of individuals to sue under the State Act. *It's not intended to expand or limit whatever rights somebody would've had.*

---

[1] The General Assembly also has explicitly waived sovereign immunity. For example, such a waiver is found in the Illinois Public Labor Relations Act, 5 ILCS 315/25, which states: "For purposes of this Act, the State of Illinois waives sovereign immunity." *Id.* The Illinois Educational Labor Relations Act contains an identical explicit waiver. 115 ILCS 5/19.

Id. at 327 (emphasis added) (quoting 93d Ill. Gen. Assem., House Proceedings, April 3, 2003, at 146-48 (statements of Representative Fritchey)). The Court also looked to statements of Senator Harmon, who sponsored the bill in the Senate

> Senator Harmon: * * * [The bill] does not break any new legal ground nor create any new rights. Rather, it creates a State right of action that has existed at the federal level for over thirty years * * * *There is no new exposure for the State, simply a new venue-State court rather than federal court.*"

Id. at 327 (emphasis added) (quoting 93d Ill. Gen. Assem., Senate Proceedings, May 21, 2003, at 9-10 (statements of Senator Harmon)). Based on this legislative history, the Court concluded:

> It is clear from the legislators' comments and from the language in subsection (b) of the statute that the Act was not intended to create new rights. It merely created a new venue in which plaintiffs could pursue in the State courts discrimination actions that had been available to them in the federal courts.

Id. at 327. The Supreme Court case to which Rep. Fritchey referred was undoubtedly *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which the Supreme Court held that there was no private right of action to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The First District's conclusion that the ICRA did not create new substantive rights serves as an important context in which to evaluate Plaintiffs' claim for attorneys' fees and costs in the instant litigation. Clearly Title VI of the Civil Rights Act of 1964 did not allow imposition of attorneys' fees or costs against the State of Illinois for violation of "a right arising under the Illinois Constitution", which is Plaintiffs' basis for seeking attorneys' fees and costs in the instant case under Section 5(c) of the ICRA. *See* Petition, ¶ 6; Memo. in Support, p. 5. Indeed, it is settled law that a plaintiff may not use the federal civil rights statutes to vindicate an alleged violation of state law. *See, e.g., Archie v. City of Racine*, 847 F.2d 1211, 1216-17 (7th Cir. 1988) ("[m]ere violation of a state statute does not infringe the federal Constitution. And

state action, even though illegal under state law, can be no more or less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature") (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). Nor can it be said that prior to the Supreme Court's ruling in *Alexander v. Sandoval*, 532 U.S. 275 (2001), there had ever been an ability of a prevailing plaintiff to recover attorneys' fees and costs against the State of Illinois for violations of rights arising under the Illinois Constitution. Because such a right did not previously exist and because the sponsors of House Bill 2330 made clear that the bill was not intended to create new rights, it would be unreasonable to find intent of the General Assembly to waive sovereign immunity with regard to the matter of attorneys' fees and costs.

The only specific reference to fees and costs in the legislative debates certainly does not provide clear and unequivocal support either. Senator Harmon addressed fees and costs in the following passing remark:

> Senator Harmon: * * * Second, [the Bill] facilitates private enforcement of civil rights laws by allowing the award of attorney fees to parties who prevail in litigation, brought under this new law or the Illinois Constitution, including those parties whose litigation causes a reversal of policy by the government. This is in direct response to recent reversals and direction by the United States Supreme Court. * * * With respect to the recovery of fees, it reversed ten of eleven circuits.

93d Ill. Gen. Assem., Senate Proceedings, May 13, 2003, at 135 (statements of Senator Harmon), attached hereto as Exhibit A. In uttering the words "including those parties whose litigation causes a reversal of policy by the government," Senator Harmon likely was referring to plaintiffs successful in challenging a governmental policy on grounds of disparate impact or intentional discrimination or, in other words, in litigation "brought under this new law." This interpretation makes sense because Section 5(c)(1) allows for attorneys' fees and costs for a plaintiff who is a prevailing party in an action brought pursuant to the ICRA. *See* 740 ILCS 23/5(c)(1). But

Plaintiffs are not seeking attorneys' fees and costs under Section 5(c)(1) for prevailing in a discrimination claim "against [an] offending unit of government" pursuant to Section 5(b) of the ICRA. Instead, they are seeking fees and costs under Section 5(c)(2) of the Act as prevailing parties in an action to enforce rights under the Illinois Constitution, specifically the constitutional rights to equal protection, due process, and privacy as set out in Counts II, III, IV, VI, and VII of their First Amended Complaint.

Construing Senator Harmon's remark about fees and costs as a reference to discrimination suits under Section 5(b) is also consistent with his subsequent statement that the bill's fee provision was intended to address a ruling by the U.S. Supreme Court that "reversed ten of eleven circuits". Senator Harmon was most likely referring to the Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001), which rejected the catalyst theory and, in doing so, overturned a majority of federal Courts of Appeals. *See id.* at 602 & n. 3 (noting that "[a]lthough most Courts of Appeals recognize the 'catalyst theory,' the Court of Appeals for the Fourth Circuit rejected it" and citing decisions from nine Courts of Appeals that had recognized the theory). The *Buckhannon* case, however, involved claims arising under federal discrimination statutes, specifically the Fair Housing Amendments Act of 1988 and Americans with Disabilities Act of 1990. This lends further support to the reasonableness of reading Senator Harmon's remark as a reference to the fees-and-costs provision applicable to discrimination suits under the new legislation, not suits, such as Plaintiffs', brought to enforce rights under the Constitution. Thus, it would be unreasonable to infer from Senator Harmon's remark any intent on the part of the General Assembly to allow an award of attorneys' fees and costs against the State in cases where a plaintiff prevails on a claim arising under the Illinois Constitution.

Because there is no clear and unequivocal waiver of the State's sovereign immunity to monetary liability in the wording of Section 5(c)(2) of the ICRA, the Court should deny Plaintiffs' corrected petition for attorneys' fees and costs.

B. Plaintiffs' claim for fees and costs is excessive

If the Court finds that an award of fees and costs against the State is permitted under the ICRA, the Court should reduce any such award on grounds that Plaintiffs' request $182,285.00 in fees is excessive in light of the fact that Plaintiffs' claims became moot before Defendant even filed a responsive pleading. Plaintiffs submit their request for fees under the analysis of fees allowed in federal cases under 42 U.S.C. §1988. Such fees are allowed, but they must be reasonable in light of the outcome achieved. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Generally speaking, the lodestar method is used to determine the appropriate fees, which is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. However, *Hensley* cautioned that "[c]ases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary..." *Id.* at 434.

Additionally, while Section 1988 provides for attorneys fees in successful civil rights cases, it is not intended to produce a windfall to such attorneys. *Simpson v. Sheahan*, 104 F.3d 998, 1003 (7th Cir. 1997) (citing *Riverside v. Rivera*, 471 U.S. 561, 580 (1986)). The time that is compensable is that "reasonably expended *on the litigation* " *Hensley*, 461 U.S. at 433, 103 S.Ct., at 1939 (emphasis added). Furthermore, the Seventh Circuit has recognized that while preparation is necessary, "a litigant is entitled to attorneys fees under 42 U.S.C. § 1988 for an effective and completely competitive representation but not one of supererogation." *Charles v.*

Daley, 846 F.2d 1057, 1076 (7th Cir. 1988), quoting *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 at 953-54 (1st Cir.1984).

As Plaintiffs' counsel in this case has submitted a fee request with dozens of non-compensable and unreasonably expended hours, the Court should deny such requests and, in the event fees are awarded, should reduce the amount accordingly.

1. Plaintiffs' fee request contains hours which are not compensable and/or which are not reasonable in light of the litigation

a. The time spent on the fee petition is excessive

Plaintiffs claim 49.5 hours was spent preparing the fee petition in this case. This is clearly excessive in the light of the fact that this case has never proceeded beyond the pleading stage. While fees incurred in the preparation of a fee petition are generally recoverable, they must be reasonable. *Batt v. Micro Warehouse, Inc.*, 241 F.3d 891, 894 (7th Cir.2001); *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 554 (7th Cir. 1999). One factor in determining the reasonableness of the hours spent on the fee petition is "the comparison between the hours spent on the merits and the hours spent on the fee petitions." *Batt*, 241 F.3d at 894.

In the present case, Plaintiffs counsel spent 49.5 of 489.2 requested hours on the fee petition. This is over 10%, or 11% assuming the remaining 439.7 hours were all spent on the merits. Courts have found that a more appropriate percentage to be closer to 5% or less. *See Kelley v. City of Chicago*, 205 F. Supp. 2d 930, 933 (N.D.Ill. 2002) (reducing hours spent on a fee petition from 14.6 to 9 where total hours spent on merits was 158.1); *Ustrak v. Fairman*, 851 F.2d 983, 987-88 (7th Cir. 1988) (finding where attorney spent 15 minutes on fee petition to every hour on the merits, hours for fee petition would be reduced by 2/3). However, as many of the hours requested are not reasonable, the percentage is in fact much higher. As such, the hours

spent on the fee petition should be reduced to a reasonable percentage of hours based on whatever the Court determines is an appropriate number of hours spent on the merits.

b. Hours related to press conferences and press releases

Plaintiffs include numerous entries for time related to press releases and press conferences. This time is clearly not compensable. *See Rum Creek Coal Sales, Inc. v. Caperton,* 31 F.3d 169, 176 (4th Cir. 1994) ("The legitimate goals of litigation are almost always attained in the courtroom, not in the media"); *Horina v. City of Granite City, Illinois*, 2007 WL 1760873, *6 (S. D. Ill. 2007) (fee request for time expended garnering publicity and drafting press releases was not reasonably related to the prosecution of the case).

The time billed by both the ACLU and Jenner attorneys regarding press conferences and releases are not individually listed, but rather are block billed, and therefore the Court should disallow press-related time contained in the entries.[2] (See Exhibit A)

Attorney	Hours	Cost
Margaret Simpson:	2.455 hours	1553.13
Kyle Palazzlo	1.375 hours	446.85
John Knight	1.842 hours	690.63
Total:	5.672 hours	2690.61

(See Exhibit B).

c. Hours for "conferences" among attorneys

Plaintiffs' fee submissions contain dozens of telephone conferences, team meetings, and other meetings of the attorneys in this case (Mr. Knight, Ms. Simpson, Ms. Djordejevic and Mr. Palazzolo) to discuss "case strategy," research issues, "potential plaintiffs", changes to the complaint and amended complaint and the timeline of the case. These conferences and meetings are excessive and duplicative, and should not be allowed as charged. Further, many of these

[2] As many of the block-billed entries contain items which are objected to on more than one ground, Defendant has attempted to determine the appropriate time by dividing the total number of tasks in each block billed entry by the total time for that entry, and assigning time spent accordingly.

conferences are block billed with other tasks, so it is impossible to determine the exact amount of time which has been double or triple billed. While the Jenner time record does include some entries which have been discounted, there is no indication of which portion of the billing entry has been reduced. Finally, the records among the attorneys are not consistent in identifying who participated in each conference or the amount of time spent. For example, on May 15, 2008, Mr. Knight has a conference for 0.5 hours with Mr. Palazzolo and Ms. Simpson, but Ms. Simpson's entry for that day only has a conference with Mr. Palazzolo. Mr. Palazzolo's entry only contains an office meeting with Ms. Simpson. (See Knight and Jenner fee submissions, Exhibits O and P to the Fee Petition) Another issue arises due to the block billing of entries. For example, on 8/28/08, Ms. Simpson's entry contains only a meeting with Mr. Knight, Mr. Palazzolo and Mr. Grossman for a total of 1 hour. Mr. Palazzolo's entry contains three tasks: team meeting regarding strategy and overview; research on Illinois procedure; and another team discussion on case planning, for a total of 4 hours, which has been reduced to 3 hours. Finally, Mr. Knight's entry states "Office conference with co-counsel regarding case strategy" for a total of 4 hours. Therefore, it is nearly impossible to determine how much of the conference time has been billed by each attorney, or how much time was actually spent on the conference.

All told, the four attorneys in this case have charged a whopping 64.534 hours and $24,975.69 in charges for such conferences (excluding conferences objected to on other grounds, such as those regarding potential plaintiffs or experts). To avoid a windfall in this case, especially in light of the procedural history in which the Plaintiffs' claims were dismissed as moot following the filing of an original and an amended complaint with no discovery, the Court should reduce these charges by half, both to compensate for poorly documented meetings and

time spent as well as to avoid charging Defendants for two and three attorneys at a time. Therefore, Defendants request the Court reduce the hours and charges as follows:

Total hours: 32.267 Total charges: $12,487.85

d. Hours for non-legal work

Plaintiffs are not entitled to be compensated at their legal rates for non-legal work. Hours "that are easily delegable to non-professional assistance" should be disallowed. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 553 (7th Cir. 1999) Such tasks include preparing documents, assembling filings, and other such tasks as "clerical" or "secretarial" tasks, which are not compensable. *Id.*; *see also Francis v. Snyder*, 2006 WL 1236052 at *4 (N.D. Ill. 2006)

Plaintiffs' fee submissions contain numerous entries for administrative tasks. These entries include such items as "worked on various administrative details," "discussions with docketing regarding filing the complaint," and "conferred with docketing regarding filing amended complaint," among others. This time should be completely disallowed as follows:

Attorney	Hours	Cost
Margaret Simpson	2.185	1147.13
Kyle Palazzolo	2.273	738.74
Total:	4.458 hours	1885.87

(See Exhibit C).

e. Hours regarding "potential plaintiffs"

Plaintiffs' counsel has listed dozens of entries regarding meetings with and conferring about potential plaintiffs and potential clients in this matter. Plaintiffs attempt to justify the costs for these meetings by claiming that due to "the risks of violence and discrimination to transgender persons, our search for persons who were willing to act as plaintiffs was extensive." (Knight Affidavit, Exhibit A to Fee Petition, ¶ 15) However, regardless of the difficulty in finding the right Plaintiffs to pursue this case, Plaintiffs in this case, namely Ms. Kirk, Ms.

Rothkopf and Mr. Johnson are the individuals who have received their birth certificates and whose claims are now moot. There are no other Plaintiffs in this action, and the Court has denied Plaintiffs' motion to amend the complaint in this matter to create a class action. Therefore, it cannot be said that the hours spent by various attorneys interviewing other transgendered individuals (often with more than one attorney present and billing for their time) had anything to do with Ms. Kirk, Ms. Rothkopf, and Mr. Johnson ultimately receiving their birth certificates. The other individuals interviewed and discussed among counsel were not part of this litigation and therefore simply cannot be the subject of fees to be charged to Defendant Arnold.

Therefore, Defendants request the Court deny the following hours and charges relating to prospective plaintiffs and prospective clients (See Exhibit C):

Attorney	Hours	Cost
Nada Djordejevic	2.0	940.00
Margaret Simpson	9.75	5118.76
Kyle Palazzolo	12.71	4130.21
John Knight	14.18	5412.38
Total:	38.64 hours	15601.35

f. Hours involving discussions with or about experts

Just as it is not reasonable for counsel to bill for prospective clients, it is also not proper in light of the current litigation for Plaintiffs counsel to have spent over 24 hours discussing experts and consulting with experts in this case. The submissions by Plaintiffs counsel essentially involve the filing of two pleadings: a complaint and an amended complaint. No discovery schedule was ever filed, and there was simply no need to begin expert discovery when the case never got off the ground. Mr. Knight, in his supplemental affidavit, claims that Dr. Bockting, one of the experts, advised them on the transgender issues of Plaintiff Johnson, but only three entries of Mr. Knights even identify Dr. Bockting in the entry, for a total of 1.08

hours. Dr. Bockting is never identified in the Jenner billing statement. Therefore, Defendants request that this Court disallow all of the attorney time spent on experts, and a reduction as follows (See Exhibit D):

Attorney	Hours	Cost
Margaret Simpson	1.25	656.25
Kyle Palazzolo	7.417	2410.41
John Knight	15.725	5897.13
Total:	27.392 hours	8963.79

In the alternative, Defendants request that Plaintiffs only be awarded the time identified as involving Dr. Bockting, for a total of 1.08 hour for Mr. Knight, and a total charge of $405.00.

2. The Hourly Rates for Plaintiffs Counsel are excessive and not properly supported.

Plaintiffs request the following hourly rates for their counsel:

John Knight	$ 375.00
Kendra Thompson	$ 150.00
Terrance Pitts	$ 75.00
Margaret Simpson	$ 525.00
Kyle Palozzolo	$ 325.00
Nada Djordejevic	$ 470.00

(See Fee Petition Memorandum, p. 19.) In order to determine a reasonable rate for an attorney's services, courts generally look to the market rate. *See Fogle v. William Chevrolet/Geo, Inc.*, 275 F.3d 613, 615 (7th Cir. 2001) The presumptive market rate is the attorney's actual billing rate. *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1310 (7th Cir. 1006). The attorney has the burden of proving his or her market rate. *Spegon v. Catholic Bishop of Chic.*, 175 F.3d 544, 544-555 (7th Cir. 1999). However, this rate is presumptive and not conclusive, and the opposing party may show why the hourly rate should be lower. *Id.*

In the present case, the lead attorney, John Knight, as an attorney for the ACLU, does not have a private billing rate, but has requested $375 per hour in light of his experience and

expertise in civil rights. Mr. Knight further states that the requested $375 rate "is based on market rates and court awards for attorneys with similar experience in similar litigation in the Chicago legal market." (See Plaintiff's Exhibit A, Affidavit of John Knight, ¶ 21.) Defendants do not object to the rate sought by Mr. Knight.

Mr. Knight also requests an hourly rate of $150 per hour for Kendra Thompson, a staff attorney at the ACLU who is a 2008 graduate of Harvard Law School. Defendants do not object to this rate for Ms. Thompson, nor do they object to the rate for Mr. Pitts, a paralegal.

With respect to the hourly rates of the Jenner & Block attorneys, in light of Mr. Knight's statement that he acted as lead counsel and that $375 per hour "is based on market rates and court awards for attorneys with similar experience in similar litigation in the Chicago legal market" it seems patently unreasonable that individuals who served as non-lead counsel with less experience in civil rights litigation should receive nearly the same rate or substantially higher rates than Mr. Knight. Ms. Simpson's claimed rate is $525 per hour, which is $150 more per hour than Mr. Knight's requested rate. Mr. Knight has been practicing since 1988, while Ms. Simpson graduated from law school in 1997. Furthermore, while Ms. Simpson's affidavit states that $525 is rate at which Jenner & Block bills clients, Ms. Simpson is an antitrust attorney, and has not identified that the billing rate is the rate her clients actually pay. (See Jenner & Block website: www.jenner.com.) There is no indication of what expertise she has in civil rights litigation that would warrant a rate which is 40% more than what the lead counsel has requested.

The same issues arise with the other Jenner attorneys, Ms. Djordejevic and Mr. Palozzolo. Ms. Djordejevic is not listed on Jenner's website, and there is no indication of her legal specialty or experience, other than that she graduated *summa cum laude* from the University of Illinois College of Law in 2002. However, it is excessive that an associate should

be granted fees in this matter based on a rate of $475 when the lead counsel has only requested $375. Likewise, Mr. Palazzolo, a 2007 law school graduate, is seeking $325 as his hourly rate. Again, there is no support for his expertise or experience which would warrant that rate in light of Mr. Knight's requested rate of $375.

Therefore, Defendant Arnold respectfully requests this Court set lead counsel Mr. Knight's rate at $375 per hour, and set the Jenner attorneys, Ms. Simpson, Ms. Djordejevic and Mr. Palazzolo at rates lower than those of the lead counsel and in accordance with their experience: $350 for Ms. Simpson, $300 for Ms. Djordejevic and $200 for Mr. Palazzolo.

3. Plaintiffs' Requested Costs Should Not Be Allowed as Charged

Plaintiffs also seek costs in this matter, totaling $7,217.99. 740 ILCS 23/5(c) permits a court to award "reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses...." *Id.* There is no law interpreting what reasonable costs are under 740 ILCS 23.5(c), but under any analysis, the costs Plaintiffs seek are simply not reasonable for the current litigation and should not be awarded as requested.

Under federal law, (which permits "reasonable" costs just as the Illinois Civil Rights Act) and which Plaintiffs have used to support their request for fees, only certain costs are allowed, and those which are requested must be reasonable and necessary to the case. *See Vito & Nick's, Inc. v. Barraco*, 2008 WL 4594347 at *2 (N.D. Ill. 2008)(finding that in assessing a bill of costs, the court "must determine whether the costs are allowable, and if so, whether they are both reasonable and necessary"); *Soler v. Waite*, 989 F.2d 251, 255 (7th Cir. 1993).

Defendants do not object to Plaintiffs' claims for filing fees in both the Circuit Court and with the Department of Public Health, which total $740.00. However, the remaining fees are not reasonable or are not properly supported. First of all, there is $5,645.49 in expert fees claimed

by Plaintiffs. Due to the fact that this case was dismissed as moot after the filing of a compliant and an amended complaint and that the Court never entered a discovery schedule nor did the parties engage in any discovery, these charges are not reasonable to this litigation and should be denied. Furthermore, these costs are not properly supported. With the exception of Dr. Bockting, whose total charge claimed is $1,049.99, there is no explanation of who the other experts are (only one other expert is even identified by name; the rest are labeled "consulting expert" or why they were necessary to the litigation. Just as it was not reasonable to have experts consulting at such an early stage of litigation which ended up moot after an amended complaint, it was also not reasonable to have Mr. Johnson travel at a cost of $225.20 to Dr. Bockting to be examined. That goes to an issue of proof, which the parties never reached in this case. Therefore, these costs should be completely disallowed as both unsupported and not reasonable.

The next category of costs is for copying costs. Claimed copying costs must show the number of pages, the rate per page and the purpose of the copy. *International Oil v. The Uno-Ven Co.*, 1998 WL 895557 at * 2 (N.D. Ill. 1998) (citing *Northbrook Excess and Surplus Ins. Co. v. Proctor & Gamble Co.*, 924 F.2d 633, 643 (7th Cir. 1991)). Such costs claimed by the ACLU should be denied as completely unsupported. While there is a general description of the documents copied, there is no mention of the number of pages or rate per page. The Jenner copying costs, while containing a page total, do not specify what documents were copied and why they were necessary to the litigation, and should be disallowed as well. *See Interclaim Holdings Ltd., v. Ness, et al.*, 2004 WL 557388, *2-3 (N.D. Ill. 2004) (denying claim for copying costs where no identification of pages or documents copied or even "rough categorization"; internal records provided only number of copies and rate per page).

Finally, the remaining costs involve messenger services, a special process server, transportation and computer research. As none of these costs are explained, the Court cannot determine if they were reasonable to the litigation and should be denied.

Therefore, Defendants request this Court reduce Plaintiffs' request for costs to $740.00 (filing fees), as the remaining costs sought are both unreasonable and not supported.

WHEREFORE, Defendant respectfully requests that this Honorable Court deny Plaintiffs' Petition for Fees or, in the alternative, reduce an award of costs and fees to Plaintiffs in conformity with the guidelines suggested by Defendant in this response paper.

Respectfully submitted,

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05003

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK and KARISSA ROTHKOPF, and RILEY JOHNSON,	)	
Plaintiffs,	)	No. 09-CH-3226
	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,	)	
Defendant.	)	

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3004

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

Plaintiffs, by and through their attorneys, reply in support of their Petition for Attorneys' Fees, Costs, and Expenses as follows:

I. The State Is Not Immune From Fees, Costs, And Expenses.

Assuming, *arguendo*, that, as Defendant contends, Plaintiffs' claim for fees, costs, and expenses is a suit against the State, the text and legislative history of the Illinois Civil Rights Act of 2003 ("ICRA") clearly establish the legislature's intent to waive the State's immunity from attorneys' fees, costs, and expenses. Further, as shown in Section C below, Plaintiffs' petition is supplemental to their claims for prospective injunctive and declaratory relief, for which there is no sovereign immunity.

A. The text of the ICRA shows that the General Assembly intended to waive the State's immunity from fees, costs, and expenses.

The fee-shifting provision of the ICRA contested by Defendant provides, in relevant part:

> Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought . . . to enforce a right arising under the Illinois Constitution.

740 ILCS § 23/5(c). It is fundamental that the prohibitions of the Illinois Constitution apply only to units of state and local government, including school districts,[1] and not to private organizations and individuals. *See Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 527 (1985) (State constitutional provisions "are limitations only on the power of government"); *Chicago Commons Ass'n v. Hancock*, 346 Ill. App. 3d 326, 330-31 (1st Dist. 2004) (Illinois constitutional clauses are "designed to protect citizens from actions by the government and not by other citizens") (citation omitted); *see also Hill v. PS Ill. Trust*, 368 Ill. App. 3d 310, 313 (1st Dist. 2006) (same). Because only the State of Illinois and its subunits may violate the Illinois Constitution, the fee-shifting provision of the ICRA on its face plainly evinces the legislative intent to waive the State's sovereign immunity.

As a general rule, the State is not liable to pay costs "except in some particular way pointed out by statute." *Dep't of Rev. v. Appellate Ct.*, 67 Ill. 2d 392, 396 (1977) (citation omitted). From this guiding principle, Defendant seems to conclude that the legislature must always use the word "state" in a statutory waiver of the State's immunity from costs, fees, and expenses. *See* Def. Br. at 2-4. Illinois courts have never created such an unqualified rule. While some statutes do contain exceptionally explicit provisions waiving the State's immunity from fees, costs, and expenses, it does not follow that this level of specificity is required to waive immunity. What is required is for the legislature to manifest clearly its intent to waive the State's immunity, as it did when it passed the ICRA.

[1] Illinois Constitution Art. VII, § 1, defines "[u]nits of local government" to include all subdivisions of state government, other than school districts. Hereinafter, "local government," "units of local government," and "subdivisions" or "subunits" of the State are intended to include all local government actors, including school districts.

Section (c)(2) of the ICRA created a new attorneys' fees and costs remedy for an existing right of action against the State for violations of the Illinois Constitution. The legislature is presumed to have acted in full knowledge of, and with the intent to incorporate, the fundamental concept that only state and local governmental actors can violate the Illinois Constitution when the legislature enacted Section (c)(2) of the ICRA. *See, e.g.*, *Village of Niles v. City of Chicago*, 82 Ill. App. 3d 60, 67 (1st Dist. 1980) ("[I]t is fundamental that a statute should be read in consonance with constitutional principles") (citations omitted). Because Section 23/5(c)(2) applies only to governmental entities, the provision authorizing an award of attorneys' fees to prevailing parties under the ICRA is a plain expression of the legislature's intent to waive the State's immunity from fees and costs.

In addition to the ICRA, there are other examples of Illinois statutes which waive sovereign immunity without using the word "state" in the fee provision or other statute under which the award is sought. Rather, like the ICRA, the fee and costs provisions read in the context of the relevant statute make the legislature's intent to waive immunity clear. For example, in *Martin v. Giordano*, 115 Ill. App. 3d 367, 368-69 (4th Dist. 1983), there is no mention of the "state" in the portion of the Worker's Compensation Act allowing an additional award for "unreasonable or vexatious delay" in paying worker's compensation. However, the Worker's Compensation Act read as a whole evidenced the legislature's intent that the state pay such awards.[2] The determinative inquiry, the court concluded, "is whether the legislature intended to impose liability upon the State – not how or where the intent is expressed." *Id.* at 370.

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[2] For example, the Act states, "The State of Illinois hereby elects to provide and pay compensation according to the provisions of this Act." Ill. Rev. Stat. 1981, ch. 48, par. 138.2. An award for "unreasonable or vexatious delay" is defined as "compensation." *Id.* at par. 138.19(k).

Similarly, the General Assembly waived sovereign immunity for awards of fees and costs against the state in the Illinois Administrative Procedure Act ("APA"), even though there was no explicit mention of "state" in the provision of the APA authorizing the awards. 5 ILCS § 100/10-55(c) ("In any case in which a party has any administrative rule invalidated by a court . . . the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees"). Courts have consistently awarded fees and costs against the State under this statute and rejected the argument that the State is immune from such awards. *See Applegate v. Ill. Dep't of Transp.*, 335 Ill. App. 3d 1056, 1061 (4th Dist. 2002) (sovereign immunity does not bar award of attorneys' fees under the APA); *Ackerman v. Ill. Dep't of Public Aid*, 128 Ill. App. 3d 982, 984 (3d Dist. 1984) (same); *see also Chand v. Patla*, 342 Ill. App. 3d 655, 663 (5th Dist. 2003) (affirming award of attorneys' fees pursuant to the APA); *Ardt v. State of Ill.*, 292 Ill. App. 3d 1059, 1063 (1st Dist. 1997) (same).

The Illinois Human Rights Act ("HRA") is another example of a statute that waives sovereign immunity for the award of fees and costs without using the word "state" in the fee provision. Defendant cites one of the fee provisions from the HRA which names the "State of Illinois" and "explicitly allows imposition of costs and attorneys' fees against the State in cases brought in *circuit courts*." Def. Br. at 3 (emphasis added). However, the HRA also permits the Human Rights Commission to impose attorneys' fees without using the word "state." *See* 775 ILCS §§ 5/8A-104(G) & 5/8B-104(D) (upon finding a civil rights violation, the Commission may order the violating party to "[p]ay to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees . . ."). Yet, the Commission's authority to award fees and costs against the State under this provision is well-established. *See, e.g., Ill. Dep't of Corr. v. Ill. Human Rights Comm'n*, 298 Ill. App. 3d 536, 540 (3d Dist. 1998)

(affirming Commission's award of attorneys' fees against Department of Corrections); *Ill. State Bd. of Elections v. Ill. Human Rights Comm'n*, 291 Ill. App. 3d 185, 187 (4th Dist. 1997) (upholding award of attorneys' fees against Board of Elections). As with the Worker's Compensation Act, the APA, and the HRA, the ICRA waives sovereign immunity.

In contrast, the cases relied upon by Defendant concern statutes whose applicability to the State is unclear.[3] *See, e.g.*, *City of Springfield v. Allphin*, 82 Ill. 2d 571, 576-77 (1980) (sovereign immunity not waived by sections 2 and 3 of the Interest Act, which assess interest against "[c]reditors" generally, and a "local government . . . or school district or community college district"); *In re Walker*, 131 Ill. 2d 300, 303 (1989) (immunity not waived by statute authorizing award against "a school district, a community college district, or any other governmental entity")[4]; *Dep't of Rev.*, 67 Ill. 2d at 396 (immunity not waived by statute and rule which "in general terms authorize the imposition of costs in various actions"); *People ex rel. Kalin v. Mathews*, 71 Ill. App. 3d 379, 380 (3d Dist. 1979) (Paternity Act's requirement that the costs of blood testing for indigent defendants be borne at "the expense of the court" – language that could as easily apply to the county as to the state – failed to waive state sovereign immunity).

The statutes of general application at issue in *Department of Revenue* and *Walker* were held not to apply to the State because "the rights of the sovereign are not impaired *by general legislative enactments* which apply to private rights unless an intent to make the State liable is

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[3] The singular exception is *Martin*, 115 Ill. App. 3d at 369, which is discussed above and which supports Plaintiffs' position.

[4] As Appellate Court Justice Jiganti explained in his dissent finding no state immunity waiver – the position ultimately adopted by the Illinois Supreme Court – "'other governmental entity' . . . follows a listing of 'a school district' and 'a community college district'" and "[t]he State is not akin to school districts or units of local government." *In re Walker*, 165 Ill. App. 3d 846, 855 (1st Dist. 1987) (Jiganti, J., dissenting), *rev'd*, 131 Ill. 2d at 300.

expressed in the statute." *Dep't of Rev.*, 67 Ill. 2d at 395 (emphasis added); *see also In re Walker*, 131 Ill. 2d at 304-06. This principle, however, does not apply to statutes such as the ICRA that apply only to the State and its subunits. Section 23/5(c)(2) permits a prevailing party to recover fees for any "action brought to enforce a right arising under the Illinois Constitution," 740 ILCS § 23/5(c)(2), and only the State or its subunits may violate the Illinois Constitution. Because the legislature clearly expressed its intent to make the State liable under the ICRA, the legislature was not then required to insert the superfluous word "state" in the statutory provision awarding fees, costs, and expenses to a prevailing party in an action "to enforce a right arising under the Constitution."

B. The ICRA's legislative history shows that the General Assembly intended to waive sovereign immunity.

The ICRA accomplished two goals: (1) It created a new cause of action for parties subject to intentional or disparate impact race, color, or national origin discrimination by an arm of State, county, or local government, 740 ILCS § 23/5(a) & (b); and (2) It provided prevailing parties under this new cause of action, or under the Illinois Constitution, with the right to seek attorneys' fees, costs, and expenses. *Id.* at (c).

The legislative history shows the legislature's intent for the ICRA to fulfill both of these purposes. During floor debate in the Illinois Senate, the bill's sponsor, Sen. Harmon, explained:

> This bill fills two gaps . . . in the law in the State of Illinois. First, it prohibits governmental policies that discriminate against a racial group or have a disparate impact against a racial group, and it allows those people who are aggrieved by such policy to challenge the policies in State or federal court. Second, it facilitates private enforcement of civil rights laws by allowing the award of attorney fees to parties who prevail in litigation, brought under this new law or the Illinois Constitution, including those parties whose litigation causes a reversal of policy by the government. This is in direct response to recent reversals and direction by the United States Supreme Court. . . .

H.B. 2330, 93d Ill. Gen. Assem., Senate Proceedings, May 13, 2003, at 135, Def. Br., Ex. A.

When Sen. Harmon spoke of "parties whose litigation causes a reversal of policy by the government," he clearly had in mind the *catalyst doctrine* of fee-shifting. That doctrine allowed fee-shifting pursuant to the federal Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988, when a state official engaged in conduct that violated the U.S. Constitution, and the state official then reversed that conduct in response to § 1983 litigation. *See, e.g., Ill. Welfare Rights Org. v. Miller*, 723 F.2d 564, 566 (7th Cir. 1983). When Sen. Harmon stated that the bill's catalyst fees language was "in direct response to recent reversals . . . by the United States Supreme Court" concerning "recovery of fees," Sen. Harmon was referring to *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Hum. Res.*, 532 U.S. 598 (2001), in which the Court rejected the catalyst doctrine of fee-shifting. While *Buckhannon* directly addressed two particular federal fee-shifting statutes not directly implicated here, the *Buckhannon* Court identified numerous other federal fee-shifting statutes, including § 1988, and stated that "[w]e have interpreted these fee-shifting provisions consistently." *Id.* at 602-03 & n. 4. Thus, Sen. Harmon intended to return the State of Illinois to the pre-*Buckhannon* status quo.

On the House side, sponsor Rep. Fritchey during a committee hearing asked the ACLU's legislative advocate, Mary Dixon, "to give a summary of how and why we're here and why this is so necessary." *See* Ex. A at p.1.[5] Like Sen. Harmon, Ms. Dixon explained on behalf of Rep. Fritchey:

> House Bill 2330 does fill two gaps in Illinois civil rights law.
> First, it prohibits government policies that have a disparate impact

[5] Exhibit A comprises an informal transcript of proceedings on March 5, 2003, before the Illinois House's Judiciary I (Civil) Committee. This transcript was recently prepared by Plaintiffs, based on an official audio recording of this proceeding. On request, Plaintiffs will provide a copy of this audio recording to Defendant and/or to this Court.

> against a racial group and allows such policies to be challenged in federal or state court. Secondly, it facilities the private enforcement of civil rights law by . . . allowing an award of attorneys' fees to parties who prevail in litigation under this new act *or under a suit to enforce rights under our state constitution.*

Id. (emphasis added). Regarding the fee-shifting provision of the bill, Ms. Dixon further explained on behalf of Rep. Fritchey:

> The second gap that this bill fills obviously is allowing access to courts to individuals who can't afford an attorney. . . . *Our constitutional rights in the state constitution* are fairly meaningless if you can't get in the door to affect justice. And by allowing award of attorneys' fees to successful civil rights plaintiffs, [House Bill] 2330 would provide justice for these individuals. It would encourage enforcement of civil rights laws. People who do so are like private attorneys general, promote settlements of the meritorious cases and deter future unlawful conduct.

Id. at 2 (emphasis added).

Thus, the House intended the ICRA fee-shifting to serve the same policy function as § 1988 – the enforcement of constitutional law by means of the payment of fees to private attorneys general. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (emphasizing the "'private attorney general' role which Congress meant to promote in enacting § 1988"). In short, the House, like the Senate, intended that the State of Illinois and its subdivisions would pay attorney fees when they terminate constitutional violations in response to litigation, and intended them to do so even when the government terminated its conduct prior to entry of a formal court order.

Defendants' contrary arguments regarding the legislative history lack merit. Defendant relies heavily on *Ill. Native Am. Bar Ass'n v. Univ. of Ill.*, 368 Ill. App. 3d 321 (1st Dist. 2006), to argue that the ICRA "was not intended to create new substantive rights, but only a state venue for a right of action for disparate-impact discrimination," Def. Br. at 4, and therefore that the

General Assembly could not have intended to waive sovereign immunity to allow attorneys' fees, because "such a right did not previously exist. . . ." Def. Br. at 6. *Illinois Native American Bar Association*, however, involved a race discrimination claim under Section 5(b) of the Act, so the court's review of the legislative history focused on only the ICRA's creation of a statutory cause of action for discriminatory state actions. As shown above, the legislative history plainly reveals the additional goal of allowing prevailing parties in cases involving government discrimination *or violations of the Illinois Constitution* to seek attorneys' fees.

Defendant attempts to explain away Sen. Harmon's explicit discussion of fees and costs by suggesting, implausibly, that he "likely was referring to plaintiffs successful in challenging a governmental policy on grounds of disparate impact or intentional discrimination." Def. Br. at 6. However, Sen. Harmon said that attorneys' fees will be available to "parties who prevail" in an action "under this new law *or the Constitution.*" Def. Br., Ex. A, p. 135 (emphasis added). He explained that prevailing parties include "parties whose litigation causes a reversal of policy by the government," without limiting the availability of catalyst fees to parties who sue under the cause of action created by the ICRA. *Id.*

Defendant agrees that Sen. Harmon was referring to *Buckhannon* when he described "a ruling by the U.S. Supreme Court that 'reversed ten of eleven circuits.'" Def. Br. at 7. But Defendant incorrectly concludes that Sen. Harmon's discussion of fees and costs applied only "to discrimination suits under the new legislation, not suits, such as Plaintiffs', brought to enforce rights under the Constitution," because *Buckhannon* "involved claims arising under federal discrimination statutes." Def. Br. at 7. Contrary to Defendant's argument, *Buckhannon* reversed the catalyst theory for attorneys' fees, not only in cases asserting violations of federal civil rights statutes, but also in cases alleging violations of the U.S. Constitution. *Buckhannon*, 532 U.S. at

602 & n. 3 (finding that "most Courts of Appeals recognize the 'catalyst theory,'" and citing decisions awarding catalyst fees from nine circuits, including awards under § 1988 to plaintiffs alleging constitutional violations).[6] The Court listed some of the "numerous" federal statutes that allow attorneys' fees to be awarded to the "prevailing party," including § 1988, and noted that "[w]e have interpreted these fee-shifting provisions consistently . . . and so approach the nearly identical provision at issue here." *Buckhannon*, 532 U.S. at 602-03 & n. 4 (citation omitted). Prior to the passage of the ICRA, subsequent cases had confirmed that *Buckhannon* disposed of the catalyst theory in claims under § 1988 that a state actor stopped violating the Constitution in response to litigation. *See, e.g., Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 2002 U.S. Dist. LEXIS 4051, at *2 n. 1 (N.D. Ill. Mar. 14, 2002).

In sum, both the language and the legislative history of the ICRA make clear the General Assembly's intention to waive the state's sovereign immunity for the award of attorneys' fees, costs, and expenses to prevailing parties under *both* the new disparate impact cause of action created by the ICRA, *and* under the Illinois Constitution.

C. Defendant is not entitled to sovereign immunity.

Even if (contrary to Part A and B above) the fee-shifting provision of ICRA did not waive state sovereign immunity, Plaintiff would still be entitled to fees under ICRA, because state sovereign immunity never applied to the underlying injunctive action and does not apply to this supplemental fee petition.

Sovereign immunity does not protect state officials from injunctive suits to restrain them from violating the Constitution or state law. *Herget Nat'l Bank of Pekin v. Kenney*, 105 Ill. 2d

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[6] *See, e.g., Stanton v. Southern Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 n. 2 (1st. Cir. 1999) (Section 1988 suit for constitutional violations); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999) (same).

405, 411 (1985). Plaintiffs initiated this suit for injunctive and declaratory relief because Defendant violated Illinois statutory and constitutional law by impermissibly denying Plaintiffs access to amended birth certificates. *See* First Am. Compl. ¶¶ 1, 5. Thus, the shield of sovereign immunity never extended to the underlying action.

Nor is Defendant now entitled to invoke sovereign immunity in this supplemental proceeding for attorneys' fees, costs, and expenses. Such fee petitions are a mere "component" or continuation of the original action against Defendant, so the claim for fees is not a suit against the State. *See People v. Wilcoxen*, 358 Ill. App. 3d 1076, 1078 (3d Dist. 2005) (explaining that the State has no sovereign immunity from a fee claim that is a continuation of a lawsuit under the Sexually Dangerous Person Act, in which there was no sovereign immunity); *People v. Downs,* 371 Ill. App. 3d 1187, 1190 (5th Dist. 2007) (same); *see also Farmer v. McClure*, 172 Ill. App. 3d 246 (1st Dist. 1988) (affirming order of costs in a mandamus action against state officers).

These Illinois appellate court decisions are consistent with the U.S. Supreme Court's interpretation of § 1988 – the federal law upon which, in significant respects, the fee provisions of ICRA were modeled. In *Hutto* v. *Finney*, 437 U.S. 678, 697-98 & 695 n. 24 (1978), the U.S. Supreme Court found that no "express statutory waiver of the States' [Eleventh Amendment] immunity" was required to allow the imposition of attorneys' fees, which "reimburses [the plaintiff] for a portion of the expenses he incurred in seeking prospective relief" and "will almost invariably be incidental to an award of prospective relief." *See also White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-452 (1982) (a petition for attorneys' fees pursuant

to § 1988 "raises legal issues *collateral to the main cause of action*," and "merely seeks what is due because of judgment") (emphasis added) (citation omitted).[7]

Because Plaintiffs' fee petition is incidental to their claim for prospective injunctive and declaratory relief, sovereign immunity is not a bar to their fee petition.

II. Plaintiffs' Request For Fees And Costs Is Reasonable And Should Be Granted.

Defendant contends that Plaintiffs' fee request includes "dozens of non-compensable and unreasonably expended hours," so this Court should deny "such requests" and reduce the award granted. Def. Br. at 9. Plaintiffs have already substantially discounted their request for fees and costs. *See* Ex. A to Fee Pet., at ¶ 20 & Ex. B, which details reductions. Plaintiffs have also provided Defendant with additional detail about time spent, because they had previously redacted time records that would have revealed work product. *See* Ex. C. In addition, as described below, Plaintiffs agree with Defendant that a few entries in Plaintiffs' fee petition were mistakenly included or are not well supported and reduce them accordingly. *See* Ex. D, for a chart of Plaintiffs' revised fee and expense requests. However, the bulk of Defendant's arguments for further reductions should be rejected.

A. The time spent on the fee petition is reasonable.

Defendant argues that the time Plaintiffs' spent on their fee request is unreasonable because the time spent amounts to ten or eleven percent of the total hours for which compensation is sought. Def. Br. at 9. He suggests that "a more appropriate percentage" is

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[7] Not to the contrary is *Allphin*, 82 Ill. 2d at 579-80, which held that a claim for interest is not incidental to an injunctive claim for unlawful withholding of certain taxes, and thus that sovereign immunity barred a claim of interest. In contrast, Illinois courts have found that attorneys' fees are collateral to the underlying action. Furthermore, in contrast to interest, attorneys' fees are necessary to facilitate the enforcement of constitutional rights. *See, supra.*, Section I.B.'s discussion of the legislative intent behind the ICRA to encourage private enforcement of civil rights laws.

"closer to 5% or less." *Id.* In *Ustrak v. Fairman*, 851 F.2d 983, 987-88 (7th Cir. 1988), the court relied in part on a comparison between the time spent on the fee petition and the time spent on the merits of the case, but also noted that the fee petitions were "marvels of misplaced ingenuity and thoroughness, rehearsing in great detail basic principles well known to the district court . . ." In *Ustrak* and the other cases cited by Defendant, the fee petitions did not present novel legal issues for the federal district courts deciding them. Other federal courts have, in contrast, awarded fees for large numbers of hours to prepare fee petitions in comparison to the total hours for which compensation is sought. *See, e.g., Eirhart v. Libbey-Owens-Ford Co.*, 996 F.2d 846, 851 (7th Cir. 1993) (affirming award of 146.8 hours for "preparing and presenting" fee petition seeking compensation for 340.4 hours).

Plainly, the five percent figure proposed by Defendant is not mandatory and was not even mentioned as the basis for the court's fee reduction in *Kelley v. City of Chicago*, 205 F. Supp. 2d 930, 933 (N.D. Ill. 2002). Where there are particular reasons why fee petition preparation and presentation demand more time, then a higher percentage is merited. *See, e.g., Williams v. Z.D. Masonry, Corp.*, 2009 U.S. Dist. LEXIS 11554, at *11-12 (N.D. Ill. Feb. 17, 2009) (because Defendant failed "to cooperate in a good faith effort to reach agreement on the amount of fees and costs to be awarded" so that Plaintiff's counsel "had to detail, explain and justify every aspect of Plaintiff's counsel's time and costs," 17.5 hours were allowed out of a total of 109.80, or 15.5 percent).

In the present case, the circumstances are different than those in *Ustrak* and the other cases cited by Defendant, because Plaintiffs are seeking fees pursuant to a relatively new fee-shifting provision about which there are no published Illinois decisions and, in response, Defendant has raised novel questions about sovereign immunity and asserted numerous

objections to Plaintiffs' request for fees and costs, which have required many additional hours to address. *See* Ex. E. An arbitrary reduction of the compensable hours spent on the fee petition as compared to the hours spent on the merits in this case is not reasonable in these circumstances. Any reductions that are made in the hours spent should consider not only the novelty and complexity of Plaintiffs' petition, but also the important legal questions Plaintiffs have been forced to address in their reply.

B. Hours related to press conferences and press releases.

Defendant argues that time related to press releases and press conferences is not compensable. With the exception of the 1/27/09 time entry for which 2 hours were already reduced from their time claimed, *see* Ex. B, Plaintiffs agree that they inadvertently included the remaining time entries in their petition and reduce their fee claim accordingly. *See* Ex. B.

C. Time spent in attorney conferences is compensable.

Many federal courts have recognized the value of attorney conferences in order to communicate about case work, and the lack of any strict rules about the hours that are reasonable. *See Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 661 (7th Cir. 2007) ("time spent on intra-team communications was compensable" and "[t]here is no hard-and-fast rule as to how many lawyers can be at a meeting or how many hours lawyers can spend discussing a project"); *Chao v. Current Dev. Corp.*, 2009 U.S. Dist. LEXIS 11653, at *30 (N.D. Ill. Feb. 13, 2009) ("[intra-office] conferences can promote efficiency, and avoid duplicative and unnecessary activity"). In the current case, conferences precede case work and allow more senior counsel to direct junior attorneys on the work so that they avoid spending time on tasks that will not be useful to the litigation. *See, e.g.,* Ex. O to Fee Pet., p. 8, 12/15/08, "Office conference with H. Grossman re draft complaint," followed by work by John Knight on 1/15 and 1/16/09 editing the

complaint. Plaintiffs have already reduced hours spent at conferences by removing all of Harvey Grossman's and James Esseks' time from the fee petition.

In addition, Defendant objects about the details of some of the billing.[8] For example, he objects that the entries on May 15, 2008 are not consistent, because Ms. Simpson and Mr. Palazzolo fail to state in their time records that Mr. Knight was in the meeting with them. Plaintiffs have reviewed these time records and will reduce their time request for Mr. Knight and Ms. Djordejevic on May 15 and also for Mr. Knight and Ms. Simpson on May 14, 2008. Defendant's complaint about the entries for August 28, 2008 is that Palazzolo and Knight's time entries do not break down the time spent at the conference to confirm that all three attended an hour-long conference. Counsel reduced the amount of Palazzolo's time by an hour based on billing judgment. *See* Ex. B. Knight's time entry does not describe the other tasks he performed during that time period, so Plaintiffs will reduce their request for fees by an additional three hours. *See* Ex. B. Defendant offers no other examples of inconsistencies or any other justification for reducing by one-half the time spent by Plaintiffs' counsel on attorney conferences and their request should be denied. Plaintiffs' counsel has again reviewed the time spent on conferences and confirmed that it is accurate and reasonable for this case.

[8] "'Block billing' . . . is not a prohibited practice." *Farfaras v. Citizens Bank and Trust of Chicago*, 433 F.3d 558, 569 (7th Cir. 2006). One court described the detail required as follows: "[T]here is no binding standard on how hours should be described and how great the detail should be. If, on the face of it, the hours seem out of line, there is some weight to a claim that descriptions are too sparse, but the hours are not out of line here." *Catalan v. RBC Mortgage Co.*, 2009 U.S. LEXIS 84339, at *15 (N.D. Ill. Sept. 16, 2009) (internal quotation and citation omitted). Here, the detail provided is sufficient to show that the hours claimed are reasonable.

D. Hours spent assigning administrative tasks.

Defendant complains that Plaintiffs seek compensation for "hours 'that are easily delegable to non-professional assistance.'" Def. Br. at 12 (citation omitted). The time spent assigning clerical tasks is not delegable to non-professional assistance, so none of Mr. Palazzolo's time should be denied. *See* Ex. P to Fee Pet. at pp. 8, 10 & 11, for 1/22/09, 1/23/09, 3/30/09, 4/6/09 & 4/7/09 (describing discussions with docketing regarding court filings). Ms. Simpson's time records regarding administrative tasks are by Defendant's calculation only 2.185, largely near the case's beginning. Because these entries are less clearly related to assigning clerical tasks, Plaintiffs withdraw their requests for this time and have reduced their fee requests accordingly. *See* Ex. B.

E. Hours spent interviewing potential plaintiffs.

Defendant argues that time spent finding plaintiffs to challenge the unconstitutional policies in this case is not compensable because only three individuals actually received their birth certificates when Defendant chose to capitulate rather than litigate. Defendant's argument is based on two erroneous assumptions: 1) that each Plaintiff's chance of success was not increased by counsels' efforts to find additional plaintiffs; and 2) that Plaintiffs and their counsel should have known that Defendant was going to provide them with birth certificates and change their birth certificate rules.

Each of the three Plaintiffs who received birth certificates benefited from their counsels' efforts interviewing other possible plaintiffs, because doing so provided information to Plaintiffs about Defendant's restrictive birth certificate practices and allowed them to identify potential witnesses for trial regarding the practices and the harms resulting from them. Each Plaintiff's case was strengthened because they were prepared to offer evidence to show what Defendant's

unwritten practices have been, how the practices have changed over time, and the many ways individuals have been harmed by those practices. *See, e.g.,* Ex. J to Fee Pet., at ¶ 9 (witness unable to obtain driver's license with the correct gender on it because his birth certificate listed the wrong gender). Other courts have approved compensation for the time spent talking with potential clients. *Dupuy v. McEwen*, 648 F. Supp. 2d 1007, 1023 (N.D. Ill. 2009). The fact that the case settled without a contest over the merits is not a proper basis for denying Plaintiffs compensation for their preparation.[9]

F. Hours related to choosing and consulting with experts.

Defendant's primary objection to Plaintiffs' time spent finding and consulting with experts is that "the case never got off the ground." Def. Br. at 13. They fail to explain how Plaintiffs were expected to know that Defendant would simply provide birth certificates to Plaintiffs, notwithstanding Plaintiffs' many pre-litigation efforts to obtain them. The federal courts have recognized the importance of experts to assist an attorney to prepare a case, even if the expert ultimately did not testify. *See Friedrich v. City of Chicago*, 888 F.2d 511, 514-15 (7th Cir. 1989), *vacated on other grounds*, 499 U.S. 933 (1991). In a case in which expert testimony is a central component, *see* Ex. A to Fee Pet. at ¶ 11, the time spent locating and consulting with experts was necessary to the preparation of the case for filing and its litigation. Defendant complains that Knight's time records only record a little more than an hour spent consulting with

[9] In addition, the witnesses identified by Plaintiffs provided testimony by affidavit to support Plaintiffs' argument in response to Defendant's motion to dismiss that the public interest exception to mootness applied in this case. Although Plaintiffs' argument was unsuccessful, it related to Plaintiffs' successful claims and was reasonably undertaken. Plaintiffs did not seek compensation for the time spent drafting this unsuccessful brief, but they should be compensated for the time spent interviewing these witnesses to Defendant's practices. *See Jaffe v. Redmond*, 142 F.3d 409, 414 (7th Cir. 1998) (providing compensation for time reasonably incurred in a losing legal position); *Uniroyal Goodrich Tire Co. v. Mut. Trading Corp.*, 63 F.3d 516, 526 (7th Cir. 1995).

Dr. Bockting to question Mr. Knight's sworn testimony regarding the role that he served. Plaintiffs should not be penalized for reducing the hours for which they seek compensation, including some of the time Knight spent consulting with Dr. Bockting, by denying them compensation for the time expended locating and consulting with experts.

G. Plaintiffs' hourly rates are reasonable.

After admitting that an attorney's actual billing rate is his or her presumptive market rate, Defendant contends that all of the Jenner attorney rates should be reduced because none of the Jenner attorneys served as lead counsel or has as much experience as Mr. Knight working on civil rights litigation. However, as explained in *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150-51 (7th Cir. 1993), the rate a private attorney charges for her time is presumptive, because it reflects that "opportunity cost of the civil rights case," so a departure must be explained by "some reason other than a different average rate in the community." As noted above, the purpose behind the fee provision of the ICRA is to encourage the enforcement of civil rights through the actions of private attorneys general. Unless private attorneys are fully compensated for the money lost working on civil rights cases, this purpose will be undermined. Plaintiffs have already shown that the rates requested for the Jenner attorneys are the rates they charge clients, *see* Ex. R to Fee Pet., ¶ 7, and are within the market rates for similar work in the Chicago legal community. Ex. Q to Fee Pet., ¶ 10; *see also* Ex. F, Suppl. Simpson Aff. regarding Jenner rates and the experience of the Jenner attorneys on other civil rights cases.

H. Plaintiffs' costs should be reimbursed.

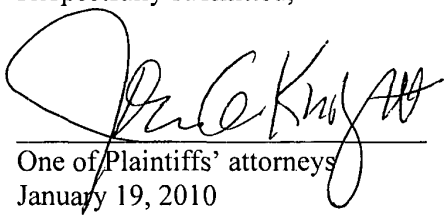
Defendant asserts that the expenses for which Plaintiffs seek compensation are unreasonable. They object to expert fees, because the case became moot based on their early capitulation. But, as noted above, Plaintiffs consulted experts to be able to file their case and

conducted the reasonable preparation necessary to present expert testimony at trial, because they had no way of knowing that Defendant would give in so quickly. Plaintiffs have an ethical responsibility to fully investigate their case prior to filing, and it was reasonable to ask Dr. Bockting to examine Riley Johnson so that he could offer an opinion on whether his transition was complete without genital surgery prior to Plaintiffs making that assertion in their amended complaint. First Am. Compl. at ¶ 67. Defendant also complains that Plaintiffs' consulting expert was not named – in order to preserve attorney work product – without explaining why the name is necessary to determine if the costs are reasonable. Plaintiffs have already, in the exercise of billing judgment, chosen not to seek $3,909.33 of Dr. Bockting's expert fees. *See* Suppl. Aff. of John Knight, filed on 11/3/09, at ¶ 3. The expert expenses requested are reasonable and Plaintiffs should be compensated for them.

Defendant complains that Plaintiffs have failed to offer certain details about copy charges. The ACLU copying charges are for medical records – as Ex. O to Fee Petition shows – and were paid to outside providers. *See* Ex. G. For copying expenses, Plaintiffs "need only provide 'the best breakdown obtainable from retained records.'" *Movitz v. First Nat'l Bank of Chicago*, 982 F. Supp. 571, 577 (N.D. Ill. 1997) (quoting *Northbrook Excess and Surplus Ins Co. v. Proctor & Gamble Co.*, 924 F.2d 633, 643 (7th Cir. 1991) (copy charges that were verified by Plaintiffs' attorneys and "were computer generated from a copy counter on the photocopier which automatically bills clients based on client codes" were compensable). Jenner's copy charges were billed to this case. *See* Ex. F. The total amount sought is reasonable as is the per page charge reflected on Ex. O to the Fee Petition (dividing the copy charges by the number of copies shows a charge of $.06 per page in 2008 and $.09 in 2009). The additional Jenner

expenses are reasonable case-related charges. *See* Exs. F and D.

Respectfully submitted,



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK and KARISSA ROTHKOPF, and RILEY JOHNSON,	)	
Plaintiffs,	)	No. 09-CH-3226
v.	)	Hon. Peter Flynn
DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,	)	
Defendant.	)	

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PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

This Court has raised the question of whether it may award attorneys' fees under the Illinois Civil Rights Act of 2003 ("ICRA"), 740 ILCS § 23/5(c), for the legal work of a law firm, when the law firm has agreed to contribute the award to a nonprofit legal organization. Plaintiffs respectfully submit that the answer to this question is yes.

In this case, attorneys from Jenner & Block ("Jenner") and the Roger Baldwin Foundation of the ACLU of Illinois ("RBF"), have agreed to provide services on a *pro bono* basis to Plaintiffs. Jenner has agreed to contribute to the RBF any fees awarded for its services. For the following reasons, this agreement should not affect this Court's considerations in awarding reasonable attorneys' fees, costs, and expenses to Plaintiffs for the legal services rendered by the RBF and by Jenner.

I. The ICRA Does Not Condition the Award of Attorneys' Fees on the Ultimate Use or Allocation of Those Fees by Counsel.

In Illinois, a court's primary objective in construing a statute is to "ascertain and give effect to the intention of the legislature." *People v. Palmer*, 218 Ill. 2d 148, 156

(2006). Accordingly, "[t]he language of the statute must be afforded its plain, ordinary, and popularly understood meaning." *Id.* Most importantly, it is "never proper for a court to depart from plain language by reading into a statute exceptions, limitations or conditions" not expressed therein. *Maddux v. Blagojevich*, 233 Ill. 2d 508, 517 (2009).

There are no qualifications in the ICRA on a prevailing party's entitlement to a fee award based on counsel's choice to donate its legal services and to contribute or share its attorneys' fees to or with its co-counsel.[1] Consequently, this Court should not deny or reduce the award of reasonable attorneys' fees to Plaintiffs simply because Jenner has agreed to donate its time and fees to the RBF.

II. Federal Fee Decisions Also Reject Consideration of Counsel's Decision to Contribute or Share Their Fees and to Provide Their Services *Pro Bono* As Reasons to Deny a Fee Award.

Under parallel federal fee statutes, whether Plaintiffs' counsel is a law firm that has undertaken the representation of Plaintiffs without any expectation of being compensated for its work and has instead chosen to donate its time and fees to a nonprofit legal organization is irrelevant.[2]

In a case directly on point, the Northern District of Illinois in *K.L. v. Edgar*, No. 92 C 5722, 2000 U.S. Dist. LEXIS 15404 (N.D. Ill. Oct. 6, 2000), squarely rejected the state's argument that plaintiffs' fee award should not include fees for the services of the

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[1] Neither is there any ethical limitation on such an agreement. *See* I.L.C.S. S Ct. Rules of Prof. Conduct, RPC Rule 5.4 ("a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter").

[2] As explained in Plaintiffs' fee petition, because there are no Illinois cases discussing the fee-shifting provision of the ICRA and because the ICRA is based in significant part on the fee-shifting provision of 42 U.S.C. § 1988, federal cases interpreting that fee-shifting statute provide persuasive authority to guide this court's analysis of the ICRA. (Plaintiffs' Pet. For An Award of Attorneys' Fees, Costs, and Expenses, 7).

law firms of Schiff, Hardin & Waite and Mayer, Brown & Platt, that successfully litigated, alongside the RBF, because those firms agreed to contribute their fees to the RBF. *Id.* at *25-26. The court refused to draw an artificial distinction between nonprofit legal organizations - for whom the ability to seek fee awards under 42 U.S.C. § 1983 even where the organizations do not charge fees to their clients was undisputed - and law firms that undertake civil rights cases on a *pro bono* basis. *Id.* at *25.[3] Accordingly, the court ultimately concluded that it had "no basis for categorically denying fees to a plaintiffs' private counsel." *Id.* at *26; *see also Alexander S. ex rel. Bowers v. Boyd*, 929 F. Supp. 925, 932-35 (D.S.C. 1995) (law firm entitled to fees for its work under § 1988 despite its decision to represent plaintiffs on a *pro bono* basis and to donate a substantial portion of its fee award to a local charity). Other federal courts have concluded that a law firm's *pro bono* undertaking of an action without any expectation of compensation for its

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[3] The United States Supreme Court held in *Blum v. Stenson*, 465 U.S. 886 (1984), that a successful civil rights plaintiff's representation by a nonprofit organization rather than private counsel had no bearing on the calculation of fee awards under § 1988. *Id.* at 893-94 (rejecting the Solicitor General's argument that a bifurcated fee award standard, awarding cost-based fees to nonprofit organizations and market rate-based fees to private counsel, was necessary to prevent windfalls to nonprofit civil rights attorneys). In reaching this conclusion, the Supreme Court relied on cases where it concluded the courts had properly applied the standard for awarding attorneys' fees under § 1988. *See id.* at 893-85. In one of those cases, the court found that it "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." *Id.* at 895 (quoting *Stanford Daily*, 64 F.R.D. 680, 681 (N.D. Cal. 1974)). The Court reasoned that the identity of plaintiff's counsel – whether a nonprofit or private counsel – was not "legally relevant" to the determination of the reasonable amount of fees to be awarded because "[i]t is in the interest of the public that . . . law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees." *Blum*, 465 U.S. at 895 (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974)).

work did not warrant denial of attorneys' fees. *See, e.g., Witherspoon v. Sielaff*, 507 F. Supp. 667, 670 (N.D. Ill. 1981).

The holdings of *K.L.*, *Alexander S.*, and *Witherspoon* directly apply to this case and support this Court ordering an award of fees to Plaintiffs that reflects the value of the legal work performed by both the RBF and Jenner. The issue is not the motivation or expectations of counsel, nor the ultimate disposition of the fees by counsel. The proper focus is to provide a reasonable fee based on the conventional market for private clients obtaining legal services from private counsel. *See K.L.*, 2000 U.S. Dist. LEXIS 15404, at *25-26.

Accordingly, the Court's order of an award of fees to Plaintiffs should be made without reference to Jenner's in-kind donation of legal services or its donation of the attorneys' fees for its work to the RBF.

III. Awarding Fees for the Work of Plaintiffs' Cooperating Counsel Will Advance the Underlying Policy Goals of the ICRA.

An order of a fully compensatory fee award advances the underlying policy objective of the fee-shifting provision of the ICRA: a) facilitates the private enforcement of civil rights laws; and b) deters future unlawful conduct. *See* Plaintiffs' Reply Memor. in Supp. of their Petition for Fees at pp. 6-10 ("Plaintiffs' Reply"). In successfully obtaining the relief sought by Plaintiffs, Plaintiffs' counsel acted as private attorney generals in the vindication of important constitutional rights by forcing the State to reevaluate its unconstitutional practices in the issuance of birth certificates. A fully compensatory fee award against the State similarly facilitates the private enforcement goal of the ICRA by serving as a powerful and effective financial deterrent to constitutional violations. For these reasons, the Court should award Plaintiffs' the full

amount of fees to which they are entitled for work performed by both the RBF and Jenner in order to further the underlying policy objectives of the ICRA.

The incentive for some private attorneys will be to personally profit from court-awarded attorneys' fees under the ICRA. However, it would be a disservice to the bar to penalize attorneys whose motives for providing services are more altruistic – securing funds for the not-for-profit organization that sponsored the litigation and provided valuable assistance to the private lawyers in their joint legal effort. This collaboration of law firms and nonprofit legal organizations is vital to the continued private enforcement of constitutional rights. Law firms, through their commitment to promoting the culture of *pro bono* service in the private sector, oftentimes provide critical resources and support necessary to further the work of nonprofit legal organizations. In turn, nonprofit legal organizations such as the RBF – an organization that is committed to the advancement of civil rights and civil liberties – provide substantive knowledge and expertise in particular areas, pay the costs of litigation associated with enforcing civil and constitutional rights, ensure continuity of representation, and have available the national resources that are often necessary to litigate complex civil rights cases. Consequently, the joint efforts of law firms such as Jenner and nonprofit legal organizations such as the RBF encourage and foster *pro bono* service by nonprofit and for-profit legal organizations alike in private enforcement cases.[4]

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[4] Indeed, the kind of cooperating counsel agreement that exists between RBF and Jenner – whereby a law firm works alongside a nonprofit legal organization to provide *pro bono* legal services and agrees that the nonprofit will receive fees for the firm's work – is a common practice throughout Illinois and the nation and helps RBF to fund future civil rights litigation. (Supplemental Affidavit of Harvey Grossman, attached hereto as Exhibit A).

The court in *Witherspoon* found that incentive to represent civil rights plaintiffs is served by an award of fees, even if counsel have agreed to act *pro bono* in the case where fees are sought:

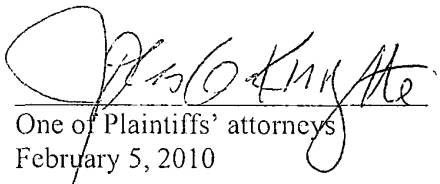
> "Pro bono services by members of the Bar provide an invaluable service to the less fortunate in our society and, thereby, to a society as a whole. Congress clearly intended to encourage this tradition of service in the field of civil rights enforcement. Thus, even though individual attorneys or law firms may have the financial resources to absorb the costs of pro bono services, they are entitled to a fee award to encourage future service by them and promote greater respect for our civil rights by all."

Witherspoon, 507 F. Supp at 670. A fully-compensatory award in this case similarly creates an incentive for future collaborative civil rights enforcement work, for Jenner and for RBF.

The legislative history for the ICRA offers an additional reason for a fully compensable award of attorney's fees to counsel who are representing a plaintiff *pro bono* – the deterrence of future unlawful conduct by the government. *See* Plaintiffs' Reply at p. 8. The *Witherspoon* court relied on this same policy to support an award under § 1988 of fees to *pro bono* counsel, finding that the award of fees serves a crucial deterrent function by "provid[ing] additional and by no means inconsequential assurance that agents of the State will not deliberately ignore (constitutional) rights." 507 F. Supp. at 669 (quoting *Carey v. Piphus*, 435 U.S. 247, 258 n. 11 (1978)).

Thus, it is clear that this Court should award Plaintiffs the full amount of reasonable fees to which they are entitled, including for the work done on behalf of the Plaintiffs by both the RBF and Jenner, in order to advance the important policy objectives of the ICRA.

Respectfully submitted,



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON,	)	
Plaintiffs,	)	No. 09-CH-3226
	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,	)	3319
Defendant.	)	2870

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR PETITION FOR ATTORNEYS' FEES, COSTS AND EXPENSES

The Defendants have written to the court to provide the case of *Morawicz v. Hynes*, No. 1-09-0316, 2010 Ill. App. LEXIS 309 (Ill. App. Ct. Apr. 7, 2010), and this Court has requested supplemental briefing regarding the case's application to the pending fee petition.

In *Morawicz*, the Court of Appeals affirmed the circuit court's denial of plaintiffs' request for attorney fees, finding that "expenses in civil litigation against the State must be considered a subject matter in which the Court of Claims is given exclusive jurisdiction." 2010 Ill. App. LEXIS 309, at *17-*18. It did not address the question whether the current version of the Court of Claims Act ("CCA") or the legislature's passage of the Illinois Civil Rights Act of 2003 ("ICRA") established jurisdiction in the circuit court over prevailing plaintiffs' request for fees, costs, and expenses in a purely injunctive action against State officials under the Illinois Constitution.[1] As shown in Plaintiffs' previous briefs and below, this Court's jurisdiction is

[1] Jurisdiction over such a claim lies in the circuit court. *Maddux v. Blagojevich*, 233 Ill. 2d 508, 512 n.2 (2009); *Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004) (assuming jurisdiction); *Cahokia Nursing and Rehabilitation Center v. Illinois*, 59 Ill. Ct. Cl. 278 (2007) (stating that the Court of Claims has no power to grant injunctions against the State).

soundly grounded in the CCA as well as the language and legislative history of the ICRA, as evaluated according to prevailing legal doctrine. The *Morowicz* decision did not change these legal principles or the result in this case.[2] *See infra.* Part I. Moreover, Plaintiffs' fee petition should not be treated as a claim against the State at all. *See infra* Part II..

I. The CCA and the ICRA Established Jurisdiction in This Court.

A. The CCA and the language of the ICRA shows the legislature's intention that the circuit courts exercise jurisdiction over claims for fees, costs, and expenses in cases arising under the Illinois Constitution.

The Illinois General Assembly determines both the scope of sovereign immunity as well as the jurisdiction of the Court of Claims. *See Loman v. Freeman*, 229 Ill. 2d 104, 112 (2008) (noting that the 1970 Illinois Constitution abolished sovereign immunity, "[e]xcept as the General Assembly may provide by law," and that "[t]he Court of Claims Act . . . is the legislature's exercise of that grant of authority") (citations and quotations omitted). Even if Plaintiffs' claim under the ICRA for fees, costs, and expenses is a suit against the State (which Plaintiffs dispute, *see infra.* Part II), the Illinois General Assembly amended the CCA in 1997 to create jurisdiction in this Court by exempting fee claims from Court of Claims jurisdiction. Pub. Act 90-492, sec. 5, § 8(a), eff. Aug. 17, 1997 (1997 Ill. Laws 492).

In 1987, the Court of Appeals in *Kadlec v. Ill. Dep't of Pub. Aid*, 155 Ill. App. 3d 384 (1st Dist. 1987), interpreted the 1985 version of § 8(a) of the CCA which provided:

> "The court shall have *exclusive* jurisdiction to hear and determine the following matters:

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[2] The *Morawicz* court noted that "the circuit court rejected the sovereign immunity argument" of the State defendants. 2010 Ill. App. LEXIS 309, at *17. However, it did not explain the basis for the circuit court's ruling regarding fees or address the arguments made in this and the other briefs filed with this Court by the Plaintiffs. Moreover, the court relies on two decisions – *Williams v. Davenport*, 306 Ill. App. 3d 465 (1st Dist. 1999), and *Kadlec v. Ill. Dep't of Pub. Aid*, 155 Ill. App. 3d 384 (1st Dist. 1987) – that either support Plaintiffs' fee claim or are distinguishable. *See infra.* at pp. 3-4.

> (a) All claims against the State founded upon any law of the State of Illinois, *or* upon any regulation thereunder by an executive or administrative officer or agency, *other than* claims arising under the Worker's Compensation Act or the Workers' Occupational Disease Act, *or* claims for expenses in civil litigation."

Id. at 387 (quoting Ill. Rev. Stat. ch. 37, ¶ 439.8 (1985)) (emphasis in the original). The court concluded that attorney fees were "claims for expenses in civil litigation" and interpreted § 8(a) as a reservation of exclusive Court of Claims jurisdiction over fee claims, rather than an exception to it. *Id.* at 386-87.[3]

However, in 1997, § 8(a) was amended to read as follows:

> "The court shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the State founded upon any law of the State of Illinois, or upon any regulation thereunder by an executive or administrative officer or agency, *provided, however, the court shall not have jurisdiction* (i) to hear or determine claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation, or (ii) to review administrative decisions for which a statute provides that review shall be in the circuit or appellate court.

705 ILCS § 505/8(a) (emphasis added). Consequently, the *Kadlec* court's holding that attorney fee claims fall within Court of Claims jurisdiction is based on a prior version of the CCA. The Act, as currently written, plainly excludes attorney fee claims from Court of Claims jurisdiction. However, neither *Morawicz*, the case under discussion, nor *Williams* acknowledges the amendment, which clearly abrogated *Kadlec*. 306 Ill. App. 3d 465; 2010 Ill. App. LEXIS 309. Moreover, *Morawicz* and *Williams* are the only cases

[3] Although *Kadelc*'s interpretation of § 8(a) is moot due to legislative amendment, *see infra*, the Court of Claims disagreed with *Kadlec*'s interpretation. *Ardt v. Illinois*, 48 Ill. Ct. Cl. 429, *5-*6 (1996).

we could find that rely on *Kadlec*'s holding after the legislature amended Section 8(a) in 1997.

In addition, the Illinois General Assembly's passage of the ICRA waived sovereign immunity *and* established jurisdiction in this Court, rather than the Court of Claims, for cases arising under the Illinois Constitution. *Williams v. Davenport*, 306 Ill. App. 3d 465, 469 (1st Dist. 1999) ("To be outside the scope of the Court of Claims Act's jurisdiction the State must provide a waiver of immunity that has been expressed by specific legislative authorization and must appear in affirmative statutory language."). Therefore, in addition to the § 8(a) exception to Court of Claims jurisdiction, the passage of the ICRA expressed the legislature's intention that fee claims, such as Plaintiffs', should be heard in the circuit court.

The jurisdictional authority of circuit courts, as well as the Illinois Human Rights Commission ("Commission"), to exercise jurisdiction to award fees against the State under properly drafted fee-shifting statutes has been implicitly recognized, since circuit courts and the Commission have regularly awarded attorneys fees against the state pursuant to such statutes. *See, e.g.*, *Callinan v. Prisoner Review Bd.*, 371 Ill. App. 3d 272, 278 (3d Dist. 2007) (remanding to circuit court to apply correct standard in considering claim for attorney fees against state agencies pursuant to the Illinois Freedom of Information Act ("FOIA")); *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 204-05 (1st Dist. 1998) (remanding case to circuit court for hearing on FOIA fee petition against state officials); *Ill. Dep't of Corr. v. Ill. Human Rights Comm'n*, 298 Ill. App. 3d 536, 540, 543 (3d Dist. 1998) (affirming Commission's award of attorneys' fees against Department of Corrections); *Ill. State Bd. of Elections v. Ill. Human Rights Comm'n*, 291 Ill. App. 3d 185, 187 (4th Dist. 1997).

The decisions do not specify whether the Human Rights Commission or the circuit courts based their jurisdiction on § 8(a) of the CCA or on the fee statute that authorized the award of fees. What is clear is that a fee-shifting statute that clearly expresses the legislature's intent that fees be awarded against the State, such as the ICRA, *both* constitutes a waiver of sovereign immunity *and* provides for jurisdiction in the circuit courts to hear fee claims based on the statutes. The use of the word "state" in the statute was not necessary to waive immunity, nor was an explicit statement regarding circuit court jurisdiction necessary to exempt the fee claims from Court of Claims jurisdiction. *See, e.g., Callinan*, 371 Ill. App. 3d at 275 (quoting 2004 version of FOIA); *Ulrich*, 294 Ill. App. 3d at 201 (quoting 1994 version of FOIA); *Ill. Dep't of Corr.*, 298 Ill. App. 3d at 540, 543 (affirming Commission's award of attorney fees under fee provision that neither includes the word "state" nor specifically exempts the claim from Court of Claims jurisdiction); *Ill. State Bd. of Elections*, 291 Ill. App. 3d at 187 (same).[4]

The ICRA as well as Section 8(a) of the CCA evidence the legislature's clear intent to establish circuit court jurisdiction over the fee claims by a prevailing party in a case asserting violations of the Illinois Constitution. Such jurisdiction avoids splitting the fee claims from the underlying merits and achieves efficiency by allowing a single court with familiarity over the litigation to determine a reasonable fee based on "the degree to which the relief obtained relates to the relief sought." 740 ILCS § 23/5(c). Appellate courts apply a deferential standard of review when considering fee awards, since the trial court "is more familiar with the work the winning attorneys devoted to the case; review of a fee petition is a highly fact-specific exercise; and the district court has a full appreciation of both the factual and the legal history of the case."

[4] Upon finding a civil rights violation, the Commission may order the violating party to "[p]ay to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees . . .". 775 ILCS §§ 5/8A-104(G) & 5/8B-104(D).

Cruz v. Town of Cicero, 275 F.3d 579, 591-92 (7th Cir. 2001); *Tampam, Inc. v. Property Tax Appeal Bd.*, 208 Ill. App. 3d 127, 136-137 (2d Dist. 1991) (same) (citing *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988)). The trial court's familiarity with the work of winning attorneys offers an additional reason why circuit courts should retain jurisdiction over fee claims in cases seeking injunctive relief under the Illinois Constitution.[5] Accordingly, this Court has jurisdiction to rule on Plaintiffs' fee petition.

B. The legislative history of the ICRA shows that the General Assembly intended for jurisdiction to lie in the circuit court, not the court of claims.

Construing the ICRA to "ascertain and give effect to the intention of the legislature," *People v. Palmer*, 218 Ill. 2d 148, 156 (2006), shows that jurisdiction over an ICRA fee petition properly lies in the circuit court. Plaintiffs outlined the legislative history in Plaintiffs' Reply Memorandum in Support of Their Petition for Attorneys' Fees, Cost, and Expenses ("Reply") at pp. 6-10 to show the General Assembly's intention to waive sovereign immunity. This history also shows the Illinois legislature's goal that fee claims be heard in the circuit court.

The bill's sponsor, Sen. Harmon, explained during the Illinois Senate floor debate that the bill "facilitates private enforcement of civil rights laws by allowing the award of attorney fees to parties who prevail in litigation, brought under this new law or the Illinois Constitution, including those parties whose litigation causes a reversal of policy by the government." *H.B. 2330*, 93d Ill. Gen. Assem., Senate Proceedings, May 13, 2003, at 135. Similarly, in the House, ACLU legislative advocate Mary Dixon explained on behalf of sponsor Rep. Fritchey that the

[5] This Court should avoid "construing a statute in a manner that would lead to consequences that are absurd, inconvenient, or unjust." *People v. Isunza*, 396 Ill. App. 3d 127, 130 (2d Dist. 2009). To have an entirely new judge reason through the merits and then award attorneys' fees could not have been what the legislature enacted the ICRA.

law "facilitates the private enforcement of civil rights law by . . . allowing an award of attorneys' fees to parties who prevail in litigation." Ex. A to Reply at p. 1. The law "encourage[s] enforcement of civil rights laws" by allowing "access to courts to individuals who can't afford an attorney." *Id.* at p. 2. "People who do so are like private attorneys general, promote settlement of meritorious cases and deter future unlawful conduct." *Id.*

When the General Assembly enacted the ICRA, it did so with the knowledge that the CCA had been amended, *State v. Mikusch*, 138 Ill. 2d 242, 247-48 (1990) ("It is presumed that the legislature, in enacting various statutes, acts rationally and with full knowledge of all previous enactments"), and that courts had interpreted similar fee-shifting statutes, such as the Illinois Human Rights Act ("HRA") and FOIA, to create jurisdiction in the circuit court or the Illinois Human Rights Commission to decide claims for attorney fees. *People v. Hickman*, 163 Ill. 2d 250, 262 (1994) ("Where statutes are enacted after judicial opinions are published, it must be presumed that the legislature acted with knowledge of the prevailing case law."). When construing a statute, the court may "consider the purpose behind the enactment and the evils sought to be remedied . . . ." *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 79 (2009). Here, the ICRA fee provisions, like those of the HRA and FOIA, were intended to facilitate private suits against the State in order to deter illegal conduct. The General Assembly's goals behind the ICRA were the same as those of the HRA and FOIA. *See Callinan*, 371 Ill. App. 3d at 276 ("primary purpose of the [FOIA's] attorney fee provision is to prevent the sometimes insurmountable barriers presented by attorney's fees from hindering an individual's request for information and from enabling the government to escape compliance with the law.") (internal quotation and citation omitted); *Ulrich,* 294 Ill. App. 3d at 203 (FOIA "encourages requestors to seek judicial relief in the event of an unlawful withholding of records by government agencies").

It is unlikely that the General Assembly would have created an extra burden for plaintiffs seeking attorney fees under the ICRA that did not exist under the other statutes. The General Assembly's knowledge that circuit courts and the Illinois Human Rights Commission were exercising jurisdiction over attorney fee claims against the State under the similarly-worded fee provisions in the IRHA and FOIA shows that it intended for ICRA fee claims to also be heard in circuit court.

II. Plaintiffs' Fee Petition is Not a Claim Against the State, so Jurisdiction Properly Lies in the Circuit Court.

As discussed in Plaintiffs' Reply at p. 10, Dr. Arnold has no sovereign immunity against Plaintiffs' suit to restrain him from violating the Constitution or state law. That is true, because such a suit is not one against the State. *Herget Nat'l Bank of Pekin v. Kenney*, 105 Ill. 2d 405, 411-12 (1985). Since Plaintiffs' fee petition involves a supplemental claim to the original action to restrain Dr. Arnold, the ancillary fee claim is not one against the State. *See* Reply at pp. 11-

12. *See also People v. Carter*, 392 Ill. App. 3d 520, 525 (2d Dist. 2009). For that additional reason, jurisdiction properly lies in this Court rather than the Court of Claims.

Respectfully submitted,

One of Plaintiffs' attorneys
May 20, 2010

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON	)	
	)	No. 09-CH-3226
Plaintiffs,	)	Hon. Peter Flynn
v.	)	
DAMON T. ARNOLD, M.D. in his official capacity as State Registrar of Vital Records;	)	
Defendant.	)	

CERTIFICATE OF SERVICE

I, John A. Knight, an attorney, certifies that a copy of the foregoing Plaintiffs' Supplemental Memorandum in Support of Their Petition for Attorney Fees, Costs, and Expenses, was served upon the following parties by hand-delivery at or before 5:00 p.m. this 20th of May, 2010, to:

To: Meghan O. Maine
Peter C. Koch
Assistant Attorney General
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John A. Knight

APPEAL TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CHANCERY DIVISION

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON, Plaintiffs-Appellants, v. DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records, Defendant-Appellee.	)	No. 09 CH 3226 Hon. Peter Flynn Room 2408

NOTICE OF APPEAL

Plaintiffs-Appellants, Victoria Kirk, Karissa Rothkopf, and Riley Johnson appeal to the Appellate Court of Illinois, First Judicial District, the order entered in this matter by the Circuit Court of Cook County on March 18, 2019, denying Plaintiffs-Appellants' Corrected Petition for An Award of Attorneys' Fees, Costs, and Expenses.

By this appeal, Plaintiffs-Appellants will ask the Appellate Court to reverse the order of March 18, 2019 and for such other relief as the Appellate Court may deem proper.

DATED: April 15, 2019

Respectfully submitted,

/s/ John A. Knight
John A. Knight (#45404)
One of their attorneys

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CERTIFICATE OF SERVICE

I, John A. Knight, an attorney, hereby certify that I caused a copy of the foregoing NOTICE OF APPEAL to be served upon the following via email on April 15, 2019:

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/s/ John A. Knight

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

VICTORIA KIRK, ET AL.
Plaintiff/Petitioner

Reviewing Court No: 1-19-0782
Circuit Court No: 2009CH003226
Trial Judge: PETER FLYNN

v.

DAMON T. ARNOLD, M.D. ET AL.
Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT

COOK COUNTY, ILLINOIS

VICTORIA KIRK, ET AL.

Plaintiff/Petitioner

Reviewing Court No: 1-19-0782

Circuit Court No: 2009CH003226

Trial Judge: PETER FLYNN

v.

DAMON T. ARNOLD, M.D. ET AL.

Defendant/Respondent

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File Date: 6/12/2019 4:07 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

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No. 1-19-0782

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON,	)	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division
Plaintiffs-Appellants,	)	No. 2009 CH 03226
v.	)	Hon. Peter Flynn, Judge Presiding.
DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,	)	
Defendant-Appellee.	)	

NOTICE OF FILING

To: See attached Certificate of Service

PLEASE TAKE NOTICE that on October 30, 2019, I caused the attached **Plaintiffs-Appellants' Opening Brief And Appendix** in the above captioned case to be submitted to the Clerk of the Illinois Appellate Court, First Judicial District by using the Odyssey eFileIL system.

Dated: October 30, 2019

Respectfully submitted,

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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 30, 2019, he caused the **Notice of Filing** and **Plaintiffs-Appellants' Opening Brief And Appendix** to be submitted to the Clerk of the Illinois Appellate Court, First Judicial District by using the Odyssey eFileIL system. Pursuant to L.R. 39 and within five days of the acceptance of the electronically filed brief, he will cause six (6) copies of the file stamped brief to be delivered to the Clerk of the Illinois Appellate Court, First Judicial District via hand delivery.

He further certifies that he caused one copy of the above named filing to be served upon counsel listed below via the Court's efiling system, and upon the Court's acceptance of the electronically filed brief caused one copy to be served by depositing a copy of same, postage prepaid via First Class Mail, in a U.S. mailbox at 353 N. Clark Street, Chicago, IL:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Clifford W. Berlow
Clifford W. Berlow