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No. 1-19-0782

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

VICTORIA KIRK, KARISSA ROTHKOPF, and RILEY JOHNSON,	)	**Appeal from the Circuit Court of Cook County, Chancery Division**
Plaintiffs-Appellants,	)	
v.	)	**No. 09 CH 3226**
DAMON T. ARNOLD, M.D., in his official capacity as State Registrar of Vital Records,	)	**Hon. Peter Flynn Room 2408**
Defendant-Appellee.	)	

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF PRO BONO COUNSEL IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTRODUCTION

The Amicus Association of Pro Bono Counsel ("APBCo"), identified below, urges this Court to reverse the March 18, 2019 Order of the Circuit Court (the "Order") on Plaintiffs' petition for fees, to ensure that the law is clear that counsel who work on matters pro bono are still entitled to statutorily mandated fees. The Circuit Court did not consider the prevailing standards and guidance for law firms handling pro bono work, including whether and to what extent a representation is still considered pro bono when fees are sought and awarded. It also overlooked the crucial importance of such fee awards to vindicate and support equal access to justice. As a result, the Order wrongly concluded that the pro bono nature of the representation precluded an award of fees to Plaintiffs' pro bono counsel. For all the reasons set forth below, APBCo urges the Appellate Court to reverse the Circuit Court's Order.

INTEREST AND EXPERTISE OF *AMICUS CURIAE*

APBCo is a nonprofit membership organization comprised of full time, professional pro bono counsel and coordinators employed by major commercial law firms. APBCo works with its members to maximize the impact of law firms' pro bono work and to serve as the voice of the law firm pro bono community. APBCo currently has almost 180 members from more than 100 law firms, nationwide and internationally. The majority of the AmLaw 100 firms employ APBCo members. APBCo is uniquely positioned to advise the Court on the practices and policies governing fee awards in cases undertaken as pro bono representations. Collectively, our members have extensive experience in litigating fee award requests and are familiar with the relevant pro bono policies and rules that our firms follow.

RELEVANT BACKGROUND

Plaintiffs are transgender individuals whose requests to correct their gender on their birth certificates were denied by the State Registrar of Vital Records. Pls. Brief at 3. The denials were

based on restrictive policies requiring, for example, that a United States licensed surgeon complete gender affirming surgery, and that female-to-male transgender individuals have complicated genital surgery before changing their birth certificates. *Id.* Plaintiffs sued under the Illinois Constitution and the Illinois Civil Rights Act of 2003 ("ICRA"), 740 ILCS 23/1 *et seq.*, represented pro bono by counsel from the Roger Baldwin Foundation of the ACLU (the "ACLU") and the Chicago office of Jenner & Block ("Jenner"). *Id.* at 3; Order at 1. After Plaintiffs filed an amended complaint, the State provided Plaintiffs new birth certificates with the correct gender listed; soon thereafter, the Circuit Court dismissed the case as moot. Pls. Brief at 3; Order at 1.

Jenner and the ACLU moved for an award of fees and costs under the ICRA, 740 ILCS 23/5(c). Pls. Brief at 3–4. Section 23/5(c) 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:
>
> (1) Pursuant to subsection (b) [in a civil lawsuit against the offending unit of government for discrimination based on race, color, national origin, or gender]; 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.

740 ILCS 23/5(c) (emphasis added). During the hearing on the fee petition, Jenner stated its intent to contribute to the ACLU any fee award that Jenner might receive. Order at 1.

In March, the Circuit Court denied the petition, except for allowing Plaintiffs to recover $6,168 in costs and expenses. Order at 9. The Circuit Court based its decision on the pro bono nature of Plaintiffs' representation, characterizing an award of fees to pro bono counsel as "a windfall" that would "charge the taxpayers for a *gift*, in the amount of the legal fees plaintiffs did not incur, to recipients *plaintiffs' counsel* will select." *Id.*

ARGUMENT

I. The definition of and standards for pro bono services encourage law firms to seek and accept fee awards.

Under the widely-accepted definition of and standards for pro bono services, large law firms are explicitly encouraged to seek and accept statutory fee awards. APBCo members run pro bono practices at large law firms. To ensure consistency across the legal industry in terms of how pro bono is defined, they follow the same standards, particularly those set out by the Pro Bono Institute (PBI). These include its Law Firm Pro Bono Challenge®[1] Statement, the additional Commentary to the Statement of Principles, and PBI's published guidance on "What Counts"[2] as pro bono. As explained below, those standards not only allow, but encourage law firms to seek fees in appropriate cases.

PBI defines "pro bono" as follows:

> [A]ctivities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of (i) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means; (ii) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; and (iii) the provision of legal assistance to charitable, religious, civic, community, governmental, or educational

[1] The Law Firm Pro Bono Challenge® Initiative is an aspirational pro bono standard for large law firms developed by law firm leaders and corporate general counsel. *See Law Firm Pro Bono Challenge® Initiative*, PRO BONO INSTITUTE, *available at* www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge/ (last visited Oct. 28, 2019); *Law Firm Pro Bono Challenge® Statement*, PRO BONO INSTITUTE, *available at* http://www.probonoinst.org/wpps/wp-content/uploads/Law-Firm-Challenge-2017-1.pdf (last visited Oct. 28, 2019) [hereinafter Statement].

[2] PBI's "What Counts" compilation of questions and answers further interprets the Law Firm Pro Bono Challenge® Statement of Principles and provides guidance to PBI's member firms, APBCo members, and the entire law firm *pro bono* community on how to evaluate particular sorts of matters that a law firm might consider undertaking as *pro bono* public matters. *See generally Law Firm Pro Bono Project, "What Counts?,"* PRO BONO INSTITUTE, *available at* http://www.probonoinst.org/wpps/wp-content/uploads/Whatcounts2019-6-11.pdf (last visited Oct. 28, 2019) [hereinafter "What Counts?"].

> organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

Statement ¶ 7.

At the heart of PBI's definition of pro bono and related guidance is a strong interest in ensuring that law firm *pro bono* work furthers the public interest. PBI focuses particularly on the well-being and representation of those members of the public who could not seek redress for violations of their rights absent private law firms' willingness to take their cases on a pro bono basis. Pro bono efforts at large law firms are thus first and foremost directed at addressing "the unmet legal needs of the poor and disadvantaged in the communities we serve." *Id.* ¶ 1; *see also id.* ¶ 3 ("[Firms'] pro bono activities should be particularly focused on providing access to the justice system for persons otherwise unable to afford it.").

With this goal in mind, when considering whether it is appropriate to recover fees and costs in pro bono cases, large law firms consult PBI's guidance. On this issue, "What Counts?" specifically advises that "[t]he Challenge definition is designed to *encourage* law firms to seek awards of attorneys' fees in appropriate pro bono cases." "What Counts?" at 12 (emphasis added); *see also id.* ("If the firm originally accepted the matter in question on a pro bono basis, then an award of attorneys' fees will not change it from being a pro bono matter."). PBI explains:

> In handling cases in the public interest, law firms are acting as "private attorneys general," enforcing legal rights, promoting access to justice for those who would otherwise be unable to press their suits, and uncovering and deterring unlawful behavior. Seeking attorneys' fees, as well as damages or equitable relief, on behalf of pro bono clients increases the disincentives and deterrence benefits of these cases by making defendants who have acted unlawfully pay the full costs associated with their behavior. Accordingly, firms are encouraged to seek attorneys' fees and to request compensation at the usual and customary billing rates.

Id.; *see also Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) ("The award of fees to legal aid offices and other groups furnishing *pro bono publico*

representation promotes the enforcement of the underlying statutes as much as an award to privately retained counsel."); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (2003) ("Attorney's fees are the fuel that drives the private attorney general engine."). Accordingly, a great many of APBCo members' firms seek to recover fees and costs in pro bono matters when they are entitled to do so by statute.

PBI has issued specific commentary recognizing additional instances in which law firms' acceptance of a fee award does *not* disqualify a matter from being counted as pro bono. For example, "[p]ost-conviction capital appeals, . . . where firms contribute thousands of hours without compensation but may receive the limited fees available to counsel under the Criminal Justice Act, are clearly pro bono cases for persons of limited means." *Law Firm Pro Bono Challenge® Commentary to Statement of Principles*, PRO BONO INSTITUTE 7, *available at* http://www.probonoinst.org/wpps/wp-content/uploads/Law-Firm-Challenge-Commentary-2017-1.pdf (commenting on Principle 7) (last visited Oct. 28, 2019) [hereinafter Commentary to Statement of Principles].

PBI's commentary also notes that fee awards "in an employment discrimination or environmental protection case originally taken on by a firm as a pro bono matter and not in the course of the firm's ordinary commercial practice would not disqualify such services from inclusion as pro bono work." *Id.*; *see also People v. Smith*, 2015 Ill. App. (1st) 123708-U, ¶ 27 (explaining that pro bono representation "is not necessarily limited to free legal services") (citing BLACK'S LAW DICTIONARY 1240–41 (8th ed. 2004)). And, in such cases, PBI "*strongly* encourage[s] [the firms receiving fees] to contribute an appropriate portion of those fees to organizations or projects that provide services to persons of limited means." Commentary to Statement of Principles at 7 (emphasis in original).

An award of attorneys' fees in this case is equally appropriate. Plaintiffs are typical, appropriate, pro bono clients. Jenner lawyers acted as "private attorneys general" when they challenged the State of Illinois's practices and made their clients the "prevailing party" in the litigation. And the ICRA specifically *mandates* reasonable fees, costs, and expenses based on Jenner's work and does so with *no* carve outs because the representation was pro bono. 740 ILCS 23/5(c); *see also* Pls. Brief at 8–9.

The Circuit Court erred in rejecting a fee award, claiming it would create a "windfall." Order at 9. Setting aside the fact that Section 23/5(c) does not, on its face, prohibit "windfalls," *see* Pls. Brief at 14, a fee award here is not a "windfall" to Jenner or the ACLU, nor would it undercut the pro bono nature of their work. Rather, a fee award would recognize the full economic costs of the wrongdoing, properly require the state to pay the full price of its prior unlawful conduct, and further the deterrence policy acknowledged by PBI and the courts. *See United Equitable Ins. Co. v. Michele*, 2019 Ill. App. (1st) 180087-U, ¶ 39 (rejecting argument that defendants represented by pro bono counsel were not entitled to award of attorney fees and costs because such fee awards "discourage … misconduct" and "plaintiff should not benefit from the fact [of defendants' pro bono representation]"); *City of Chicago v. Illinois Commerce Comm'n*, 187 Ill. App. 3d 468, 470–71 (1989) (discussing Illinois state and federal appellate court precedent holding that "fees and expenses may not be reduced because appellant's attorney is employed or funded by a civil rights organization … or because the attorney does not exact a fee").

In sum, the Circuit Court's Order erroneously overlooked the statute, relevant pro bono standards and guidance, and the policy underlying fee awards, by which plaintiffs' counsels' fee award was appropriate.

II. Both the prospect, and the ultimate granting, of fee awards to *pro bono* counsel are critical for equal access to justice.

Pro bono counsel's eligibility for and receipt of fee awards are crucial in promoting equal access to justice—they ensure that pro bono and private representation are equally effective and support the work of legal services organizations. Along with encouraging enforcement of legal rights by "private attorney generals," the prospect of a fee award also helps to resolve disputes more efficiently by incentivizing litigants to act rationally, assess their positions, and strategize in ways they might not if they did not face the possibility of having to eventually pay fees. *See, e.g.*, "What Counts?" at 12. For example, the chance that a defendant could face a fee award may well discourage unnecessary delay or obstructive tactics (frivolous motions, for example) and provide the leverage in settlement discussions that would normally exist, in cases where the other side might obtain attorneys' fees. *See, e.g.*, *Rickels v. City of S. Bend, Ind.*, 33 F.3d 785, 787 (7th Cir. 1994) (explaining that fee shifting "encourages [the] voluntary resolution [of disputes] and curtails the ability of litigants to use legal processes to heap detriments on adversaries… without regard to the merits of the claims").

Taking fees off the table in cases involving pro bono counsel skews the incentives and sends the wrong message to defendants. Under the Circuit Court's reasoning, parties represented by pro bono counsel would have less leverage than, and face a distinct disadvantage compared to, those who can afford counsel; and the ultimate effect would frustrate the intent of fee and cost recovery statutes and unfairly reward the adjudged wrongdoer. The availability of fee awards for pro bono counsel promotes fair and equal representation for indigent and affluent parties alike.

And in practice, law firms typically donate at least some portion of fee awards to legal services organizations—which was Jenner's stated intent—to help fund and facilitate the availability of critical legal services to indigent or low-income individuals and communities. As

noted, PBI not only recognizes that the recovery of fees does not disqualify a matter from consideration as pro bono, but also strongly encourages firms to redistribute fee awards to legal services organizations. Commentary to Statement of Principles at 7. Firms thus often agree to donate some or all of a fee and cost award, that exceeds their out-of-pocket expenses, to the legal services organization co-counseling on the case or to other legal services organizations. *See* ABA Formal Op. 93–374 (1993) (finding that it is not ethically improper for a lawyer who undertakes pro bono litigation to agree in advance to share court-awarded fees with the referring nonprofit organization).

It is commonplace for our members' firms to donate some portion of their fee awards, and legal services organizations have come to depend on these recovered fees as a crucial source of revenue as their funding from other sources has been cut or otherwise declined. *See, e.g.*, Commentary to Statement of Principles at 3 ("Studies routinely report that more than 80% of the civil legal needs of the poor are not presently being met. The resources and expertise of leading law firms should be brought to bear to assist the most vulnerable of our citizens in securing their rights."); *Legal Aid*, LAWYERS TRUST FUND OF ILLINOIS, *available at* http://ltf.org/legal-aid/ (explaining that "demand for legal services continues to exceed supply") (last visited Oct. 28, 2019); Press Release, Chicago Bar Foundation, Investing in Justice Campaign Sets New Record, Leverages Hundreds of Thousands More (May 30, 2019), *available at* http://chicagobarfoundation.org/pdf/campaign/press-release.pdf (noting that "more than half of low-income and disadvantaged people in the Chicago area" cannot obtain "crucial legal help due to a shortage of legal aid resources"). It is no surprise that the ACLU and Jenner, organizations known for their longstanding traditions of exceptional pro bono work, sought fees here, and that Jenner intended to donate any award to the ACLU.

As recovering attorneys' fees in pro bono cases is standard industry practice for large law firms, firms nearly uniformly assess whether a fee award would negate the characterization of a matter as pro bono. Law firms look to PBI guidance to determine what may properly "count" as pro bono when externally reporting their pro bono hours to various organizations that track those metrics such as PBI, The American Lawyer, national, state, and local bar associations, and local legal services organizations. As firms self-regulate with respect to their pro bono work in accordance with PBI guidance, courts need not evaluate the size, wealth, or motivations of pro bono counsel in taking on a case before applying time-tested criteria for awarding fees.

Consistent with PBI guidance, and as explained more fully in Plaintiffs-Appellants' submission, courts nationwide and in Illinois have recognized that it is proper to award statutory fees and costs to prevailing parties who are represented by pro bono counsel, no matter if their counsel took on the matter without the expectation of a fee. *See, e.g.*, *McLean v. Arkansas Bd. of Educ.*, 723 F.2d 45, 48–49 (8th Cir. 1983) ("Fee awards ultimately benefiting legal services organizations, over and above their general or specific fund-raising efforts, help to ensure the continued existence of such organizations and their ability to represent other indigent parties who cannot afford private legal representation."); *Witherspoon v. Sielaff*, 507 F. Supp. 667, 669–70 (N.D. Ill. 1981) ("[E]ven 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."); *United Equitable Ins. Co.*, 2019 Ill. App. (1st) 180087-U, ¶ 39.

In short, the overall principle articulated by PBI is that the award, and acceptance, of statutory attorney's fees and costs to which prevailing parties are legally entitled, does not mean that the legal services provided were not pro bono. Contrary to the Circuit Court's Order, a fee

award in this case is not a "*gift* [charged to taxpayers and given] to recipients *plaintiffs' counsel* will select." Order at 9 (emphases in original). Rather, it is a well-established, statutorily-mandated, and industry-wide practice that helps enforce legal rights and promote fair access to justice, both by allowing for equal leverage in advocacy by pro bono and paid counsel and helping to support the availability of legal services. There is no reason to disallow Jenner's and the ACLU's recovery of an award of fees (and costs) incurred in prosecuting this action simply because they undertook this representation on a pro bono basis. The statute does not support such a decision nor do the principles articulated above.

CONCLUSION

For these reasons, the Association of Pro Bono Counsel respectfully urges this Court to reverse the decision of the Circuit Court.

Respectfully submitted

Association of Pro Bono Counsel

By: /s/ *Matthew Carter*

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 10 pages.

Dated: November 1, 2019

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Defendant-Appellee.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on November 1, 2019, the undersigned filed with the Clerk for the Appellate Court of Illinois, First District the Appearance of Counsel on behalf of the Association of Pro Bono Counsel and proposed Brief *Amicus Curiae* in Support of Plaintiffs-Appellants and Reversal. Copies of these items are herewith served upon you.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I electronically filed the Appearance of Counsel and proposed *Amicus Curiae* Brief of the Association of Pro Bono Counsel in Support of Plaintiffs-Appellants and Reversal with the Clerk of the Illinois Appellate Court, First Judicial District.

I further certify that on November 1, 2019, an electronic copy of the Appearance of Counsel and proposed *Amicus Curiae* Brief of the Association of Pro Bono Counsel in Support of Plaintiffs-Appellants and Reversal is being served either through the Court's electronic filing manager or an approved electornic filing service provider on the counsel listed below, and upon the Court's acceptance of the electronicly filed brief, by electronic mail.

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Under penalties 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.

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