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

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

Introduction

In August 2009 the Illinois legislature amended the Illinois Lobbyist Registration Act, 25 ILCS 170, Pub. Act 96-555 at § 65 ("the amended Act"). Effective January 1, 2010, the amended Act would impose on plaintiffs and others similarly situated a tax on the rights of speech, association and petition in violation of the First Amendment to the United States Constitution. It would also favor certain types of speakers over plaintiffs and others by exempting the favored speakers from the tax, fees and other requirements of the amended Act, in violation of the First and Fourteenth Amendments.

Plaintiffs filed a Verified Complaint ("Complaint") challenging portions of the amended Act. The facts described below are supported by the sworn Complaint and by the provisions of the amended Act. Applying settled constitutional law to those facts, the Court should enter a temporary restraining order enjoining implementation of the fee provisions of the amended Act before they take effect on January 1, 2010. It should also preliminarily enjoin those provisions pending the conclusion of this lawsuit.

Factual Background

A. Parties.

Plaintiff the American Civil Liberties Union of Illinois ("ACLU") is a non-profit, non-partisan, statewide organization with more than 20,000 members and supporters dedicated to protecting the civil rights and civil liberties guaranteed by the Constitutions and civil rights laws of the United States and the State of Illinois. The ACLU engages in substantial legislative advocacy. It is a Section 501(c)(4) organization under the Internal Revenue Code. (Compl. ¶4.) Plaintiff Mary Dixon ("Ms. Dixon") is employed by the ACLU, and has served as its full-time Legislative Director from 1992 to the present. (*Id.* ¶5.)

Defendant, Jesse White, is the Illinois Secretary of State ("the Secretary"). He bears the statutory responsibility of administering the amended Act, which includes collection of the challenged registration fee under the amended Act. He is sued in his official capacity. (Compl. ¶6.)

B. The Amended Act.

1. Overview

In general terms, the Illinois Lobbyist Registration Act, 25 ILCS 170, requires "lobbyists" and "lobbying entities" to register with the Secretary, pay a registration fee, and file certain reports. The law was amended in August 2009, Pub. Act 96-555 at § 65, and those amendments will become effective on January 1, 2010. It defines the terms "lobby" and "lobbying" broadly to encompass any communication with the executive or legislative branch of state government "for the ultimate purpose of influencing" their respective actions. 25 ILCS 170/2(e). (Compl. ¶¶11-12.)

Subject to certain exemptions, the Act requires lobbyists and lobbying entities to register with the Secretary. 25 ILCS 170/3(a). Each lobbyist and lobbying entity must register before lobbying, and file a statement by January 31 and July 31 of every year containing several items of information about the registrant (including an annual picture of the registrant), plus a description of the "executive, legislative, or administrative action in reference to which such [lobbying] service is to be rendered," and a list of each executive and legislative branch agency the registrant expects to lobby during the registration period. 25 ILCS 170/5. (Compl. ¶¶13-14.)

2. Fee provisions

Both before and after the recent amendments, the statute requires registrants to pay an annual fee to the Secretary. Specifically, Sections 3(a) and 5 of the Act require that if a non-profit organization employs a registered lobbyist, then there must be two payments of the registration fee, one for the lobbyist and one for the lobbying entity. (Compl. ¶¶15-16.)

Before the recent amendments, the Act required an annual payment of: (a) $150 by entities qualified under Section 501(c)(3) of the Internal Revenue Code; and (b) $350 by all other entities. These payments were allocated as follows: $50 to "the Lobbyist Registration Administration Fund for administration and enforcement of this Act," which was "intended to be used to implement and maintain electronic filing of reports under this Act"; "the next $100" was "deposited into the Lobbyist Registration Administration Fund for administration and enforcement of this Act"; and "[a]ny balance" – meaning the additional $200 paid by non-501(c)(3) organizations – was "deposited into the General Revenue Fund." On information and belief, this $200 was not used to administer and enforce the Act. (Compl. ¶¶17-18.)

The amended Act would increase to $1,000 the annual fee for all registering persons and organizations. This comprises more than a six-fold fee increase for 501(c)(3) organizations, and nearly a three-fold fee increase for all other registrants, including non-profits that are not 501(c)(3) organizations (such as the ACLU). The allocation is as before, except that the entire $650 increase is "deposited into the Lobbyist Registration Administration Fund to be used for the costs of reviewing and investigating violations of this Act." 25 ILCS 170/5. (Compl. ¶19.) Thus, the amended Act allocates the $1,000 fee as follows: $200 to the General Revenue Fund, as before; and $800 to the Lobbyist Registration Administration Fund, comprised of the $150 allocation under the prior Act, plus the additional $650 under the amended Act. (*Id.* ¶20.)

The amended Act would require a non-profit advocacy organization employing a "lobbyist" to pay two $1,000 fees, one for the organization and one for the employee. Additional $1,000 payments would be required for any additional lobbyist employee. Upon information and belief, $2,000 far exceeds the amount it actually and reasonably costs the Secretary to ensure that a non-profit advocacy organization and its registered lobbyist employee comply with the amended Act. This amount far exceeds registration fees charged by other states to a non-profit advocacy organization and its registered employee, none of which charge more than $365. In 42 states, such fee is $150 or less. The federal government charges no lobby registration fee. Even

before the proposed increase, Illinois charged the most. The prior Act required $700 to register a non-profit advocacy organization and its lobbyist employee (although the amount was only $300 if the organization was qualified under Section 501(c)(3) of the Internal Revenue Code. (Compl. ¶¶19-22.)

3. The amended Act's exemptions for media and religion

Section 3(a) of the amended Act exempts ten categories of persons and organizations from the $1,000 registration fee, and also from the Act's substantial reporting and disclosure requirements. Two of the exemptions are at issue here. In essence, they provide that certain media and religious organizations and individuals may advocate for legislative or executive action without paying a fee, while others organizations and individuals – including the ACLU and Ms. Dixon – must pay a fee to advocate on precisely the same issues.

a. The media exemption

Section 3(a)(2) of the amended Act would exempt: "Persons or entities who own, publish, or are employed by a newspaper or other regularly published periodical, or who own or are employed by a radio station, television station, or other bona fide news medium that in the ordinary course of business disseminates news, editorial or other comment, or paid advertisements that directly urge the passage or defeat of legislation." Under this exemption, such news organizations and their owners, publishers and employees can and do lobby state legislators and officials without paying the $1,000 registration fee or filing required reports and photographs, while many non-profit advocacy organizations (including the ACLU) engage in legislative advocacy on these same issues, but without an exemption from this $1,000 registration fee or the other reporting requirements. (Compl. ¶¶24-25.)

b. The religion exemption

The amended Act also grants a preference to religious speech. Section 3(a)(7) would exempt: "Any full-time employee of a bona fide church or religious organization who represents that organization solely for the purpose of protecting the right of the members thereof to practice the religious doctrines of that church or religious organization, or any such bona fide church or religious organization." In other words, this exemption extends to persons who (a) work full-time for a religious organization, and (b) work exclusively to advance "the right of the members [of that religious organization] to practice . . . religious doctrines . . . ." (Compl. ¶26.) This religious fee waiver extends, for certain full-time employees of religious organizations, to

legislative advocacy in support of the free exercise of religion or of religiously motivated issues. Many other non-profit advocacy organizations (including the ACLU) engage in legislative advocacy on these same issues, sometimes in support of and sometimes in opposition to positions taken by the religious organizations – but without a waiver of this $1,000 registration fee or reporting requirements. (*Id*. ¶¶27-28.)

C. Application of the Act to Plaintiffs

For decades, the ACLU has dedicated substantial resources towards advocacy on matters of public concern before the Illinois General Assembly, the Illinois Governor, and various Illinois executive officials. For example, the ACLU and Ms. Dixon every year engage in legislative advocacy regarding scores of bills before the Illinois General Assembly on a broad range of issues, including but not limited to AIDS/HIV privacy, criminal justice, education, free speech, foster care, gender equality, LGBT rights, health care facilities, immigration, law enforcement, national security, prisons, racial justice, religious liberty, and reproductive freedom. Additionally, in light of the amended Act's exemption from the fee for certain advocacy by for-profit and non-profit media organizations, it is pertinent that the ACLU and Ms. Dixon engage in legislative advocacy in support of freedom of the press, and the ACLU also regularly publishes many times per year printed and electronic newsletters and educational materials and maintains a website, which provide updates and substantive discussions of current civil liberties issues. (Compl. ¶¶29-31.)

To carry out its legislative advocacy, the ACLU for more than 25 years has employed a legislative advocate, and from 2005 to the present has employed two legislative advocates. In the future, the ACLU will continue to engage in substantial legislative and executive advocacy, including by means of employing registered lobbyists to do so. The ACLU pays the fee required by the amended Act, both for itself and for its registered lobbyist employees. In the future, it will continue to do so. (Compl. ¶¶32-34.)

In 2009, the ACLU paid $1,050 to register itself, Ms. Dixon, and the ACLU's second employee who is a registered lobbyist. In 2010, the amended Act would require the ACLU to pay $3,000 to register itself and these two persons. Every dollar that the ACLU spends on the registration fee required by the amended Act is a dollar diverted from what the ACLU can pay for legislative and executive advocacy and its other activities. For example, the fee diminishes the ACLU's capacity to print written legislative advocacy materials, and to upgrade technologies

that help mobilize ACLU members to participate in the legislative process. (*Id.* ¶¶35-37.)

The Court Should Enter a TRO and a Preliminary Injunction

The amended Act is unconstitutional. It taxes protected First Amendment activity and it exempts certain types of speakers from the tax. As such it violates the First and Fourteenth Amendments. The fee provisions should be temporarily restrained before they take effect on January 1, 2010, and preliminarily enjoined thereafter pending final judgment on the merits.

Plaintiffs satisfy all of the requirements for a TRO and a preliminary injunction: (1) they have a reasonable likelihood of success on the merits of the underlying claims; (2) they have no adequate remedy at law; (3) they will suffer irreparable harm if the injunctive relief is denied; (4) the irreparable harm they will suffer without the injunction is greater than the harm that the defendants will suffer if the injunction is granted; and (5) temporary injunctive relief will not harm the public interest. *See Kiel v. City of Kenosha*, 236 F.3d 814, 815-16 (7th Cir. 2000); *Ayres v. City of Chicago*, 125 F.3d 1010, 1013 (7th Cir. 1997). The great harm to plaintiffs in the absence of injunctive relief – and also to the hundreds of members of the putative classes of non-profit advocacy organizations and their registered lobbyist employees – requires such relief. *See Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1393 (7th Cir. 1992) ("The greater the harm to the plaintiff if the injunction is denied, the less of a showing that his case has merit need he make to get the injunction . . . ."). Here, plaintiffs have a great likelihood of success on the merits, and they more than adequately meet the other elements for relief.

A. The Plaintiffs Have a Reasonable Likelihood of Success on the Merits.

Plaintiffs are likely to succeed on the merits with respect to their challenge to both the fee amount and the religious and media organization exemptions. The $1,000 fee set forth in the amended Act, which applies to each non-profit entity and each employee of the entity hired to engage in lobbying, violates the First Amendment because it is not rationally related to the costs of administering the amended Act and constitutes a tax on First Amendment activity. Indeed, on its face, 20% of the each fee ($200) is allocated to the General Revenue Fund and does not even purport to be related to administration. In addition, the media and religious exemptions violate the First and Fourteenth Amendments because they make impermissible distinctions among persons engaged in protected activity, and the religious exemption creates an impermissible endorsement of religion. These constitutional violations are clear under long-standing Supreme

Court law, and plaintiffs' likelihood of success is far higher than the threshold showing normally required for preliminary injunctive relief.

1. The $1,000 fee is not rationally related to the costs of administering the Act.

"A state may not impose a charge for the enjoyment of a right guaranteed by the Bill of Rights." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Lobbying is such a right. *See Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 326 (5th Cir. 1994) ("Lobbying . . . is activity protected by the First Amendment."); *Moffett v. Killian*, 360 F.Supp. 228, 231 (D. Conn. 1973) ("lobbyists and their employers . . . have First Amendment rights"). *See also United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J. dissenting) ("The First Amendment forbids Congress to abridge the right of the people 'to petition the Government for a redress of grievances.'"). While the state may collect a reasonable, non-burdensome fee to defray the cost of administering permissible regulation of protected speech, the fee collected must bear a rational relationship to the administrative costs. *South-Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868, 897-98 (7th Cir. 1991); *Joelner v. Village of Washington Park*, 378 F.3d 613, 626 (7th Cir. 2004); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2nd Cir. 1983). The government bears the burden of proving that its fee is directly related to its costs. *South-Suburban Housing Ctr.*, 935 F.2d at 898; *Covenant Media of Illinois v. City of Des Plaines*, 2005 WL 2277313, *5 (N.D. Ill. 2005) (Lefkow, J.).

The fee provisions here bear no rational relationship to the costs of administering the lobbying registration and disclosure provisions of the amended Act. Indeed, as expressly required by both the current and amended Acts, $200 of each registration fee is deposited into the General Revenue Fund, not the Lobbyist Registration Administration Fund. 25 ILCS 170/5. Moreover, under the amended Act, even Section 501(c)(3) organizations would be required to pay into the General Revenue Fund in order to advocate to a state official. Thus, the Act is plainly unconstitutional on its face to the extent it imposes and collects a $200 tax on First Amendment activity that is expressly not used to defray the cost of administering the Act.

Further, it is likely that the Secretary will be unable to meet his burden of proving that the remaining $800 amount of each fee not expressly (and unconstitutionally) diverted to the

General Revenue Fund is rationally and actually related to the costs of administering the amended Act. The amendments would increase the payments into the so-called "Lobbying Registration Administration Fund" by $650, which represents an increase of more than 533% over the $150 per person deposited into the Lobbyist Registration Administration Fund under the current Act. It is highly unlikely that the costs of administration have increased so dramatically.

Indeed, this increase renders Illinois an anomaly. No other state in the country charges more than $365 for the lobbying registration of a non-profit advocacy organization plus its lobbyist employee. Indeed, 42 states charge $150 or less for such registration,[1] and only 7 states charge between $151 and $365.[2] This shows that the registration fee here is not rationally

[1] Al. St. § 36-25-18(a) ($100/year/lobbyist); Ariz. St. § 41-1232(C), (E) ($25 biennial fee for principals); Ark. St. § 21-8-601 through 21-8-607 (no fee); Cal. Government Code 86102 (no more than $25/year/lobbyist); Col. Rev. St. § 24-5-303(1.3), (1.5), (6.3) (no more than $50/year); http://www.sos.state.co.us/pubs/lobby/2008-2009_Professional_Lobbyist_Manual.pdf (waiving fee for lobbyists representing non-profits); Conn. St. §§ 1-94, 1-95(a)-(b) ($25 biennial fee per employer and lobbyist); Del. Code §§ 5831-5837 (no fee); Florida, Fla. St. § 112.3215(4) (no more than $40 per organization); Fla. Admin. Code 34-12.200 ($25/year for each represented principal); Ga. St. § 21-5-71(f)(1)-(2) ($25/year/lobbyists who represent nonprofits); Haw. Rev. St. § 97-2 through 97-7 (no fee); Id. St. § 67-6617 ($10/year for each employer represented); Ind. Code § 2-7-2-1 ($50/year for nonprofits and their lobbyists); Iowa Code §§ 68B.36-68B.38 (no fee); Ky. Rev. St. §§ 6.807(2), 6.809 ($250 biennial fee for all employers of lobbyists); La. Rev. St. § 24:53(I) ($110/year/lobbyist); Mass Gen. Laws, Ch. 3, §§ 39, 41 ($100/year/lobbyist); Mich. St. §§ 4.417-4.431 (no fee); Minn. St. §§ 10A.03-10A.38 (no fee); Miss. Code § 5-8-5(1) ($50/year per lobbyist and per client); Mo. St. § 105.473(1) ($10/year/lobbyist); Mt. St. § 5-7-103(1), (5) ($150 biennial fee per lobbyist); Nev. Code § 218.932(1) (fees may be charged); http://www.leg.state.nv.us/Lobbyist/SessionData/75/Docs/11%202009%20Packet%20Mem.pdf ($120/year/lobbyist); N.H. St. 15:1 ($50/year/lobbyist); N.M. § 2-11-3 ($25/year/lobbyist); N.J. St. 52:13C-23a ($100/year/lobbyist); N.Y. Legis. Law 1-e(a)(1), (e)(iii) ($200 biennial fee per lobbyist); N.C. St. §§ 120C-201, 120C-207 ($100/year/lobbyist); N.D. St. § 54-05.1-03(1)(c), (e) ($25 per party represented); Ohio St. § 101.72(A), (E)-(F) ($25 fee biennially for each lobbyist and employer); Ok. St. Tit. 74 § 4250(A) ($100/year/lobbyist); Or. Rev. St. §§ 171.740-171.785 (no fee); Pa. St. Title 65, Pa.CSA § 13A10 ($100 biennial fee per lobbyist and per principal); R.I. St. §§ 22-10-1 through 22-10-12 (no fee); S.C. St. 2-17-20(A), (G) ($100/year/lobbyists); S.D. St. § 2-12-3 ($40 per year per principal); Tenn. St. § 3-5-302(e) (fees may be charged); http://state.tn.us/sos/tec/lobbyist%20-%20important%20dates.pdf ($150/year per principal); Ut. St. § 36-11-103(3)(a)-(b) ($25 biennially per lobbyist); Vt. St. Tit. 2 § 263(e)-(g) ($25 biennially per lobbyist and per employer); Va. St. § 2.2-424 ($50/year per principal); Wash. Rev. St. §§ 42.17.150 – 42.17.230 (no fee); W.V. St. §§ 6B-3-2(b), (d), 6B-3-3a(a) (biennially, for each lobbyist, $100 baseline, plus $100 per principal); Wy. St. § 28-7-101 ($25/year/lobbyist).

[2] Alaska St. § 24.45.041(a), (f), (g) ($250/year/lobbyist); Ks. St. § 46-265(b) (for each lobbyist not employed by a lobbying firm, $300/year/employer); Me. St. Tit. 3, § 313 (for each employer, $200/year/lobbyist); Md. State Government § 15-701(a)(1), (5), 15-703(e)(1) ($100/year per lobbyist and per employer); Neb. St. § 49-1480.01(1)-(3) ($200/year/lobbyist); Tx. Government §§ 305.003(a),

related to the costs of administering the amended Act. Indeed, a lobbying fee as low as $35 was held unconstitutional in 1974, *Moffett*, 360 F. Supp. at 231, and, even allowing for inflation, the amount would not remotely approach $1,000.

In sum, plaintiffs have more than a reasonable likelihood of success in showing that both the $200 paid into the state's general coffers and the $800 paid into the "administration" fund substantially exceed the reasonable costs of administration and therefore violate the First Amendment.

2. The religion and media exemptions violate the First and Fourteenth Amendments.

The exemptions for news media and certain full-time employees of religious organizations make impermissible distinctions among persons exercising First Amendment rights. Where government regulation discriminates among speech-related activities, such distinctions must be carefully scrutinized. *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). Under the Equal Protection Clause, any such distinctions must be narrowly tailored to further legitimate objectives of the regulations. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

The exemptions for religious and media organizations from registration and fees fail to further any legitimate objectives of the amended Act, and constitute impermissible discrimination against plaintiffs and other non-exempt organizations and lobbyists. *See Chicago Acorn v. Metropolitan Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) ("If the [government] waives fees for one political group, it must waive fees for other political groups, without favoritism."); *Genusa v. City of Peoria*, 619 F.2d 1203, 1213-15 (7th Cir. 1980) (invalidating, as improper distinction, requirement that adult bookstores be inspected for compliance with generally applicable city code prior to receiving adult use license because "[b]ookstores with one type of books must be inspected before a license issues; bookstores with another type of books need not be licensed or inspected").

In addition, the religious exemption also constitutes an impermissible endorsement of religion in violation of the Establishment Clause. The religious exemption constitutes a subsidy to and preference for religious speech. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989)

305.005 ($100/year per lobbyist and per employer); Wis. St. § 13.75 ($350 biennially per lobbyist, and $375 biennially per principal).

(plurality) ("Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors.") (internal quotations omitted). *See also id.* at 28 (Blackmun, J., concurring in the judgment) ("Texas engaged in preferential support for the communication of religious messages."); *id.* at 26 (White, J., concurring in the judgment) (opining that the law unlawfully discriminated on the basis of content). *See, e.g., Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (striking down a municipal light department's preferential treatment of a church). A government subsidy to religious organizations that is not required by the Free Exercise Clause represents an unconstitutional endorsement of religion. *Texas Monthly, Inc.*, 489 U.S. at 14-15. The subsidy here in the form of an exemption from paying lobbying registration fees is not required by the Free Exercise Clause, *see Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 392 (1990), and thus constitutes an impermissible endorsement of religion.

Thus, plaintiffs have more than a reasonable likelihood of successfully showing that the media and religious exemptions are unconstitutional.

B. The Plaintiffs Have No Adequate Remedy at Law.

Plaintiffs lack an adequate remedy at law. They seek only declaratory and injunctive relief. Regarding the media and religion exemptions, no remedy other than injunctive relief will cure the constitutional violation. Likewise, regarding the request to enjoin collection of the fees pending litigation, money cannot make the plaintiffs and the classes whole. The additional funds unconstitutionally collected from plaintiffs and the classes under the amended Act, as verified in the complaint, would go towards additional advocacy. That advocacy is obstructed by the unlawful registration fee.

C. The Plaintiffs Will Suffer Irreparable Harm if the TRO and Preliminary Injunction were Denied.

The irreparable injury element is easily met, since infringement of First Amendment and Constitutional rights, for even minimal periods of time, unquestionably constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *National People's Action v. Village of Wilmette*, 914 F.2d 1008 (7th Cir. 1990).

D. The Balance of Harms Favors Plaintiffs.

The irreparable harm that the plaintiffs will suffer if the TRO and preliminary injunction are not granted is far greater than any harm that the state would bear if injunctive relief is granted. Enjoining the fees paid by non-profit entities and their employees pending litigation would cause only a very modest drop in state revenue, which would be recouped at the appropriate level once the Court determines the constitutional amount the state may charge for administering the amended Act. Such a result is far preferable to requiring non-profit organizations to dramatically overpay what is proper.

E. The Public Interest Favors Entry of a TRO.

The public interest factor also tips decisively in favor of injunctive relief. The public has a powerful interest in the vindication of constitutional rights. *See O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 363-64 (6th Cir. 1998).

Relief Requested

Plaintiffs now seek a temporary restraining order, and/or a preliminary injunction, that enjoins the Secretary from requiring non-profit advocacy organizations and their registered lobbyist employees to pay:

(1) a registration fee above $150, because $200 of the amended Act's fee is expressly diverted to the Illinois General Revenue Fund, and the remaining $650 of the amended Act's fee has not been proven by the Secretary to be his actual and reasonable costs of administering the Act; and

(2) any fee at all, because the media and religion exemptions comprise unlawful speaker-based discrimination.

Because plaintiffs have established their entitlement to injunctive relief, the Court should enter the foregoing TRO and preliminary injunction, which preserves the status quo pending the litigation. "[T]he courts define 'status quo' as the last peaceable, uncontested status of the parties which preceded the actions giving rise to the issue in controversy." *Praefke Auto Elec. & Battery Co., Inc. v. Tecumseh Prod. Co.*, 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000) (citing *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir.1958)), *rev'd on other grounds*, 255 F.3d 460 (7th Cir. 2001). "'This standard allows the court to restore the status quo ante when the continuation of the changed situation would inflict irreparable harm on

plaintiff.'" *Kimbley v. Lawrence Cty. Ind.*, 119 F. Supp. 2d 856, 874 (S.D. Ind. 2000) (quoting 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure Civil* 2d §2948). Here, the action giving rise to the issue in controversy is the enactment of the unconstitutional fees and exemptions. However, the Court can and should enter the injunctive relief requested here regardless of whether it alters the status quo because the likelihood of success on the merits is so great. *See Praefke*, 255 F.3d at 464 ("preliminary injunctions are often issued to enjoin the enforcement of a statute or contract and thus interfere with existing practices"); *Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1209 (10th Cir. 2009) (preliminary injunction altering status quo or mandatory in nature may be entered upon heightened showing of likelihood of success).

Finally, as to the amended Act's unlawful fee exemption for certain media and religious lobbying, the proper remedy is to enjoin the fee in its entirety, as opposed to severing and enjoining solely the exemption. *Mosley*, 408 U.S. at 94; *Carey*, 447 U.S. at 459 n.2 & 460.

The amended Act's severability clause does not change this result. Federal courts look to state law in interpreting severability. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507 (1985). In the very circumstances here – a state law restraining speech with an unlawful speaker-based exemption, and also a state legal presumption of severability – federal courts have remedied the unlawful favoritism by enjoining the speech restraint as to all speakers, as opposed to enjoining just the speaker-based exemption. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 n. 15 (11th Cir. 2005); *Rappa v. New Castle County*, 18 F.3d 1043, 1073 n.53 (3rd Cir. 1993). In *Rappa*, the Third Circuit rested its decision on *Mosley*. 18 F.3d at 1073 n.53. Further, that court explained that severance of the exemption and upholding the rule would trigger a "constitutional dimension" of analysis, because "we would be requiring the state to restrict *more* speech than it currently does." *Id.* at 1072-73 (emphasis in original). Also, that court stated: "To our knowledge, no court has ever mandated issuance of an injunction such as that, and we decline to be the first." *Id.* at 1073. Likewise, the Eleventh Circuit explained in *Solantic* that "[t]he legislature might have preferred not to impose these regulations . . . if doing so meant that all . . . would be subjected to these rules." 410 F.3d at 1269 n.15.

Under Illinois law, state courts in various circumstances involving unlawful state statutes have declined to apply severability clauses. *See, e.g., Cincinnati Ins. Co. v. Chapman*, 181 Ill. 2d 65 (1998) (refusing to apply a severability clause, holding that they are "not necessarily

conclusive" or an "inexorable command," and explaining: "[A]lthough the use of severability clauses has become a common legislative drafting practice in modern times, it is regarded little more than a mere formality."); *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54 (1990) (refusing to apply a severability clause, where the court did not believe that the General Assembly would have passed the valid portions of the act alone).

In sum, the appropriate remedy is to enjoin the registration fee, and not just the exemption.

Conclusion

Whether the state's motivation was to tax speech to help plug its budgetary hole, or some other reason, its large increase in lobbying fees, as well as its exemption favoring some news media and religious lobbyists, violates the Constitution. The Court should enter the TRO and preliminary injunction requested above.

DATED: December 11, 2010

Respectfully submitted:

/s/ Edward W. Feldman
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CERTIFICATE OF SERVICE

I, Edward W. Feldman, an attorney, certify that on December 11, 2009 I served the forgoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION** on the below listed parties by messenger delivery:

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Dated: December 11, 2009

/s/ Edward W. Feldman