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

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

PLAINTIFFS' POST-HEARING BRIEF

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INTRODUCTION

The rights at issue in this case lie at the core of our system of representative democracy. State legislators and executive officials make countless decisions each year that affect our society. The lobbying process is a principal means by which the public communicates its views to these officials to seek redress of grievances, and to influence the development of law and policy. Many individuals and entities, directly or through professional lobbyists, participate in this democratic process, which is protected by the First Amendment. The nearly 4,000 entities and individuals who annually have registered to lobby in recent years run the gamut from large business interests to small charitable institutions, and every conceivable interest group between.

The statute at issue in this case, the Lobbyist Registration Act (the "LRA" or the "Act"), 25 ILCS 170/5, *as amended by* Pub. Act 96-555 at § 65, imposes a $1,000 lobbyist registration fee – a steep increase over prior years' fees – as a precondition to engaging in this democratic process. The Act also imposes detailed reporting obligations on those who make expenditures as part of lobbying. At the same time, it exempts certain privileged media and religious speech from those requirements. Subject to these exemptions, only those willing and able to pay the new $1,000 fee will be permitted to "lobby" legislative or executive officials about issues affecting the State. Anyone who does so without complying with this precondition on lawful and constitutionally protected speech is subject to fines of up to $10,000 per day. While the State may have the power under the Constitution to charge some reasonable and non-burdensome fee tailored to the actual costs of administering and enforcing its registration system, the Constitution does not permit it to impose the $1,000 fees contained in the amended statute, or to treat certain parties as preferred speakers by exempting lobbyists for the news media and certain religious entities from the statute's obligations.

On December 29, 2009, the Court entered a TRO restraining collection of the $1,000 fee, based on its conclusion that Plaintiffs were likely to succeed in their claim that the fee is unconstitutional. (R. 35) Plaintiffs now seek to make that relief permanent. Specifically, they seek a permanent injunction – or in the alternative a preliminary injunction – that enjoins Illinois Secretary of State Jesse White ("the Secretary") from requiring any person or organization to pay the lobbyist registration fee set forth in the Act. At the hearing on January 14, 2010, plaintiffs introduced substantial and undisputed evidence in support of this request. This brief summarizes that evidence, and explains why the amended LRA is unconstitutional and should continue to be enjoined.

In light of the undisputed factual record, there can be no serious question as to the Act's unconstitutionality. The $1,000 fee is far in excess of what is required for administration and enforcement of the amended Act. It far exceeds what the Secretary has budgeted for the future for administration and enforcement. Indeed, no increase (let alone an increase to $1,000) was even sought by the Secretary of State, and the Legislature passed the increase without any data from the Secretary of State as to its past or expected future costs of administration or enforcement. It should hardly be surprising, therefore, that a number that appears to have been plucked from the air would not reasonably correlate to the relevant costs. Based on the stipulations of revenues and expenditures under the LRA, the Secretary cannot satisfy his burden of establishing a "reasonable fit" between the $1,000 registration fee and the cost of administration and enforcement. *See infra* Section I.

The amended Act suffers from additional and independent constitutional flaws. It exempts from the registration, fee, and reporting requirements speech by certain "news media" entities and by certain employees of religious organizations. These discriminatory exemptions

violate the First and Fourteenth Amendment guarantees of free speech and equal protection. The religious exemption also violates the Establishment Clause by preferring certain religiously motivated speech. *See infra* Section II.

Finally, Section III of this brief addresses the remaining points supporting Plaintiffs' right to injunctive relief and the proper scope of injunctive relief. Plaintiffs rest on their prior filings regarding the pending amended class certification motion (R. 9, 37) and motion to consolidate under Rule 65 (R. 39), and will reserve for their reply any further argument if needed.

I. THE DISPUTED FEE IS UNLAWFULLY EXCESSIVE.

Lobbying is a form of speech, association, and petition protected by the First Amendment. *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.'").

The $1,000 registration fee under the amended Act violates the First Amendment because it imposes a charge, as a precondition to exercising the protected right to lobby, that far exceeds the reasonable costs of administering and enforcing the Act's registration and disclosure system.

A. The First Amendment prohibits excessive fees.

Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943), and its progeny are the controlling line of cases. *Murdock* held that the First Amendment forbids the government from charging a fee as a precondition for engaging in expressive activity, where that fee is not "calculated to defray the expense" born by the government in regulating that activity. There, in a

case involving religious proselytizing by the Jehovah's Witnesses, the Court struck down a fee of $1.50 per day to engage in door-to-door solicitation. *Id.* at 116-17. Here, the challenged $1,000 lobbying fee is unconstitutional under this line of cases.

1. The fee is unconstitutional unless the Secretary can prove a "reasonable fit" with the costs of administration and enforcement.

The government bears the burden of proving a proper fit between the disputed government fee and the government's actual and reasonable costs. *See Joelner v. Village of Washington Park*, 378 F.3d 613, 626 (7th Cir. 2004) ("the Village will have the opportunity on remand to adequately demonstrate its justification for these fees"); *South-Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 898 (7th Cir. 1991) ("the city bears the burden of proof" regarding the fee/cost fit). The Secretary concedes this point, as he must. *See* R. 22-1 (Secretary's memorandum in opposition to TRO) at p. 9 ("The State bears the burden of proving" the fee/cost fit).

The government's burden is to prove a "reasonable fit" between the fee and its actual and reasonable costs. *South-Suburban Housing Ctr.*, 935 F.2d at 898. *See also Joelner*, 378 F.3d at 626 (the fee on speech "must bear a rational relationship to the public services involved with the matter licensed"); *Covenant Media of Illinois, LLC v. City of Des Plaines*, No. 04 C 8130, 2005 WL 2277313, *5 (N.D. Ill. Sept. 15, 2005) (Lefkow, J.) (the fee on speech must be "reasonably related to its costs in administering the permit"). Thus, the Secretary "is required to carry the burden of demonstrating that its permit fee . . . is not excessive in that it [does] not exceed the [government's] costs in enforcing its . . . regulations." *South Suburban Housing Ctr.*, 935 F.2d at 898. In other words, the government must prove that its fee on speech is "necessary" to cover its actual and reasonable costs in administering that speech. *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991) ("a state or municipality may charge no more than

the amount *needed* to cover administrative costs") (emphasis added); *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) ("Licensing fees used to defray administrative expenses are permissible, but only to the extent *necessary* for that purpose") (emphasis added).[1]

To meet its burden, the government must produce evidence, and not mere conclusions or speculation. For example, the Seventh Circuit in *Joelner* held that "the statement of purpose included in the statute is insufficient to support the fees, particularly considering the differentiation" among two regulated groups, and the "large" size of one fee. 378 F.3d at 626. Likewise, Judge Hart in *Chicago Newspaper Publishers Association* held that enforcement "hardly requires the time and expertise of senior city officials," and thus rejected a fee based on the government's plan to have senior officials administer the ordinance. 697 F. Supp. at 1472. *See also Sentinel Communications Co.*, 936 F.2d at 1205-06 (striking down a fee in the absence of "cost studies"); *Bayside Enters., Inc. v. Carson*, 450 F. Supp. 696, 705-06 (striking down a fee based on the government's plan to deploy an excessively large number of employees to regulate the speakers).

2. <u>Many cases have struck excessive fees</u>.

Over the six decades since *Murdock*, the courts time and again have struck down excessive government fees on expressive activity that lacked a proper fit to the government's actual and reasonable costs of regulating that activity. For example, courts applying the rule in

[1] *See also Fernandes v. Limmer*, 663 F.2d 619, 633 & n.11 (5th Cir. 1981) (holding that speech fees are permissible "only to the extent that the fees are *necessary*" to recover government costs) (emphasis added); *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1471 (N.D. Ill. 1988) (Hart, J.) ("a municipality can charge no more than the amount *needed* to cover administrative costs") (emphasis added); *Bayside Enters., Inc .v. Carson*, 450 F. Supp. 696, 705 (M.D. Fla. 1978) (issue is "whether the city adduced evidence sufficient to demonstrate its *need* to charge" the disputed fee to meet its "reasonable expenses") (emphasis added).

Murdock and its progeny have struck down excessive government fees imposed in a myriad of contexts:

- ***Lobbying***. *Moffett*, 360 F. Supp. at 232 (three-judge panel) (striking down a $35 annual fee). *See also Fidanque v. State of Oregon*, 969 P.2d 376, 380 (Or. 1998) (striking down a $50 biennial fee, pursuant to a state constitutional guarantee of free speech).

- ***Expression on public property***. *Chicago Newspaper Publishers Ass'n*, 697 F. Supp. at 1471 (striking down a $25 fee, with a $15 annual renewal fee, to install news racks); *Fernandes*, 663 F.2d at 633 & n.11 (striking down a $6 daily fee to solicit in an airport); *NAACP v. City of Chester*, 253 F. Supp. 707, 712 (E.D. Pa. 1966) (preliminarily enjoining a $25 fee to operate a sound truck); *Busey v. District of Columbia*, 138 F.2d 592, 595-96 (D.C. Cir. 1943) (striking down a $5 minimum fee to sell magazines in public). *See also Sentinel Communications Co.*, 936 F.2d at 1205-06 (remanding for fact finding regarding a fee of five cents per newspaper for news racks at interstate rest areas); *Eastern Connecticut Citizens Action Group*, 723 F.2d at 1056 (remanding for fact finding regarding a $200 fee to use a rail bed).

- ***Display of signs on private property***. *South-Suburban Housing Ctr.*, 935 F.2d at 897-98 (7th Cir. 1991) (striking down a $60 fee on "for sale" yard signs); *Covenant Media of Illinois, LLC*, 2005 WL 2277313, *5 (preliminarily enjoining a $15,000 fee on billboards).

- ***Sale of sexually explicit materials***. *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981, 994-95 (S.D. Ind. 2008) (striking down a $250 fee for the sale of sexually explicit books); *Wendling v. City of Duluth*, 495 F. Supp. 1380, 1384-85 (D. Minn. 1980) (striking down a $500 annual fee for adult bookstores); *Bayside Enters., Inc.*, 450 F. Supp. at 704-06 (striking down various fees for adult bookstores, massage parlors, and adult theaters). *See also Joelner*, 378 F.3d at 626 (remanding for fact finding regarding a $10,000 fee for adult bookstores, and a $30,000 fee for adult cabarets).

B. The Secretary has not met and cannot meet his burden.

The stipulated and undisputed facts show that the Secretary cannot meet his burden of proving that the new $1,000 lobbyist registration fee is reasonable and necessary. The registration fees exceeded the costs of administering the prior Act, and the increased fees that triggered this lawsuit would vastly exceed the Secretary's reasonably expected future costs of administration and enforcement, indeed, possibly tripling them.

The figures are summarized in the following chart, which was presented to the Court at the January 14 hearing. The following sections discuss the figures in the chart.

Revenues and Expenditures to Administer the Lobbyist Registration Act

Fiscal Year	Fee Revenue (1)	Expenditures (2)	Excess (3)
2008	$1,230,210 (actual)	$984,003 (actual)	$246,207
2009	$1,200,100 (actual)	$641,779 (actual)	$558,321
2010	$3,947,000 (estimated)	$1,224,739 (estimated)	$2,722,261
2011	$3,947,000 (estimated)	$1,362,359 (estimated)	$2,584,641

(1) Actual or estimated fee revenue. *See* PX 24 (stipulated facts) (hereafter "Stip. Facts") ¶¶ 4, 9.[2] Estimated fees are calculated by multiplying the number of registrants as of December 16, 2009, by the increased fee of $1,000. *Id*. at ¶¶ 7, 12, 17, 19, 23.

(2) Actual or estimated expenditures provided by the Secretary.

(3) Fee revenue minus expenditures.

[2] "PX" refers to the plaintiffs' exhibits, taken into evidence, at the preliminary injunction hearing on January 14, 2010.

1. The prior fee structure already was generating a surplus.

Prior to amendment, the lobby registration fee was $350 per person or entity required to register, except that the fee was $150 for entities registered under Section 501(c)(3) of the Internal Revenue Code. *See* 25 ILCS 170/5. In fiscal years 2005 through 2009, this lobby registration fee consistently generated annual fee revenue of approximately $1.2 million. *See* Stip. Facts ¶¶ 1-4, 9.

In fiscal years 2008 and 2009, the Secretary spent $984,003 and $641,779, respectively, to administer the Act. *See* Stip. Facts ¶¶ 7, 12. As shown by the deposition testimony of Ms. Trimmer, whom the Secretary also presented in court, these figures included moneys from the Lobbyist Registration Fund, as well as moneys from the General Revenue Fund and a special "483 Fund" (generally used for information technology), that pay for the expenses of employees who spent only a portion of their time on lobbyist registration tasks. *See* Stip. Facts ¶¶ 5, 6, 10, 11; PX 27 (Trimmer Dep.) at 26:19-28:20, 31:5-32:21; Trimmer Dep. Ex. 2 (Trimmer decl. of 12/12/09), *also at* PX 6. In spending these sums, the Secretary was able to fulfill all statutory duties under the prior Act, which included a computer based system for registration and expenditure reporting. *See* Stip. Facts ¶¶ 8, 13; PX 26 (Price Dep.) at 21:23-22:11.

In each of these years the fees generated a substantial surplus. In FY 2008, the surplus was $246,207, a 20% surplus. *Compare* Stip. Facts ¶¶ 4, 7. In FY 2009, the surplus grew to $558,321, a surplus of 46.5%. *Compare* Stip. Facts ¶¶ 9, 12. Accordingly, it is no surprise that neither the Secretary, nor anyone in his Office or the Office of the Inspector General, sought a fee increase for the Lobbyist Registration Act. *See* Stip. Facts ¶¶ 21, 22.

Thus, the old fee structure was generating a level of funding that approximated the funds needed to take on the new responsibilities imposed by the amended Act. That is, the old fee was

generating revenue of about $1.2 million (as shown above), and the projected costs for complying with the amended Act are $1.225 million for FY10, and $1.362 million for FY11 (as shown below).

2. The new fee structure will generate vastly excessive fees.

a. Revenues under the amended Act.

In the absence of Court action, the amended Act would impose a lobby registration fee of $1,000 per person or entity required to register, with no reduced fee for Section 501(c)(3) or other non-profit entities. This increased fee may reasonably be expected to generate nearly $4 million per year in receipts. As of December 15, 2009, there were 3,947 lobbyists registered with the Secretary. *See* Stip. Facts ¶ 23. Assuming that the number of lobbyists does not change significantly, the new $1,000 lobby registration fee will generate revenue of approximately $3,947,000. This assumption that the number of lobbyists will remain stable rests upon the fact that it has done so in recent years: the revenue from the previous lobby fee held steady at slightly more than $1.2 million per year in fiscal years 2005 through 2009 (at the prior rate structure), *see id.* ¶¶ 1-4, 9, showing a striking stability over the past five years in the number of registered lobbyists.

The Secretary has taken the position that he is unable to estimate his revenues in fiscal years 2010 and 2011 if the new $1,000 fee goes into effect, because he does not know how many individuals and organizations will register as lobbyists in the future. *See* Stip. Facts ¶ 14. The Secretary's stated uncertainty is not reasonable: government regularly projects revenues from new programs.

More importantly, the Secretary's stated uncertainty is fatal to the disputed fee. It concedes that the Secretary will not satisfy his burden of proving a proper fit between the

disputed fee and his administrative costs. Indeed, his position puts the Secretary in a bind. If, as plaintiffs have assumed above, the new fees do not materially diminish the number of registrants, the fee revenue will approach $4 million, and vastly exceed the expenditures of administration and enforcement. If, as the Secretary argued at the hearing, the new fees may result in a material drop in registrations, that would comprise an additional reason that the fee violates the First Amendment, namely, an excessively high government fee on expressive activity that chills and deters participation in that expressive activity. *See Murdock*, 319 U.S. at 111 (holding that free speech must be "available to all, not merely to those who can pay their own way"). In this scenario, those deciding not to pay the fee would be placed in the untenable position of foregoing their right to speak to and petition government, or to lobby without registering and take the risk of being exposed to fines of up to $10,000 per day. The result would be less speech or less public transparency. Moreover, registration would have to drop from the current 4,000 lobbyists to below 1,400 lobbyists – a highly unlikely 65% reduction – for the $1,000 fee to generate less revenue than the operational costs projected by the Secretary for FY10 and FY11.

b. Future costs.

For fiscal years 2010 and 2011, the Secretary has budgeted $1,224,739 and $1,362,359, respectively, to administer the amended Act. *See* Stip. Facts ¶¶ 17, 19. This sum includes all projected costs for new duties under the amended Act, including hiring additional personnel, based upon consultation with the heads of the units of the Office of the Secretary of State with a role in administering and enforcing the Act: the Index Department, the Information Technology Department, and the Office of the Inspector General. *See* Stip. Facts ¶ 20; PX 27 (Trimmer Dep.) at 42:9-43:1. This estimate includes all personnel and other resources these department heads requested in order to enforce and administer the amended Act. *See* Stip. Facts ¶ 20. For

example, the estimate includes the request of the Index Department for additional clerical help, a programmer, and equipment software upgrades, as well as the request of the Office of the Inspector General for one additional administrator and one additional investigator. *See* PX 27 (Trimmer Dep.) at 40:6-21, 43:9-19.

If the past is prologue, the Secretary will spend substantially less than the foregoing estimates. In fiscal year 2008, the Secretary spent only 76% of the amount that the State of Illinois appropriated from the Lobbyist Registration Fund pursuant to his budgetary request ($446,376 out of $587,929), leaving $141,553 of this appropriation unspent. *Compare* Stip. Facts ¶¶ 5, 7. Likewise, in fiscal year 2009, he spent only 81% of the amount that the State of Illinois appropriated from the Lobbyist Registration Fund pursuant to his budgetary request ($499,891 out of $617,600), leaving $117,709 of this appropriation unspent. *Compare* Stip. Facts ¶¶ 10, 12. Moreover, just as completion of new computer programming work in fiscal year 2008 caused a drop in expenditures from $984,008 in fiscal year 2008 to $641,773 in fiscal year 2009, *see* PX 27 (Trimmer Dep.) at 66:21-67:23, it is likely, according to the testimony of the Secretary's senior budget analyst, that the completion of new computer programming work in fiscal year 2010 will cause a drop in expenditures from fiscal year 2010 to fiscal year 2011 and beyond, *id.* at 67:24-68:18.

c. Future excess.

In the end, the Stipulated facts, based on the Secretary's own figures, lead to only one conclusion: for each of fiscal years 2010 and 2011, the Secretary's revenues from the new $1,000 lobby registration fee would likely approach $4 million, while his costs in administering and enforcing the amended Lobbyist Registration Act would likely amount to something less than $1.3 million – less than one-third of the revenues. In the face of these figures, the Secretary

cannot possibly meet his burden under the *Murdock* line of cases of proving a "reasonable fit" between revenues and expenditures.

This is not surprising, because Illinois' $1,000 annual lobbyist registration is extraordinary. Nine states and the federal government have no fee.[3] Sixteen additional states charge an annual lobbyist registration fee no higher than $150.[4] Fourteen more states have sliding scales, in which the size of the lobbyist fee depends upon the number of principals that each lobbyist represents, so that a lobbyist with only one principal pays no more than $100 per year.[5] A further seven states charge between $150 and $360 per year.[6] The remaining three

[3] *See* 2 U.S.C. §§ 1601-03; Ark. St. § 21-8-601 through 21-8-607; Del. Code §§ 5831-5837; Haw. Rev. St. § 97-2 through 97-7; Iowa Code §§ 68B.36-68B.38; Mich. St. §§ 4.417-4.431; Minn. St. §§ 10A.03-10A.38; Or. Rev. St. §§ 171.740-171.785; R.I. St. §§ 22-10-1 through 22-10-12; Wash. Rev. St. §§ 42.17.150 – 42.17.230. *See generally* "Lobbyist Registration Requirements," National Conference of State Legislatures (March 2008) (a 50-state survey of lobby fees), *at* http://www.ncsl.org/LegislaturesElections/Ethics/NCSLsEthicsCenterLobbyistRegistrationRequir/tabid/15362/Default.aspx.

[4] *See* Al. St. § 36-25-18(a) ($100/year/lobbyist); Ariz. St. § 41-1232(C), (E) ($25 biennial fee for principals); Cal. Government Code § 86102 (for each principal, $25/year/lobbyist); Co. St. § 24-6-303(1.3)(a), and 8 Co. Regs. 1505-8(2.1) ($40/year/lobbyist, with a discretionary exception for non-profits); Conn. St. §§ 1-95(a) & (b), and Office of State Ethics, Agency Regulations § 1-92-47, *available at* http://www.ct.gov/ethics/cwp/view.asp?a=2313&q=301724 ($150 biennial fee per employer and lobbyist); Ind. Code § 2-7-2-1 ($50/year for non-profits and their lobbyists, $100 for others); 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); Mo. St. § 105.473(1) ($10/year/lobbyist); Mt. St. § 5-7-103(1) ($150 biennial fee per lobbyist); N.J. St. 52:13C-23a ($100/year/lobbyist); Nev. Code § 218.932(1), and Leg. Counsel Bureau, *at* http://www.leg.state.nv.us/Lobbyist/SessionData/75/Docs/11%202009%20Packet%20Mem.pdf ($120/year/lobbyist); Ok. St. Tit. 74 § 4250(A) ($100/year/lobbyist); Pa. St. Title 65, Pa.CSA § 13A10 ($100 biennial fee per lobbyist and per principal); Ut. St. § 36-11-103(3)(a)-(b) ($25 biennially per lobbyist); Wy. St. § 28-7-101 ($25/year/lobbyist).

[5] *See* Fla. Admin. Code 34-12.200 ($50 for the first principal, and $20 for each additional principal); Idaho St. § 67-6617(a)-(b) ($10 per principal); Md. State Government §§ 15-703(a)(2), 15-703(e)(1) ($100 per principal); Miss. Code § 5-8-5(1) (for each agent, $25 per principal, and for each principal, a flat $25); N.H. St. § 15:4 ($50 per principal); N.M. St. § 2-11-3 ($25 per principal); N.Y. Leg. Law 1-e(a)(1), (e)(iii) ($200 per principal, biennially); N.C. St. §§ 120C-200, 120C-201, 120C-207 (for each agent, $100 per principal, and for each principal, a flat $100, with a discretionary waiver for non-profits); N.D. St. § 54-05.1-03(1)(c), (e) ($25 for the first principal, and $15 per each additional principal); Ohio St. § 101.72(A)-(C), (E)-(F) (for each agent, $25 biennially per principal, and for each principal, a one-time flat $25); S.D. St. § 2-12-3 ($40 per principal); Vt. St. Tit. 2 § 263(e)-(g) ($25 biennial fee for each agent and each principal, plus $5 for each principal represented or agent retained);

states vary their fees as follows: in Texas, non-profits pay $100 per lobbyist, while for-profits pay $500 per lobbyist; in Wisconsin, there is a sliding scale depending upon the number of principals per agent, so that the annual fee for a lobbyist with one principal, plus the fee for that principal, is $375; and in Massachusetts, non-profits pay $100 per lobbyist, while for-profits pay $1,000 per lobbyist.[7] In short, Illinois' flat $1,000 lobbyist registration fee, with no exception for non-profits or for lobbyists with only one principal, is far out of the national mainstream.

II. THE DISPUTED FEE IS UNLAWFULLY DISCRIMINATORY.

A. Summary of the two exemptions at issue.

The amended Act sets forth ten categories of persons and organizations that are exempt from the $1,000 registration fee, and also from the Act's substantial reporting and disclosure requirements. *See* 25 ILCS 170/3(a). Two exemptions comprise unlawful discrimination. In essence, they provide that certain media and religious organizations and individuals may advocate for legislative or executive action without paying a fee or disclosing expenditures, while others organizations and individuals – including plaintiffs the ACLU and Ms. Dixon – must pay a fee to advocate on precisely the same issues and report any lobbying expenditures.

Va. St. § 2.2-424 ($50 per principal); W.V. St. §§ 6B-3-2(b), (d), 6B-3-3a(a) (biennially, $100 fee from each agent, plus $100 per principal).

[6] *See* Alaska St. § 24.45.041 (g) ($250/year/lobbyist); Ga. St. § 21-5-71(f)(1)-(2) ($25/year for lobbyists representing non-profits, and $200 for others); Ks. St. § 46-265(b) (as much as $360/year/lobbyist); Me. St. Tit. 3, § 313 ($200/year/lobbyist); Neb. St. § 49-1480.01(1)-(3) ($200 per principal); S.C. St. 2-17-20(A), (G) ($100 per employer and principal); Tenn. St. § 3-6-302(e), and Rules of Tennessee Ethics Commission, Rules 580-1-1-.03(3), and .04(3), *at* http://www.state.tn.us/sos/rules/0580/0580-01-01.pdf (for each agent, $150 per principal, and for each principal, $150 per agent).

[7] *See* Mass Gen. Laws, Ch. 3, §§ 39, 41; Wis. St. § 13.75 (biennially, $375 from each principal, $250 from each agent with one principal, $400 from each agent with two or more principals, and $125 from each agent per principal); Tx. Government §§ 305.003(a), 305.005.

1. 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." This exemption applies to a category of person or entity, not to a type of expression. That is, translating the statutory language into plainer English, it applies to persons or entities that publish news and opinion, rather than merely to the news and opinion itself. The publication of news already falls outside the definition of "lobbying" under the amended Act.[8] Thus, no exemption is needed to preserve the press's freedom to publish news and opinion. It would be one thing for an exemption merely to clarify that the Act does not apply to news reporting or editorializing by the news media. That, in fact, is what a media exemption in several other states is limited to.[9] It is quite another thing for an exemption to apply to *any* face-to-face *lobbying* on *any* topic by a news organization or journalist, merely because they happen to write or broadcast about legislative issues. That is what the amended Act's news media exemption permits. Thus, for example, the exemption would have permitted the Tribune Company to lobby and wine and dine legislators without

[8] The Act defines "lobbying," in relevant part, as "any communication with an official." 25 ILCS 170/2(e).

[9] For example, the Iowa exemption extends only to "[r]epresentatives of the news media *only* when engaged in the reporting and dissemination of news and editorials." Iowa Code § 68B.2(13)(b)(2) (emphasis added). *See also* Al. St. § 36-25-1(18)(b)(3); Ark. St. § 21-8-601(a)(3)(A); Conn. St. § 1-91(*l*)(2); Haw. Code § 97-2(e)(4); Idaho St. § 67-6618(b); Md. State Government § 15-701(b)(1)(ii); Mich. St. § 4.415(7)(a); Minn. St. § 10A.01 Subd. 21(b)(7); Miss. Code Ann. § 5-8-7; Neb. St. § 49-1434(3)(b); Nev. Code § 218.912(1) & (2)(b); NJ St. § 52:13C-27(a); N.M. St. § 2-11-2(E)(8); N.Y. Legis. Law § 1-c(c)(B); N.C. St. § 120C-700(5); Ohio St. § 101.76(A); Ok. St. Tit. 74 § 4249(1); Or. Rev. St. § 171.735(1); Pa. St. Title 65, Pa.CSA § 13A06(2); R.I. St. § 22-10-3(2); Texas Gov. § 305.004(1); Vt. St. Tit. 2 § 262(4); Wash. Code § 42.17.160(3); Wis. St. § 13.621(1).

registration or disclosure on issues ranging from press-related topics to business taxation to the Chicago Cubs.

Representatives of the news media may engage in such direct advocacy on a broad array of matters of public concern, including the reporters' privilege, the Freedom of Information Act, the Open Meetings Act, regulation of commercial advertising, and the tort of defamation. Many non-media organizations (including the ACLU) engage in legislative advocacy on these same issues. *See* PX 25 (stipulated testimony of Colleen Connell) (hereinafter "Connell Stip. Test.") at ¶ 4.[10] Further, many non-media organizations (including the ACLU) regularly disseminate information to the public. *Id.* at ¶ 5.[11] But these groups do not enjoy an exemption from the $1,000 registration fee.

2. <u>The religion exemption.</u>

Section 3(a)(7) of the amended Act 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 bona fide religious organization,

[10] For example, the ACLU and Ms. Dixon have dedicated substantial resources towards the passage of the following laws: (a) the original passage of, and the recent amendments to, the Illinois Freedom of Information Act, 5 ILCS 120, which allows the public and the press to obtain records from state and local government; (b) the Illinois College Campus Press Act, 110 ILCS 13/1, which bars censorship of student journalists at public colleges and universities; and (c) the Illinois Citizen Participation Act, 735 ILCS 110, which protects everyone, including the press, from retaliatory litigation against speech that petitions the government for redress of grievances. *See* Connell Stip. Test. ¶ 4.

[11] For example, the ACLU: (a) regularly publishes many times per year printed and electronic newsletters that discuss current civil liberties issues, and distributes them to many thousands of people; (b) publishes topical educational materials (including "Know Your Rights" documents) that are broadly disseminated to the public; (c) maintains and updates a website that includes substantial news and information about various subject areas related to civil liberties; and (d) hundreds of times per year communicates with the general public regarding current civil liberties issues, by means of broadcast and print media, and in-person speaking events. *See* Connell Stip. Test ¶ 5.

and (b) whose lobbying work is exclusively to advance "the right of the members [of that religious organization] to practice . . . religious doctrines . . . ."

At a minimum, this religious fee waiver extends, for certain full-time employees of religious organizations, to certain legislative advocacy in support of the free exercise of religion. This includes advocacy for a broad array of exemptions for religious practices from various laws of general applicability (*e.g.*, an exemption from the Illinois Human Rights Act for church employees who define and disseminate church doctrine). It also includes support for numerous kinds of laws that require various accommodations of religious practice (*e.g.*, a mandate that employers accommodate certain religious practices of their employees). 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 the proposed religious exemption or accommodation. *See* Connell Stip. Test. ¶ 6.[12] But these groups do not receive a waiver of this $1,000 registration fee.

3. <u>The breadth of the media and religion exemptions.</u>

The media and religion exemption extend not just to payment of the $1,000 annual lobbyist registration fee, but also from annual registration, and from periodic detailed reporting regarding lobbying expenditures. *See* 25 ILCS 170/3, /5, /6.

Further, both the media and religious exemptions apply even if the person or entity had expenditures related to lobbying. *See* 25 ILCS 170/3(a)(2). This would include expenditures, in the course of lobbying public officials, on meals, alcohol, and travel. Thus, in addition to

[12] For example, the ACLU and Ms. Dixon dedicated substantial resources towards the passage of the Illinois Religious Freedom Restoration Act, 775 ILCS 35/10, which requires strict judicial scrutiny of government actions that substantially burden the free exercise of religion. *See* Connell Stip. Test. ¶ 6. Moreover, the ACLU and Ms. Dixon frequently advocate for or against myriad proposed exemptions for religious practice and belief from laws of general applicability. *Id.*

comprising unlawful discrimination in violation of the First and Fourteenth Amendments, these exemptions undermine what plaintiffs speculate may be the government's ostensible interest in transparency regarding who is lobbying whom, and with what expenditures. Notably, other private persons and entities exempted under the Act lose their exemption, and are required to register and make reports, if they have expenditures related to lobbying, including "[p]ersons or entities in possession of technical skills and knowledge relevant to certain areas of executive, legislative or administrative actions . . . whose activities are limited to making occasional appearances for or communicating on behalf of a registrant"; and "[p]ersons who receive no compensation other than reimbursement for expenses of up to $500 per year." *See* 25 ILCS 170/3(a)(6), (8). *See also* 25 ILCS 170/3(a)(9), (10).

B. The exemptions violate the First and Fourteenth Amendments.

The Act's exemption for the news media is speaker-based, and the Act's exemption for certain religious lobbyists is both speaker-based and content-based. Such favoritism is prohibited by both the Free Speech Clause of the First Amendment, and by the Equal Protection Clause of the Fourteenth Amendment. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("the equal protection claim in this case is closely intertwined with First Amendment interests"); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (framing this as an Equal Protection Clause problem); *Rosenberger v. University of Virginia*, 515 U.S. 819, 828, 837 (1995) (framing this as a First Amendment problem, and stating that "government regulation may not favor one speaker over another").

Such discrimination among speakers is subjected by courts to mid-level scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 657-62 (1994).[13] Under this test, the government must prove that the discrimination, *inter alia*, "further[s] an important or substantial governmental interest," and is "no greater than is essential to the furtherance of that interest." *Id.* at 662. *See also Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980) (a speech regulation distinguishing among speakers "cannot be sustained unless it serves a sufficiently strong, subordinating interest that the [government] is entitled to protect"); *Genusa v. City of Peoria*, 619 F.2d 1203, 1214 (7th Cir. 1980) (a category of speakers may not be "singled out for special regulation unless the [government] can prove that such action is narrowly devised to further a substantial and legitimate state interest unrelated to censorship"); *Perry v. LAPD*, 121 F.3d 1365, 1370 (9th Cir. 1997) (holding that the *Carey* test is "whether the means the government uses to discriminate are narrowly tailored to fit its interests").

The exemption from a speech restraint itself will frequently show that the speech restraint is not narrowly tailored. *Mosley*, 408 U.S. at 99-100 (while the city has "a substantial interest" in protecting schools from disruptive protest, the city "itself has determined that peaceful labor picketing during school hours is not an undue interference," and thus the city "may not maintain that other picketing disrupts the school unless the picketing is clearly more disruptive"); *Carey*, 447 U.S. at 465 (while the state asserted an interest in residential privacy, the labor exception from the protest ban shows that "residential privacy is not a transcendent objective"); *Schaumburg*, 444 U.S. at 638 (while the state asserts an interest in residential privacy, residents are "equally disturbed by solicitation" by the favored and disfavored solicitors); *City of*

[13] The exception to this rule is when government prefers the favored speakers' message, or has an aversion to the disfavored speakers' message – in which case the legal standard is strict scrutiny. *Turner Broad. Sys., Inc.*, 512 U.S. at 658.

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 (1993) (while the city asserted an interest in aesthetics, the forbidden commercial news racks "are no greater an eyesore" than the authorized media news racks); *Perry*, 121 F.3d at 1370 (while the city asserted an interest in the free flow of pedestrian traffic, "there is no justification for eliminating only those individuals with no nonprofit affiliation").

Moreover, courts have rejected government arguments that the favored speakers are more deserving of the exemption than the disfavored speakers. *Carey*, 447 U.S. at 466-67 (rejecting this argument as to labor protesters); *Discovery Network, Inc.*, 507 U.S. at 418-28 (rejecting this argument as to news media).

Thus, courts time and again have struck-down laws that regulate speech while exempting favored speakers. *Mosley*, 408 U.S. at 92-94 (striking down a Chicago ordinance prohibiting demonstrations near a public schools, but exempting picketing regarding "a labor dispute"); *Carey*, 447 U.S. at 457-59 (striking down an Illinois statute prohibiting residential demonstrations, but exempting picketing regarding "a labor dispute"); *Schaumburg*, 444 U.S. at 622 (striking down an ordinance prohibiting door-to-door and on-street solicitation by organizations that use less than 75% of the proceeds for charity, which favored charitable groups and disfavored policy groups); *Discovery Network, Inc.*, 507 U.S. at 412 (striking down an ordinance prohibiting news racks used for "commercial handbills," but allowing news racks used by news media); *Chicago ACORN v. Metropolitan Pier and 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*, 619 F.2d at 1214-15 (striking down an ordinance forbidding operation of adult book stores, but not other book stores, prior to a rigorous building code inspection); *Perry*, 121 F.3d at 1367 (striking down an ordinance banning on-street

solicitations, but exempting non-profit organizations). *See also Rosenberger*, 515 U.S. at 837 (striking down a public university policy of funding student journals, except for those promoting a particular belief about religion).

Here, the Secretary cannot meet his burden of proving that the media and religion exemptions from the Act's fee, registration, and reporting requirements are narrowly tailored to advance a substantial government interest. Indeed, the Secretary has not to date suggested any government interest in support of these exemptions, let alone a substantial interest.[14] Further, the Secretary has made no effort to prove narrow tailoring. Nor could he succeed in doing so. Many non-media organizations lobby regarding the same issues as media organizations, and many non-religious organizations lobby regarding the same issues as religious organizations. There is no rational basis, let alone a substantial basis, to treat differently these similarly situated groups.[15]

Moreover, the Act's religious exemption also violates the Free Speech Clause because it comprises viewpoint discrimination. This exemption on its face uses both speaker-based discrimination (it applies only to a full-time employee of a religious organization) and content-based discrimination (it applies only when such a speaker lobbies to protect the right "to practice . . . religious doctrines"). The result is viewpoint discrimination: in practice, the lobby fee exemption will often benefit the view that religious practices should be protected, but it will not

[14] On January 4, 2010, plaintiffs propounded interrogatories to the Secretary requesting identification of any government interests in these exemptions, and identification of any facts showing that the exemptions "advance" the interests. The Secretary did not respond to this discovery.

[15] This Court has suggested that the challenged fee may be a prior restraint. *See* TRO Opinion at 9. Prior restraints bear "a heavy presumption" of unconstitutionality. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). *Cf. Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002) (holding that a content-neutral licensing scheme for both expressive and non-expressive activities in public parks is not a prior restraint). Without regard to whether Illinois has created a prior restraint by prohibiting lobbying until a lobbyist obtains a license, and by creating speaker-based and content-based exemptions, the media and religion exemptions plainly are subject to, and in violation of, mid-level scrutiny, as shown above.

benefit the opposing view. "When the government targets not just subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829.

Finally, the Act's 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) (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). Thus, it constitutes an impermissible endorsement of religion.

III. THE COURT SHOULD ENJOIN THE FEE PROVISIONS OF THE ACT.

Under any of the legal claims described above, the Court should enter the same relief as it entered in the TRO. It should enjoin the Secretary from collecting the $1,000 fee set forth in the amended Act. The facts adduced at the January 14 hearing demonstrate that plaintiffs are entitled to such relief. They are not merely likely to prevail on the merits (thus entitling them to

a preliminary injunction); given the undisputed facts the Court should grant the Rule 65 consolidation motion and find that they have prevailed (thus entitling them to a final injunction). Additionally, as the Court has already found in granting the TRO, the other elements of injunctive relief are satisfied. *See infra* Part III(A) & R. 30 (TRO Opinion) at pp. 8-10.

The terms of the injunction should remain the same under any of plaintiffs' legal claims. The Court should bar collection of any fee from any registered lobbyist, and should not attempt to rewrite the statute to try to fashion a constitutional fee level. That is the legislature's job. *See infra* Part III(B).

A. Plaintiffs satisfy the remaining requirements for an injunction.

The $1,000 lobbying fee under the amended Act would irreparably injure the ACLU and Ms. Dixon, and they lack an adequate remedy at law.

1. Injury to the plaintiffs.

Plaintiff ACLU is a non-profit, non-partisan, statewide organization with nearly 17,000 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. *See* Connell Stip. Test. ¶ 1. 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. *Id.* ¶ 3. For example, the ACLU every year engages in legislative advocacy regarding scores of bills 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. *Id.*

To carry out this 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. *Id.* ¶ 7. Plaintiff Mary Dixon has served as the ACLU's full-time Legislative Director from 1992 to the present. *Id.* ¶ 2. 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. *Id.* ¶ 8. The ACLU pays the fee required by the amended Act, both for itself and for its registered lobbyist employees. *Id.* ¶ 9. In 2009, the ACLU paid $1,050 to register itself, Ms. Dixon, and the ACLU's second employee who is a registered lobbyist. *Id.* ¶ 10. In 2010, the amended Act would require the ACLU to pay $3,000 to register itself and these two persons. *Id.* 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. *Id.* ¶ 11. 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.*

2. Plaintiffs will suffer irreparable harm without an injunction.

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, 1013 (7th Cir. 1990). *See also* TRO Opinion at 10.

3. Plaintiffs have no adequate remedy at law.

Plaintiffs seek only declaratory and injunctive relief. Regarding the media and religion exemptions, no remedy other than injunctive relief will cure the constitutional violation. Likewise, the excessive fee unlawfully collected from plaintiffs and the classes would go

towards additional advocacy on a timely basis. *See* TRO Opinion at 8-9. That advocacy is obstructed by the unlawful registration fee.

4. The balance of the harms favors plaintiffs.

The irreparable harm that the plaintiffs will suffer if the injunction is not granted is far greater than any harm that the state would bear if injunctive relief is granted. Enjoining the fees paid by registered lobbyists pending litigation would cause only a modest and temporary drop in state revenue, which would be recouped at the appropriate level once the State enacts a new fee provision at a constitutional level. Such a result is far preferable to requiring lobbyists to dramatically overpay unconstitutional amounts to engage in protected expression.

5. The public interest favors entry of a preliminary injunction.

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).

B. The Court should enjoin the fee, not legislate a new one.

Whether preliminary or permanent, the injunction Plaintiffs now seek would enjoin the Secretary as follows: "The Secretary is enjoined from requiring any natural person or organizational entity to pay the lobbyist registration fee set forth in the Lobbyist Registration Act, 25 ILCS 170/5, *as amended by* Pub. Act 96-555 at § 65." The Court should not try to rewrite the statute by reinstating the prior fee structure or creating a new one.

The Court should enjoin the fee pursuant to any of plaintiffs' First Amendment claims. If plaintiffs prevail on their claim that the $1,000 lobby registration fee is excessive under *Murdock* and its progeny, then the proper remedy is to enjoin that fee in its entirety. There is no other

presently existing Illinois statute or rule authorizing a lobbying fee of a smaller size, and this Court should not rewrite the challenged statute. Rather, the General Assembly remains free to enact a new and properly sized lobbyist registration fee. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("[w]e will not rewrite a state law to conform it to constitutional requirements."); *National Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731, 750 (N.D. Ill. 2007) (holding that court could not rewrite state statute to bring it into compliance with constitution) (citing *American Booksellers*). *See also United States v. National Treasury Employees Union*, 513 U.S. 454, 478-79 (1995) (finding task of narrowing unconstitutional federal statute was "properly left to Congress," noting "obligation to avoid judicial legislation" and that "tamper[ing] with the text of [a] statute [is] a practice [courts] strive to avoid").

Likewise, if plaintiffs prevail on their claim that the media and religion exemptions are unlawfully discriminatory under the Speech or Establishment Clause, then the proper remedy is to enjoin collection of the fee in its entirety – and prohibit collection of the fee from any registered lobbyist – 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, *see* 25 ILCS 170/12, does not warrant a different result. State law determines 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 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 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 (3d Cir. 1994). In *Rappa*, the Third Circuit relied on *Mosley*. *Id.* 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.16.

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, 81 (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 Bd. of Educ.*, 142 Ill. 2d 54, 100 (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).

Finally, the scope of the preliminary injunction proposed herein is proper, because it would preserve the status quo. "[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. v. Tecumseh Prods. 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 excessive fees and the discriminatory exemptions.

In any event, the Court should enter the injunctive relief requested here, regardless of whether it alters the status quo, because the material facts are undisputed and there is no serious question as to plaintiffs' likelihood of success on the merits. *See Praefke Auto Elec. & Battery Co. v. Tecumseh Prods. Co.*, 255 F.3d 460, 464 (7th Cir. 2001) ("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).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court enter a permanent injunction – or in the alternative a preliminary injunction – that enjoins the Secretary from requiring any organization or individual to pay any lobby registration fee pursuant to the amended Lobbyist Registration Act.

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Respectfully submitted.

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