**Nos. 04–11–1040 and 04–11–1048 (Consolidated)**

**IN THE APPELLATE COURT OF ILLINOIS**
**FOURTH JUDICIAL DISTRICT**

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| Robert D. Lynch,<br><br>Plaintiff-Appellant,<br>v.<br><br>SOI, Dept. of Transportation,<br><br>Defendant-Appellee. | Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangmon County<br><br>Case No. 10–MR–567<br><br>Hon. John W. Belz presiding |
| Timothy L. Storm,<br><br>Plaintiff-Appellant,<br>v.<br><br>SOI, State Police,<br><br>Defendant-Appellee. | Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangmon County<br><br>Case No. 11–MR–171<br><br>Hon. John W. Belz presiding |

# BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS


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## INTEREST OF AMICI CURIAE

The American Civil Liberties Union of Illinois ("ACLU of Illinois") is a statewide, non-profit, nonpartisan organization with more than 20,000 members dedicated to the protection and defense of the civil rights and civil liberties of all Illinoisans. The ACLU of Illinois has a long history of advocating for statutes and local ordinances to protect Illinoisans from discrimination, especially those Illinoisans who have been subjected to a long history of such discrimination. Through its Lesbian, Gay, Bisexual, & Transgender Project, the ACLU of Illinois works specifically to overcome discrimination on the basis of sexual orientation and gender identity. In addition, the ACLU of Illinois has fought through litigation and legislative advocacy to ensure that Illinois government is open and accountable for its conduct and that there are incentives through the availability of attorney's fees to encourage private parties to hold the government accountable for its discriminatory and otherwise unconstitutional behavior.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Chicago Lawyers' Committee") is the public interest law consortium of Chicago's leading law firms. The mission of the Chicago Lawyers' Committee is to promote and protect civil rights, particularly the civil rights of poor, minority, and disadvantaged people in the social, economic, and political systems of our nation. The Chicago Lawyers' Committee staff, with the assistance of its member firms, provides free legal assistance and representation to individuals on a variety of civil rights matters, including challenges to discrimination in both the public and private sectors. The Chicago Lawyers' Committee, through its decades old Employment Law Project, takes a special interest in employment discrimination law and combating illegal employment discrimination. Moreover, the

Lawyers' Committee has been a leader in providing written materials and training for lawyers representing plaintiffs in employment discrimination cases.

## ARGUMENT

The General Assembly unambiguously showed its intent to waive the State's sovereign immunity from civil actions alleging employment discrimination under the Illinois Human Rights Act ("IHRA"). The IHRA allows an employee to sue his "employer" in circuit court when he alleges certain discriminatory acts, and the Act explicitly includes "the State" in its definition of "employer." The government's argument—that the legislature's intent to waive sovereign immunity can only be established when it uses certain "magic words"—is without merit. Under applicable Illinois Supreme Court precedent, a waiver exists as long as the General Assembly's intent to do so is clear, and it is absolutely clear in the IHRA.

The government's position is not only wrong under the law, it would also disregard Illinois's policy of antidiscrimination. The government asks this Court to render a decision that would deny state employees access to the courts, and create a subclass of citizens with inadequate remedies for employment-based civil rights violations. This would be absurd and unjust, as it would run counter to Illinois's unambiguous policy against discrimination and for equal rights between public and private-sector employees.

Furthermore, the holding sought by the government—that magic words are required to waive sovereign immunity—would significantly impact citizens' ability to police and alter the State's discriminatory acts and other unconstitutional conduct. In addition to the IHRA, the General Assembly has passed other statutes that empower citizens to force the government to obey the law through fee-shifting provisions. A

magic-words litmus test could severely undermine these legislative acts. For these reasons, this Court should reject the State's argument that the IHRA does not waive the State's sovereign immunity and, thus, reverse the circuit court's order granting the State's motions to dismiss.

## I. The General Assembly Expressed A Clear Intent To Waive Sovereign Immunity In The IHRA

The doctrine of sovereign immunity, which prevents the State from being sued absent its consent, derives from the concept that "the King can do no wrong." *Feres v. United States*, 340 U.S. 135, 139 (1950); *see generally* Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 2 (1924). Although Americans rejected the idea of the infallible king, our state and federal courts nonetheless applied the doctrine to our governments in the same manner it had been applied to the Crown. *See id.*; *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 460 (1983). As our governments expanded their activities into more and more aspects of their citizens' lives, their agents "caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government." *See Feres*, 340 U.S. at 139–140. By the 1950s, the doctrine had been roundly rejected by scholars, and our Supreme Court initiated its demise in Illinois. *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 18 Ill. 2d 11, 14–15, 29 (1959) (noting that scholars have "almost unanimously condemn[ed] the immunity doctrine" and holding that a "school district is liable in tort for the negligence of its employee, and all prior decisions to the contrary are hereby overruled"). By 1970, the People of Illinois abolished sovereign immunity via an amendment to our Constitution. Ill. Const., art. XIII, § 4.

However, this change was not absolute, as it allowed the General Assembly to restore sovereign immunity as it deemed necessary. *Id*. ("*Except as the General Assembly may provide by law*, sovereign immunity in this State is abolished.") (emphasis added). Then, in 1972 the legislature enacted the State Lawsuit Immunity Act to reflect its decision that, with some exceptions, "the State of Illinois shall not be made a defendant or party in any court," thus, effectively reinstituting the State's sovereign immunity. 745 ILCS 5/1 (State Lawsuit Immunity Act). Of course, the legislature may enact exceptions to this general rule, and it has done so. The General Assembly waived sovereign immunity for many statutes, primarily those that deal with employer-employee relations. For example, the General Assembly allowed the State to be sued under the Illinois Public Labor Relations Act, Section 19(k) of the Workers' Compensation Act, Title VII of the federal Civil Rights Act of 1964, and many other statutes. *See, e.g.*, 745 ILCS 5/1; 820 ILCS 305/19(k); 745 ILCS 5/1.5(e). The question on appeal in this case is whether the General Assembly also intended to allow the State to be sued under the IHRA. It did.

The plain language of the IHRA shows the General Assembly's intent to waive sovereign immunity under that Act. The IHRA allows an employee to sue his employer in circuit court when he alleges certain discriminatory acts, and the IHRA explicitly defines "employer" to include "the State." The government asks this Court to ignore this unambiguous reading of the statute and focus exclusively on language added in a 2008 amendment (which did not remove "the State" from the class of "employers" that could be sued). Additionally, it argues that only certain magic words are sufficient to waive immunity. But neither logic nor precedent requires this Court to ignore the IHRA as

written or require the General Assembly to use any particular words to waive sovereign immunity so long as the statute's meaning is clear.

### A. A general liability statute waives sovereign immunity when it expressly imposes liability on the State

"The rights of the sovereign are not impaired by general legislative enactments which apply to private rights ***unless*** an intent to make the State liable is expressed in the statute." *Department of Revenue v. Appellate Court, First Dist.*, 67 Ill. 2d 392, 396 (1977) (emphasis added, citation omitted). Thus, when a statute imposes liability on a class of defendants that potentially—but not necessarily—includes the State, courts should not conclude that the General Assembly intended to waive sovereign immunity. In *Department of Revenue*, the appellate court ordered the State to reimburse the appellant for his litigation costs pursuant to a statute requiring that, "'if any person shall take appeal… and if the judgment be reversed, the appellant shall recover his costs.'" *Id.* at 395 (quoting Ill.Rev.Stat.1975, ch. 33, par. 22). The appellate court treated this as a straightforward application of a clear rule—the statute said appellees must pay when the appellant wins, the State was the appellee, and the appellant won; thus, the State must pay. But the Supreme Court saw it differently. The cost-shifting provision could apply to numerous appellees who were not the State, and the statute gave no indication that the General Assembly specifically intended to include the State in this very broad group of potential appellees. *See id*. at 398. In other words, there was nothing in the statute of ***general*** applicability that "could be claimed to make the State ***specifically*** liable for costs." *Id*. at 398 (emphasis added).

Similarly, *In re Walker* dealt with a statute that included a general statement of applicability. 131 Ill. 2d 300, 303 (1989). The Court considered Section 2–1303 of the

Code of Civil Procedure, which required payments by certain types of defendants, including "…a school district, a community college district, or ***any other governmental entity***." *Id*. (emphasis added). The State (the defendant) argued that the General Assembly did not intend to refer to the State of Illinois when it used the general statement "any other governmental entity"; therefore, the statute did not waive the State's sovereign immunity. *See id*. at 302–03. The Court agreed. It reasoned that "any other governmental entity" was a broad and general term (covering a wide variety of public entities), and the statute failed to make clear whether the General Assembly specifically intended to include the State in this group. *See id*. at 307.

Consequently, sovereign immunity is waived only when a statute goes beyond a statement of general applicability and makes clear the legislature's intention to include the State in particular.

### B. The IHRA contains an explicit waiver of the State's sovereign immunity

The IHRA allows a suit in circuit court when "any employer" is alleged to have committed an act of employment discrimination. 775 ILCS 5/2–102; 775 ILCS 5/7A–102. Without more, "employer" is a term of general applicability; so waiver of sovereign immunity should only be found if the General Assembly expressed its intent to waive immunity elsewhere in the IHRA. *See Department of Revenue*, 67 Ill. 2d at 396. Such intent is explicitly contained in the IHRA, so this Court must reverse the circuit court.

The General Assembly clearly and unequivocally defines who can commit acts of employment discrimination and, thus, who can be sued under the IHRA. Critically, the IHRA does not rely on the common understanding of the term "employer"; instead, it

specifically lists which entities are liable as "employers," and includes "the State" in this list. The Act states,

> "It is a civil rights violation" for "***any employer*** to [act]… on the basis of unlawful discrimination" 775 ILCS 5/2–102 (emphasis added),

and

> " '***Employer***' includes… ***The State*** and any political subdivision," 775 ILCS 5/2–101 (emphasis added).

Thus, there is no ambiguity as to whether the State is included in the term "employer"—it is right there in the definition.

The explicit definition in the IHRA is plainly distinguishable from the phrase "other governmental entity" (at issue in *Walker*) on which the government so heavily (and incorrectly) relies. Here, the definition of "employer" makes clear that the General Assembly intended for the State to be specifically liable for its acts of employment discrimination. Thus, unlike the statute at issue in *Walker*, "an intent to make the State liable is expressed in" the IHRA. *Department of Revenue*, 67 Ill. 2d at 396.

### C. The 2008 General Assembly was not required to add additional waiver language in the 2008 amendment to the IHRA

The government suggests that the General Assembly needed to add specific waiver language when it amended the IHRA in 2008. Specifically, because (i) the 2008 amendment added the circuit courts as a forum to litigate discrimination claims under the IHRA and (ii) "employer" was defined when jurisdiction under the IHRA was limited to the Illinois Human Rights Commission, the government argues that the General Assembly was required to add some *new* clear language in 2008 to express its intent to waive immunity. *See* Storm R. C–126 (Gov't Reply at 2) (arguing that language

specifically mentioning sovereign immunity is needed in the Act).[1] There is no support for this proposition, and it must be rejected.

The government's position derives from the history of the IHRA. Before 2008, the Act exclusively provided an administrative remedy—a hearing before the Human Rights Commission ("HRC")—for all employees, both public and private. *See* 775 ILCS 5/7A–102 (2007). Thereafter, the General Assembly, aware that some employees needed an alternative to the HRC's procedures (*see infra* Section II.A), created a cause of action in the circuit courts for civil rights violations that had previously been confined to the HRC's exclusive jurisdiction. 2007 Ill. Legis. Serv. P.A. 95-243 (H.B. 1509) (eff. Jan. 1, 2008). Because the government cannot ignore that the IHRA's express definition of "employer" includes "the State," it argues that the State can only be a defendant in an action before the HRC, and not in state court. Storm R. C–126 (Gov't Reply at 2). However, the 2008 amendment merely added a second avenue for "seeking redress for alleged violations" (Storm R. C–126 (Gov't Reply at 2)), it did not change the substance of the law or the class of people who could sue or be sued.

The government apparently believes that this Court should ignore the express language of the statute—where "employers" is unambiguously defined to include "the State"—and, instead, should discern intent by what is *missing* from the 2008 amendment. There is no support for this approach. Instead, the legislature is assumed to act consistently with practices and interpretations of the pre-amended law. *Follett's Illinois Book & Supply Store, Inc. v. Isaacs*, 27 Ill. 2d 600, 605–06 (1963) ("Amendments are to

[1] References to Lynch R. C–XXX and Storm R. C–XXX refer to the records in 10–MR–567 and 11–MR–171, respectively. Parenthetical references to Gov't Mem. and Gov't Reply refer to the Government's Memorandum of Law and Reply, respectively, in support of its Motion to Dismiss in each case.

be construed together and with the original act to which they relate as constituting one law and as part of a coherent system of legislation"); *see also In re May 1991 Will County Grand Jury,* 152 Ill. 2d 381, 388, (1992) ("It is presumed that the General Assembly knows how courts have interpreted a particular statute"); *People v. Antoine*, 286 Ill. App. 3d 920, 925 (4th Dist. 1997) (same). Thus, in 2008 the General Assembly amended the statute knowing that the IHRA subjected the State to the full array of procedures and remedies available to private parties. The General Assembly had no need to add a new statement indicating that the State was subject to the Act's remedies, because it had already done that by including "the State" in the definition of "employer."

*Department of Revenue* and *Walker* ***do not*** impose a duty on the General Assembly to affirm a previously expressed intent as part of every amendment. Instead, they compel the legislature simply to go beyond terms of general applicability and include some clear language expressing its intent to impose liability on the State. The IHRA, when read as a whole, does so.

### D. The General Assembly was not required to use magic words to clearly demonstrate its intent to waive sovereign immunity

Acknowledging that it cannot ignore the IHRA's definition of "employer," the government also asserts that the unambiguous definition is insufficient to waive immunity. Lynch R. C–214–15 (Gov't Reply at 2–3); Storm R. C–126–27 (Gov't Reply at 2–3). The government never explicitly says what language would be sufficient, but its position is unmistakable: the General Assembly cannot waive sovereign immunity without using particular magic words like "the State of Illinois waives sovereign immunity." *See* Storm R. C–30 (Gov't Mem. at 4); Lynch R. C–114 (Gov't Mem. at 3); Transcript of Nov. 8, 2011, Hearing on Motion to Dismiss at 15:8–10 ("The only thing

that matters is whether or not the statute says [it] waive[s] sovereign immunity."). There is no basis in *Department of Revenue, Walker* or any other precedent for such a holding.[2]

The government confuses the requirement of *clear legislative intent* with the use of *specific statutory words*. Yet the distinction is important, as the former is required, but the latter is not. *See Twp. of Jubilee v. State*, 960 N.E.2d 550, 558 (Ill. 2011) ("it is axiomatic that in matters of statutory construction, we cannot allow formality to trump substance where the result would be contrary to the purposes for which the statute was enacted and lead to consequences which the legislature could not have intended"); *People ex rel. Baker v. Cowlin*, 154 Ill. 2d 193, 197 (1992) ("The primary rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the true intent of the legislature.").

The government has sought hyper-clear waivers in statutes before, but this Court rejected those arguments and held that the General Assembly can show its intent *without* using a phrase such as "the State of Illinois waives sovereign immunity." *Martin v. Giordano*, 115 Ill. App. 3d 367, 369 (4th Dist. 1983). In *Martin*, the State argued that a waiver of sovereign immunity should be found only when the State was specifically mentioned in each of the relevant sections of the statute. The court rejected this argument:

> By relying upon *Appellate Court of Illinois* and *Allphin*, [defendant] misconstrues those holdings. These cases stand for the proposition that general enactments imposing liability cannot be applied to the State in the absence of a specific legislative intent to so apply them. The critical issue is whether the legislature intended to impose liability upon the State—***not how or where*** the intent is expressed.

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[2] Moreover, such an expansive ruling could have significant unintended consequences. *See infra* Section III.

*Id.* at 370 (emphasis added). Similarly, in *People v. Carter*, the appellate court held that the Illinois Sexually Dangerous Persons Act required the State to compensate a plaintiff even though the text of the statute ***did not*** include an explicit statement of waiver. 392 Ill. App. 3d 520, 525 (2d Dist. 2009). Instead, the court found the Act's language (and the language of a related act) "indicates that the legislature did not intend for sovereign immunity to bar claims of this nature." *Id.* at 526.[3]

These decisions are consistent with *Department of Revenue* and *Walker*. The government is improperly trying to narrow *Walker*'s holding to require the examples noted in that opinion's dicta. Again, these cases merely hold that clear legislative intent is required; they do not require specific magic words. Consequently, the General Assembly's inclusion of "the State" within the definition of "employer" clearly demonstrated its intent that the State be subject to liability, as *Department of Revenue* and *Walker* require.

## II. The Implication Of The Government's Position Would Contravene Illinois's Policy Of Antidiscrimination

"It is well settled that statutes are to be construed in a manner that avoids absurd or unjust results." *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 46 (2001) (internal quotation and citation omitted). Yet the government asks this Court to render a decision that would deny a subset of citizens, government employees, access to the courts to redress employment-based civil rights violations. This result would be absurd and unjust,

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[3] The court listed two reasons for awarding fees. In addition to the argument discussed above, the court also determined that, since the State initiated the court proceeding, the State Lawsuit Immunity Act did not apply because it only covered circumstances where the State is "made" a defendant. *Carter*, 392 Ill. App. 3d at 526.

because it would run counter to Illinois's unambiguous public policy against employment discrimination.

### A. A judicial remedy is needed for employment-based civil rights violations, as the administrative remedy is inadequate

The General Assembly created a cause of action in the circuit courts because the procedures of the Human Rights Commission ("HRC") and the Department of Human Rights ("DHR") were not effective for certain aggrieved parties. Because discrimination is often subtle and requires significant evidence, some victims may only successfully litigate their claims in a forum with procedures more robust than those provided by the HRC and DHR. The General Assembly determined that some employees need access to the circuit courts' discovery procedures and right to a trial by jury to effectively prosecute their claims. This is especially true for those Illinoisans whose right to be free from discrimination has not been recognized by the federal government (*i.e.*, those protected on the basis of sexual orientation, gender identity, marital status, military status, order of protection status, citizenship status, language, or ancestry) and, thus, cannot rely on federal analogs to the IHRA to vindicate their rights.

Under the IHRA (now and before the 2008 amendment) an employee alleging discrimination must file a charge with the DHR, which then has 365 days to investigate the claim. 775 ILCS 5/7A–102(A); 775 ILCS 5/7A–102(G). Employees are afforded a hearing before an HRC officer only when the DHR finds "substantial evidence" or does not complete its investigation on time. 775 ILCS 5/7A–102(D); 775 ILCS 5/7A–102(G).

The DHR's investigations are circumscribed because the victim is not allowed to develop his own case: a DHR staffer directs the investigation, and the employer and employee are limited to exchanging accusations. 775 ILCS 5/7A–102(B); 775 ILCS

5/7A–102(C). Moreover, the DHR's limited investigation primarily consists of sending the employer a questionnaire and holding an optional fact-finding conference. Kent Sezer & Jacinta Epting, *Rights, Remedies, And Procedures Under Illinois Law* in *Employment Discrimination* §§ 10.40–10.51 (Adrianne C. Mazura ed., 2012). When conferences are held, they are "informal"; cross-examination ordinarily is not permitted; statements by parties and witnesses are not under oath; and no verbatim record of conference proceedings is made or permitted. 56 ILAC 2520.440(c); Kent Sezer & Jacinta Epting, *Rights, Remedies, And Procedures Under Illinois Law* in *Employment Discrimination* §10.47 (Adrianne C. Mazura ed., 2012). On top of that, the investigator may simultaneously pursue the potentially conflicting goal of encouraging the parties to settle. *See id.*

Even if an employee proceeds to an HRC hearing, the employee's hands are tied by limited discovery and no right to a jury. Specifically (and critically), absent a special showing, the employee cannot take depositions. 775 ILCS 5/8A–102(F). Indeed, depositions are rarely allowed. Kent Sezer & Jacinta Epting, *Rights, Remedies, And Procedures Under Illinois Law* in *Employment Discrimination* §10.58 (Adrianne C. Mazura ed., 2012). Yet, depositions are one of the most important discovery tools in litigation. "Because discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare." *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999). Moreover, the employer is often the only one with knowledge of potential evidence and, simultaneously, the sole repository of the evidence. As such, depositions are the best, and often only, means for developing the facts. For example, the alleged discriminator's motive is usually a central issue in dispute. Motive would rarely

be documented in writing, so the employee needs deposition testimony to develop the winning facts.

Likewise, without such documentary evidence, the outcome of the hearing will turn on the perceived veracity of testimony. The jury's critical role in making such assessments is long established. *Gainey v. People*, 97 Ill. 270, 275 (1881); *accord Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). Yet, under HRC procedures, an administrative law judge is the sole finder of fact. 775 ILCS 5/8A–102(I).

In light of the potential limitations of DHR investigations and HRC hearings, the General Assembly's 2008 amendment brought a sea change. It allowed the victim to advance his own cause in circuit court, thereby providing him with the full set of discovery tools and the benefit of a jury deciding the truth. 775 ILCS 5/7A–102; 775 ILCS 5/8–111(A). This is particularly relevant for victims of discrimination based on sexual orientation, gender identity, marital status, military status, order of protection status (under Illinois Domestic Violence Act of 1986), citizenship status, language, or ancestry. For some forms of discrimination, state employees may have recourse in the courts through the federal antidiscrimination statutes (*e.g.*, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964). A state employee can sue under these federal statutes if he was discriminated against on the basis of his age, disability, or race. *See, e.g.*, 29 U.S.C. 621 et seq. (1994 ed. and Supp. III) (Age Discrimination in Employment Act). When the United States Supreme Court held provisions of these statutes allowing claims against the

states unconstitutional under the 11th Amendment,[4] the Illinois General Assembly passed legislation to ensure that the State, as an employer, could continue to be sued under those statutes. 2003 Ill. Legis. Serv. P.A. 93-414 (H.B. 469) (eff. Jan. 1, 2004). But those statutes did not help victims of discrimination based on sexual orientation, gender identity, marital status, military status, order of protection status, citizenship status, language, or ancestry, because no federal statute prohibits discrimination on those bases. Thus, while a person alleging employment discrimination based on his sex may have a claim under Title VII of the Civil Rights Act, a victim of discrimination based on one of the aforementioned classes has only the protections of the IHRA. *See* 775 ILCS 5/1–102(O–1); 775 ILCS 5/1–102(Q); 775 ILCS 5/2–102(A); 775 ILCS 5/2–102(A–5).

The government effectively argues that it was the General Assembly's intent to create (at least) two classes of public employees who are victims of workplace discrimination: (1) those with a federally-recognized discrimination claim, who can access the courts and (2) those who (although protected by Illinois law) are not protected from discrimination by federal law, who have no access to the courts. This result is absurd and unjust on its face. And, as shown below, it is absurd and unjust in light of well-established policy.

### B. It is contrary to public policy to allow the State to discriminate against its most vulnerable employee-citizens with minimal consequence

Affirming the circuit court's dismissal will effectively hold that the State can discriminate against many of its employees without any serious consequence. Such a holding would be contrary to a body of Illinois law that clearly and consistently ensured

[4] *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

that public employees were afforded the same procedural and substantive protections from discrimination as private employees.

Although the government relies on the Illinois State Lawsuit Immunity Act ("Immunity Act") for support, that Act actually demonstrates an affirmative legislative intent to provide state employees with the same rights enjoyed by private sector employees. The Immunity Act has waived sovereign immunity for actions arising under the Illinois Public Labor Relations Act, *see* 745 ILCS 5/1, which allows public-employee unions to bring suit against the State in circuit court, the same right enjoyed by private-sector unions, *see* 5 ILCS 315/16.

Furthermore, in 2003 the General Assembly amended the Immunity Act to overcome United States Supreme Court decisions that restricted state employees' rights to sue the State under certain federal statutes. As Illinois State Representative Barbara Flynn Currie explained to the General Assembly:

> Starting in 1999, the United States Supreme Court, in several civil rights actions, concluded that Congress exceeded its authority when it gave state employees the same right to sue for protections under the Age Discrimination and Employment Act, the Fair Labor Standard Act and the Americans with Disabilities Act. ***This Bill would say that people who happen to work for the State of Illinois instead of the Ford Motor Company or the City of Chicago have the same rights as those individuals*** to enforce these responsibilities that Congress has approved.

H.B. 469, 93d Ill. Gen. Assem., House Proceedings, Mar. 4, 2003, at 37 (comments of Rep. Currie) (emphasis added). Specifically, the General Assembly made clear that state employees have the right to sue their employer in the same manner as their private-sector counterparts. *See* 745 ILCS 5/1.5 (state employees may bring suit against the State in circuit court for violations of the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Family and Medical Leave Act, the Americans

with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964). Thus, when the General Assembly amended the IHRA in 2008 to allow aggrieved employees the right to sue in circuit court, the 2003 amendments to the Immunity Act were in place. As such, it was still the State's policy that "people who happen to work for the State of Illinois" have the same rights as their private-sector counterparts.

The IHRA is not included with these federal statutes in the 1972 Immunity Act or its 2003 amendments because the IHRA did not provide for a right to sue in circuit court until 2008. So there was no reason to include the IHRA in the Immunity Act when the Immunity Act was passed or amended. Moreover, the General Assembly does not need to amend the Immunity Act every time it wants to waive immunity. It can express that intent on a statute by statute basis, as it had already done in the IHRA. *See In re Walker*, 131 Ill. 2d at 303–304 (evaluating legislative intent in the specific statute at issue).

Under the government's theory, despite ensuring that public employees can sue the State in circuit court for discrimination under analogous federal statutes, the General Assembly intentionally prohibited claims against the State under the IHRA (by leaving out certain magic words). This result is nonsensical, as the exact same kinds of claims covered by the federal statutes are also covered by the IHRA.

The text of the IHRA must be considered against the backdrop of a very clear public policy: employees who happen to work for the State should have the same rights as those who work for a private employer. This is especially true since this policy fully overlaps with the stated policy goals of the IHRA:

> To secure for ***all individuals within Illinois*** the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual

> orientation, or unfavorable discharge from military service ***in connection with employment***, real estate transactions, access to financial credit, and the availability of public accommodations.

775 ILCS 5/1–102(A) (emphasis added). It would be absurd to assume that the General Assembly wanted the IHRA to deny a judicial remedy to public-employee victims of discrimination, when its acts consistently show that the General Assembly does not tolerate discrimination and wants public employees to have the same rights to redress it as their private-sector counterparts. *See Twp. of Jubilee,* 960 N.E.2d at 558 ("it is axiomatic that in matters of statutory construction, we cannot allow formality to trump substance where the result would be contrary to the purposes for which the statute was enacted and lead to consequences which the legislature could not have intended").

## III. The Government Requests An Expansive Holding That Would Remove Incentives For Private Parties To Police The State's Illegal Conduct Under The IHRA And Other Statutes

If this Court adopts the government's position, it would substantially curtail incentives created by the General Assembly in the IHRA and other statutes for private parties to police the State's illegal conduct. This is because the government seeks a requirement for ***each and every*** Illinois statute that establishes a cause of action against the State that the legislature write, "the State of Illinois waives sovereign immunity" or some approximation of that phrase. Storm R. C–30 (Gov't Mem. at 4). This rigid requirement would ignore the General Assembly's intent to waive immunity using other language. As a result, it could undermine the broader goal of encouraging private parties to police the State's unconstitutional conduct, which the General Assembly encourages through statutorily required awards (*i.e.*, damages or attorney's fees).

Citizens, not the government, must police the State's conduct. For example, in the ordinary course of her duties, the Attorney General must "investigate all violations of the laws relating to civil rights and the prevention of discriminations against persons by reason of race, color, [etc.], and shall, whenever such violations are established, undertake necessary enforcement measures." 15 ILCS 210/1. But this presents a conflict, because the Attorney General also has the constitutional duty to act as lawyer to the State agencies. *Envt'l Prot. Agency v. Pollution Control Bd.*, 69 Ill. 2d 394, 398 (1977). Since the person charged with upholding Illinois's civil rights laws, including the IHRA, cannot do so against the State (her client), the General Assembly must rely on the people to hold the State accountable for its discriminatory conduct.

Consequently, waiver of sovereign immunity in the civil rights context encourages private parties to serve as private attorneys general who will force the State to meet its constitutional obligations. Legislatures promote these lawsuits through fee-shifting provisions, which allow a successful private-party plaintiff to recover his legal expenses from the State. For example, the fee provision in the Illinois Freedom of Information Act ("FOIA") was intended to "prevent the sometimes *insurmountable barriers* presented by attorney's fees from hindering an individual's request for information and from enabling the government to *escape compliance with the law*." *Duncan Pub., Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 786 (1st Dist. 1999) (emphasis added). Likewise, the Illinois Civil Rights Act "*facilitates private enforcement of civil rights laws* by allowing the award of attorney fees to parties who prevail in litigation, brought under [certain civil rights laws] or the Illinois Constitution, including those parties whose litigation *causes a reversal of policy by the government*." H.B. 2330,

93d Ill. Gen. Assem., Senate Proceedings, May 13, 2003, at 135 (comments of Sen. Harmon) (emphasis added).[5] Statutes like these are supposed to keep the State from encroaching on fundamental rights. For this reason, their enforcement is paramount. Hence, each has a fee-shifting provision that encourages citizen actions by ensuring that the State will reimburse the citizen's costs if he wins.

But neither statute says "the State of Illinois waives sovereign immunity" or uses an approximation of that phrase. *See, e.g.,* 5 ILCS 140/11 (FOIA); 740 ILCS 23/5 (Illinois Civil Rights Act). Consequently, holding that some specific phrase is always required to waive immunity would effectively nullify government accountability statutes in contravention of legislative intent. This Court should decline the government's invitation to institute a magic-words litmus test for sovereign immunity waiver.

## CONCLUSION

For the reasons stated above, this Court should reverse the circuit court and hold that the Illinois Human Rights Act contains a clear expression of the General Assembly's intent to subject the State to suit in circuit court for violations of that Act.

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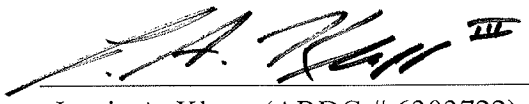
[5] The encouragement of private attorneys general is common in both federal and state legislation. For example, Congress included damages and fee-shifting provisions in Title VII of the Civil Rights Act, the Americans with Disabilities Act, and 42 USC § 1988 to encourage the enforcement of federal civil rights laws. 42 USC § 2000e-5(k); 42 USC § 12205; 42 USC 1988(b). Likewise, when the General Assembly waived sovereign immunity so that public employees could sue the State under the federal anti-employment-discrimination laws (*see supra* Section II.B), it ensured that citizens would keep the State in legal compliance, even if the cost of litigation was high. *See also* 5 ILCS 100/10–55(c) (under the Illinois Administrative Procedure Act the court "shall award" fees to a party that "has any administrative rule invalidated by a court for any reason").

Date: April 11, 2012

Respectfully submitted,



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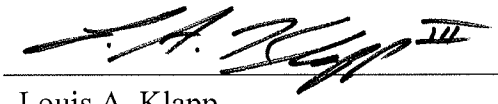
## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.



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## CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2012, I served three copies of this Brief of *Amici Curiae* American Civil Liberties Union of Illinois and Chicago Lawyers' Committee for Civil Rights Under Law in Support of Plaintiffs-Appellants upon

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