No. 122349

IN THE SUPREME COURT OF ILLINOIS

Institute for Justice, Plaintiff-Appellant, v. **Illinois Department of Financial and Professional Regulation**, Defendant-Appellee.	Appeal from the Illinois Appellate Court, First Judicial District Case Nos. 1-16-2141, 1-16-2294 (consol.) There on Appeal from the Circuit Court of Cook County No. 14 CH 19381 Hon. J. Rodolfo Garcia, Judge Presiding

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

The **American Civil Liberties Union of Illinois** ("ACLU") is a statewide, non-profit, non-partisan organization of more than 65,000 members. The ACLU is dedicated to the defense and promotion of the principles embodied in the U.S. Constitution, the Illinois Constitution, and state and federal civil rights laws. The ACLU believes that open government is essential to the preservation of liberty. The ACLU regularly requests public records under the Illinois Freedom of Information Act to serve its mission of strengthening and protecting civil rights and civil liberties.

The **Better Government Association** ("BGA") is a nonpartisan, nonprofit civic watchdog organization working for government reform, including transparency, accountability, honesty and efficiency, through investigative journalism, civic engagement and public policy advocacy. BGA works for integrity, transparency, and accountability in government by exposing corruption and inefficiency; identifying and advocating effective public policy; and engaging and mobilizing the electorate to achieve authentic and responsible reform. BGA makes many FOIA requests each year in furtherance of its mission and frequently litigates FOIA denials.

Chicago Appleseed Fund for Justice ("CA") is a research, education, and advocacy organization working to achieve systemic reform of the courts and the justice system. CA is dedicated to improving access to justice by addressing policies and practices that relate to government effectiveness issues. CA focuses on criminal justice, family law reform, immigration court reform, and access to justice. Each of CA's programs have involved FOIA policies and procedures, and the effectiveness of its reform programs often involves FOIA

requests.

The **Chicago Council of Lawyers** ("CCL") is a public interest bar association formed nearly 50 years ago as a voice for the legal profession in systemic reform issues. CCL is dedicated to achieving a justice system that is accessible, effective, and fair. Together with other community stakeholders, CCL works to identify problems, study possible solutions, and propose practical reforms that will meaningfully improve the administration of justice in Cook County, and help to implement those reforms. CCL works to make the justice system more transparent and accountable, and has worked for many years to improve our FOIA process and procedures.

The **Citizen Advocacy Center** ("CAC") is an award winning, non-profit, non-partisan free community legal organization. Founded in 1994, CAC's mission is to build democracy for the 21st century by strengthening the citizenry's capacities, resources, and institutions for self-governance. CAC seeks to increase democratic protocols at every level of government and develop the voice of the public. CAC was a leading organization in the effort that resulted in the 2010 FOIA reform. CAC answers hundreds of FOIA questions each year from concerned citizens; helps people file FOIA requests; trains lawyers and government employee on FOIA compliance; and routinely uses FOIA which has resulted in its engaging in FOIA litigation.

The **Illinois Press Association** ("IPA") is the largest state press organization in the United States. Founded in 1865 near the end of the Civil War, the IPA's members include nearly all of the more than 600-plus newspapers in Illinois. Throughout its long history, the IPA has been dedicated to promoting and protecting the First Amendment interests of

newspapers and citizens before the Illinois legislature and Illinois courts.

SUMMARY OF ARGUMENT

The Freedom of Information Act, 5 ILCS 140/1 *et seq.* ("FOIA") strengthens democracy by allowing the public to understand the government's work and thereby hold elected officials accountable. In pursuit of such accountability, the Institute for Justice ("IJ") properly requested public records under the FOIA from the Department of Financial and Professional Regulation (the "Department"). After the request was denied, IJ filed this case in the Circuit Court.

Upon the Department's denial of its request, IJ had a vested right in the documents and a cause of action under the FOIA.[1] A majority of the First District (the "Majority Opinion") nonetheless stripped IJ of its right to the documents and its cause of action by retroactively applying a new exemption to the FOIA that was enacted after this lawsuit was filed. The decision contorts this Court's retroactivity jurisprudence and undermines the democracy-enhancing function of the FOIA.

Illinois law is particularly hostile to the retroactive application of new statutes. Under Illinois statute and this Court's repeated holdings, a newly-enacted statute may not be applied to the detriment of a substantive right that has already accrued under prior law, unless the legislature clearly indicates otherwise. In this case, IJ's FOIA request is a completed transaction made in reliance on prior law, and IJ's right to the FOIA records accrued upon the

[1] As the Department apparently acknowledges, the records were subject to disclosure under FOIA at the time IJ requested them. *See Inst. for Justice v. Dep't of Fin. & Prof'l Regulation*, 2017 IL App (1st) 162141, ¶ 6.

Department's denial of the request. The new FOIA exemption therefore may not deprive IJ of that right. The Majority Opinion nonetheless found that application of the new exemption had "no impermissible retroactive effect." It reached this erroneous conclusion by considering only the type of relief sought, and by ignoring the retroactive impact on IJ's impaired right.

The Majority Opinion, if upheld, will give public bodies an incentive to deny or delay responses to FOIA requests and lobby for new exemptions in the interim. Such a practice undermines the FOIA's stated purpose: to promote the citizens' right to informed policy debate and empower them to hold public bodies accountable.

ARGUMENT

I. IJ'S RIGHT TO DOCUMENTS PROPERLY REQUESTED UNDER THE FOIA MAY NOT BE THWARTED BY A LATER-ENACTED EXEMPTION

A. Illinois law prohibits the application of a new law in a way that alters "any right accrued, or claim arising before the new law takes effect," absent clear legislative direction otherwise.

"When called upon to determine whether an amended statute may be applied retroactively, Illinois courts are to follow" a version of "the approach set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29. Under *Landgraf*, a court first asks whether the legislative intent is clear as to whether the statute applies retroactively or proactively. If the intent is unclear, "the court must go on to determine whether applying the statute would have a retroactive impact," that is, whether "application of the new statute would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *J.T. Einoder at* ¶¶ 29, 30 (citations omitted).

If so, "the court must presume that the legislature did not intend that it be so applied." *Id.* (quoting *Caveney v. Bower*, 207 Ill.2d 82, 91 (2003)).

But this Court has, in practice, modified *Landgraf* to disfavor retroactivity: "Illinois courts will rarely, if ever, need to go beyond step one of the *Landgraf* analysis," (looking for clear legislative intent as to the temporal reach of the statute), because the rest of the analysis is subsumed by the Illinois Statute on Statutes. *J.T. Einoder*, ¶ 31. That statute provides:

> No new law shall be construed . . . in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.

5 ILCS 70/4; *see also Caveney*, 207 Ill. 2d 82 at 92.

If a court finds no clear legislative intent regarding the amended statute's "temporal reach," it must presume that the statute was "framed in view of" the Statute on Statues. *J.T. Einoder*, ¶ 31. As this Court has summarized, amendments "that are procedural in nature may be applied retroactively, while those that are substantive may not." *J.T. Einoder*, ¶ 32 (quoting *Caveney*, 207 Ill.2d at 92).

B. The new FOIA amendment may not be applied here because IJ's right to the documents accrued, and its cause of action against the Department arose, before the new exemption went into effect.

As the Majority Opinion acknowledges, the FOIA amendment contains no language as to its intended "temporal reach." *Inst. for Justice*, ¶ 10. Accordingly, under the Statute on Statues and this Court's rulings, the amendment may not be applied in a way that impairs IJ's substantive rights under the prior statute.

The FOIA confers substantive rights on those who request public

records. The right to "full and complete information regarding the affairs of government" derives from the "fundamental philosophy of the American constitutional form of government." 5 ILCS 140/1. Since "access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government," it is "a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible." *Id.* This right is "necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.* The right of access to public records is so important that any restraints on that right must be construed narrowly:

> Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a **right** to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle.

Id. (emphasis added).

The new FOIA exemption, applied to this case, impairs IJ's right to receive the public records it properly requested. IJ's right accrued, and its cause of action arose, upon the government's denial of the request. *See* 5 ILCS 140/11(a) (providing a cause of action for "[a]ny person denied access to inspect or copy any public record by a public body."). If the new FOIA exemption is applied to this case, IJ's right, and its cause of action to enforce that right, simply disappears. This is a substantive change, not a procedural one, because it changes the scope of documents IJ may receive, not the procedure it follows to acquire them. 5 ILCS 70/4.

Because of this impermissible retroactive effect, the new FOIA exemption does not apply in this case. The Majority Opinion erred to hold otherwise.

II. THE FIRST DISTRICT'S ANALYSIS MISSTATES AND MISAPPLIES THE STATUTE ON STATUTES AND THIS COURT'S RETROACTIVITY JURISPRUDENCE

A. The First District erroneously relies on the type of relief sought, rather than the right that was impaired, to determine if the statute has an impermissible retroactive effect.

The Majority Opinion erroneously found that IJ's FOIA claims were subject to a new FOIA exemption enacted after its claims arose. At the heart of this error is the majority's focus on the type of relief sought. Since IJ sought an injunction to remedy the violation of its vested rights under the FOIA, the majority found that application of the FOIA exemption to the case would be prospective, rather than retroactive. Instead, as described above, the question under Illinois law is not what form of relief is sought, but whether IJ seeks vindication of a right that has accrued or a claim that has arisen before the statute went into effect. 5 ILCS 70/4. Put another way, the question is whether the amendment was substantive or procedural. *Caveney*, 207 Ill.2d at 92.

The majority correctly found, under the first step of the *Landgraf* inquiry, that the amendment "contains no express provision regarding its temporal reach." *Inst. for Justice*, ¶ 10. The majority also correctly noted that it must therefore construe the statute in light of the Statute on Statutes, and determine whether the change was substantive or procedural. *Id.*, ¶ 9.

It is at this point that the Majority Opinion went off the rails. The majority did not in fact determine whether the amendment was substantive or procedural. Nor did it determine whether the right to documents was

"accrued," or whether the cause of action under the FOIA had "arisen" before the amendment was effective, as the language of 5 ILCS 70/4 directs.

Rather, the majority found that the new exemption has "no impermissible retroactive effect" because it "only exempts the requested records from disclosure, and does not **otherwise** impair the Institute's rights with respect to any completed transaction made in reliance on any prior law." *Inst. for Justice*, ¶ 23 (emphasis added). But disclosure of the requested records **is** the right at issue in this case, and IJ's request for those records **was** a "completed transaction made in reliance on . . . prior law." *Id.* With the word "otherwise," the Majority Opinion swept away the central issue of the case.

Relying on its prior opinion in *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, the First District insisted that its "holding is further bolstered because the Institute sought injunctive relief, which is a prospective form of relief for which the circuit court must apply the law in effect at the time of its decision." *Inst. for Justice*, ¶ 24. In *Kalven*, as in this case, this focus on the relief sought, rather than the right impaired, is erroneous. IJ seeks an injunction **solely** to effectuate its preexisting right to documents. Such an injunction does not affect the Department's future operations, including its disclosure of documents in the future. The injunction is only "prospective relief" in the same way that a court order requiring a defendant to pay a debt owed to the plaintiff is "prospective": it requires the defendant to honor its preexisting obligation to restore the plaintiff's fully vested right.[2]

Under the majority's view, when a party seeks injunctive relief, any

[2] For the same reasons, *Kalven*'s finding that a FOIA claim must be considered under an exemption past after the claim was filed was also erroneously.

application of a new statute to the case is necessarily "prospective." This Court's opinion in *J.T. Einoder* demonstrates that this is not the case. There, the Attorney General sought monetary penalties against companies who had violated environmental regulations. While the lawsuit was pending, legislation was enacted that allowed the Attorney General to seek a mandatory injunction as well. This Court held that a mandatory injunction could not be issued as a remedy for the company's conduct before legislation was enacted. Such an injunction would be an impermissible retroactive application of the new law because:

> It creates an entirely new type of liability—a mandatory injunction—which was not available under the prior statute. Applying it retroactively here would impose a new liability on defendants' past conduct. For that reason, it is a substantive change in the law and cannot be applied retroactively.

J.T. Einoder, ¶ 36. In *Einoder*, as here, the plaintiff sought an injunction that would affect the defendant's future behavior. Nonetheless, issuing that injunction under the new statute would change the defendant's *prior* liabilities—a retroactive effect.

The First District unsuccessfully attempts to distinguish *J.T. Einoder* on the basis that the new FOIA exemption "only affects present or future disclosure of information and . . . does *not* impose any new liability on past conduct." *Inst. for Justice*, ¶ 28 (emphasis in original). But an impermissible retroactive effect does not merely encompass new liabilities. Rather, a law also has a "retroactive impact" if it "would impair rights a party possessed when he acted," *J. T. Einoder*, ¶ 30. As explained above, that is exactly what happened here.

The Majority Opinion also relied on *Wisniewski v. Kownacki*, 221 Ill.2d

453 (2006) to support its application of the new FOIA exemption to this case. In fact, however, *Wisniewski* supports IJ's right to the requested documents.

In *Wisniewski*, the Court considered whether the Confidentiality Act and the Dependency Act could be used to block a plaintiff's discovery request for mental health records, even though the records were created years before the statute was enacted. The Court held that the statutes could be applied in the discovery dispute, and had no retroactive effect, because "any new duties regarding disclosure or nondisclosure [under the statutes] would . . . be imposed only in the present or the future, not in the past." *Wiesniewski*, 221 Ill.2d at 463. Key to the analysis was the fact that the plaintiff had no vested right in documents before the statutes were enacted. Thus, "applying the nondisclosure provisions of the Confidentiality Act and the Dependency Act to preenactment treatment records and communications would not impair anyone's rights with respect to past transactions. Neither statute impacts any actions that may have taken place in the past with regard to [defendant]'s records." *Id.*

In other words, in *Wisniewski*, there was no retroactive effect because no one had acquired any right, or completed any transaction, with respect to the records before the privacy statutes were enacted. To the extent that the plaintiff had any right to the records, it accrued when he made his discovery request, **years after** the privacy statutes were enacted.[3]

[3] The majority also relied *Center for Biological Diversity v. United States Department of Agriculture*, 626 F. 3d 1113 (9th Cir. 2010), a federal case with no binding authority on this Court. Moreover, as the dissent below explained, the case is distinguishable because the federal statute lacks the strong statement of public policy and the people's rights found in the Illinois FOIA, and the Ninth Circuit does not apply the strong presumption against retroactivity espoused by this Court and codified in the Statute on Statutes. *See Institute for Justice*, ¶ 37 (Delort, J., dissenting).

This case presents the opposite situation: The transaction between IJ and the Department (a FOIA request) was completed, and the right arising from that transaction accrued, before the new exemption was enacted. The new FOIA exemption may not be applied to impair those rights.

III. THE FIRST DISTRICT'S ANALYSIS, IF UPHELD, WOULD SEVERELY UNDERMINE THE PUBLIC'S RIGHT TO OBTAIN PUBLIC RECORDS UNDER THE FOIA

The First District's ruling, if upheld, will have far-reaching implications beyond this case. The FOIA recognized that public access to government records is necessary to promote vigorous policy debate and hold public bodies accountable. As advocates for open government who also rely heavily on FOIA disclosures, the *amici curiae* are alarmed by the potential consequences of the First District's opinion.

Affirming the Majority Opinion would incentivize public bodies to deny valid FOIA requests to conceal scandalous information from its citizens and then lobby the Illinois General Assembly to change the law. Such lobbying is **already** rife:

> [R]ecent proposals to the current FOIA include proposals to exempt performance evaluations for other groups such as public employees and law enforcement personnel, a proposal to make awards of attorneys' fees to prevailing plaintiffs noncompulsory, a proposal to reduce the number of pages that a requester may receive for free, and a proposal that would require criminal convictions in order to disclose employee disciplinary records.[4]

This outcome would subvert the core policy goal of the FOIA: to empower citizens to "discuss[] public issues fully and freely" and promote "the transparency and accountability of public bodies." 5 ILCS 140/1.

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[4] *Illinois's Freedom of Information Act: More Access or More Hurdles?*, 33 N. ILL. U. L. REV. 601, 14 (Summer 2013).

For the *amici curiae* and other public interest organizations, requesting records and pursuing litigation under the FOIA is time-consuming and costly. The *amici curiae* must carefully weigh the likelihood of successfully acquiring government records with the risk of sinking their scarce time and resources into a futile endeavor.

Prior to this ruling, public bodies already faced minimal sanction for noncompliance with the FOIA and individual agents are immune from sanction.[5] What's worse, despite the 2010 amendment intended to reform FOIA procedures, over 40% of public bodies still refuse even to respond to FOIA requests.[6] Since many requestors lack adequate resources, a wrongful denial is unlikely to result in litigation. And even if it did, the resulting litigation would take years to resolve. By that point, the agent who made the denial could have been promoted to a different position or transferred elsewhere. Accordingly, public bodies are naturally biased against disclosure.

And this ruling magnifies the costs and risks for the *amici curiae* to litigate against even the most egregious FOIA denials. The First District opinion, if allowed to stand, would hamstring FOIA requesters' ability and willingness to hold public bodies accountable. Groups like the *amici curiae* will be wary of expending their limited budget and resources on litigation only to be quashed by a retaliatory change of law years later.[7]

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[5] *Illinois's Freedom of Information Act: More Access or More Hurdles?*, 33 N. ILL. U. L. REV. 601, 8 (Summer 2013).
[6] *Study still shows massive FOIA noncompliance*, NW. HERALD (June 15, 2012), http://www.nwherald.com/2012/06/15/study-still-shows-massive-foia-noncompliance/ads2hqy/?__xsl=/print.xsl.
[7] *Illinois's Freedom of Information Act: More Access or More Hurdles?*, 33 N. ILL. U. L. REV. 601 (Summer 2013) ("Within a year after the enactment of the 2009 amendments, the Illinois legislature has introduced at least one half-dozen bills aimed at making access more difficult.").

IV. CONCLUSION

This Court should hold that IJ's right to the subject records vested when it made its FOIA request and should therefore reverse the First District's contrary holding.

Dated: December 7, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief conforms with the requirements of Rules 345, 341(a) and 341(b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 14 pages.

/s/ Isaac Rabicoff
Isaac Rabicoff

CERTIFICATE OF FILING AND SERVICE

The undersigned, an attorney, certifies that on December 7, 2017, the undersigned caused this Brief to be filed with the Supreme Court of Illinois through its e-filing system.

The undersigned, an attorney, certifies under penalty of law as provided in 735 ILCS 5/1-109 (2014) that this Brief was served by email to all primary and secondary email addresses of record by the person named below on December 7, 2017, before 5:00p.m.

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Additionally, the above-listed documents will be served via the Court's electronic filing system on all counsel registered for that system.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Isaac Rabicoff
Isaac Rabicoff