No. 122349 (consolidated with No. 122411)

In The Supreme Court Of Illinois

INSTITUTE FOR JUSTICE, Plaintiff-Appellant v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellee.	On 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, Illinois, County Department, Chancery Division, No. 14 CH 19381 Hon. J. Rodolfo Garcia, *Judge Presiding*
CHRISTOPHER J. PERRY and PERRY & ASSOCIATES, LLC, Plaintiff-Appellants v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellee.	On 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, Illinois, County Department, Chancery Division, No. 14 CH 17994 Hon. Rita M. Novak, *Judge Presiding*

JOINT REPLY BRIEF OF PLAINTIFF-APPELLANTS INSTITUTE FOR JUSTICE; CHRISTOPHER J. PERRY AND PERRY & ASSOCIATES, LLC

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POINTS AND AUTHORITIES

ARGUMENT[1]

The Department is not presenting the retroactivity arguments that a party typically offers when a new law comes into effect during litigation. The Department does not argue that the Illinois General Assembly intended Sections 4-24 and 2105-117 to apply to pending cases. IJ Br. at 13–16 (citing *People v. Hunter*, 2017 IL 121306, ¶ 20 (under Illinois' retroactivity analysis, a court first looks to whether the "legislature has clearly indicated the statute's temporal reach")). The legislature could have written the new statutes such that they explicitly applied to prior FOIA requests or pending litigation, but it did not. The Department is not arguing that the new laws are procedural changes that can be appropriately applied to pending cases without affecting substantive rights. IJ Br. at 15 n.5. Instead, the Department hinges its entire legal argument on an especially narrow exception to the traditional retroactivity jurisprudence: an "intervening statute" is "not retroactive" where it "authorizes or affects the propriety of prospective relief." Resp. Br. at 15.

By choosing to hinge its defense of the Appellate Court's Orders on a narrow "propriety of prospective relief" exception, the Department is walking a legal tightrope. If Appellants can show that any sliver of the relief being

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[1] Appellant Institute for Justice ("IJ") and Appellants Christopher J. Perry and Perry & Associates ("Perry") each filed their own opening briefs in this litigation. IJ is challenging the improper retroactive application of Section 4-24 of the Barber Act (225 ILCS 410/4-24) to its case, and Perry is challenging the improper retroactive application of Section 2105-117 (20 ILCS 2105/2105-117) to its case. They join together in this Joint Reply to the Department's Response.

sought is not wholly prospective, or that it has some backwards-looking or remedial quality, the Department's legal argument falls apart. If Appellants can show that the application of the laws would have a retroactive impact or impair their rights, then the Department cannot use this exception. Moreover, if Appellants can show that applying the laws to these pending cases would be inequitable, the Department cannot prevail.

In reality, the Department cannot meet this narrow "propriety of prospective relief" exception. Rather, the Department is asking this Court to expand the exception such that it swallows the rule, rewriting Illinois law and undermining the purpose of the Illinois FOIA in the process.

I. APPELLANTS SEEK AN INJUNCTION TO REMEDY PAST HARM AND VINDICATE THEIR RIGHTS—NOT TO REGULATE FUTURE BEHAVIOR.

Throughout its Response, the Department repeatedly asserts that Appellants are seeking "prospective relief only." This argument is based on two faulty premises. First, the Department asserts that injunctions are ***always*** prospective because they "operate in the future to correct ongoing violations." Resp. Br. at 17. Second, the Department argues that because Appellants seek an injunction requiring it "to disclose information in the future," the relief sought must be prospective. Resp. Br. at 18.

Neither premise is factually nor legally correct. The case law is clear that injunctive relief can be either prospective ***or*** retrospective, depending on whether the injunction affects the parties' future relationship or cures a past wrong committed by the defendant. Both the text of the Illinois FOIA and this

Court's *J.T. Einoder* decision establish that the relief sought by Appellants serves to remedy a past harm committed by the Department. *See People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193; 5 ILCS 140/11(d). To be more specific, Appellants seek a ***mandatory*** injunction, which this Court held in *J.T. Einoder* is an injunction that operates retrospectively, not prospectively. None of the Department's Illinois cases requires a different result.

A. Injunctions Can Be Either Prospective or Retrospective.

Contrary to Appellate Court's Opinions—and the Department's protestations—injunctive relief is not always a prospective form of relief. Instead, it can be either prospective ***or*** retrospective. The central question is whether the injunction sought affects the parties' future relationship (i.e. prospective relief) or serves to remedy a past wrong committed by the defendant (i.e. retrospective relief). *See* IJ Br. at 30–31 (citing *Machete Prods., L.L.C. v. Page*, 809 F.3d 281 (5th Cir. 2015); *Edelman v. Jordan*, 415 U.S. 651 (1974); Erin L. Sheley & Theodore H. Frank, Prospective Injunctive Relief and Class Settlements, 39 Harv. J.L. & Pub. Pol'y 769, 773 (2016)).[2]

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[2] In its Response Brief, the Department argues that Appellants' "[r]eliance on Eleventh Amendment cases is misplaced" and that, "at best," they "illustrate the general difference between retrospective and prospective relief." Resp. Br. at 29, 30. As to the Department's second point, Appellants agree. Indeed, that is why Appellants cited them. *See* IJ Br. at 32 ("Here, while sovereign immunity is not at issue, the distinction is relevant because IJ seeks a retrospective injunction, which is at odds with the Appellate Court's conclusory pronouncement that IJ seeks prospective relief."). As a result, Appellants' reliance on the Eleventh Amendment cases as illustrative of this distinction is not "misplaced" at all.

In effect, therefore, when analyzing whether Appellants are seeking prospective or retrospective relief, the Department is asking the wrong question. The question is not whether Appellants are seeking relief that will require the Department to do something in the future (in this case, to turn over documents). Indeed, if that were the pivotal question, then a request for money damages would also be prospective, as the payment of money damages is itself a future act.[3] Instead, the operative question is whether Appellants seek relief that remedies the Department's past wrongful conduct, or whether Appellants seek relief that regulates the Department's future behavior.

A review of the facts establishes that the purpose of the relief sought here is to cure the harm caused by the Department's past wrongful conduct. At the moment the Department received a valid FOIA request from Appellants, the Illinois FOIA imposed a legal obligation to disclose the requested information. The Department harmed Appellants by refusing to comply with this statutory obligation. To be made whole after the wrongful FOIA denials, Appellants need two things: the requested documents and compensation for the costs of litigation. The fact that FOIA provides both sources of relief through litigation highlights the intent to vindicate the requester's wrongful denial. Accordingly, Appellants filed their lawsuits to enforce their statutory right and to remedy the harm of the improper FOIA denials.

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[3] The Department agrees that a request for money damages is a request for retrospective relief. Resp. Br. at 16 (noting that "retrospective relief looks back at a completed event and remedies any wrongs with money damages").

B. The Department Ignores Clear Statutory Text Showing That Appellants Seek a Retrospective Injunction.

Not only does the Department ask the wrong question regarding whether Appellants seek prospective or retrospective relief, it also ignores the text of FOIA itself. The statute reads as follows: "The circuit court shall have the jurisdiction . . . to ***order the production*** of any public records ***improperly withheld*** from the person seeking access." 5 ILCS 140/11(d) (emphasis added). As IJ explained in its Initial Brief, the statute utilizes the past tense—"improperly withheld"—instructing the court to look backwards and evaluate past conduct and past harm. IJ Br. at 32. The Department writes—without any citation—that "a FOIA action resolves whether the plaintiff *is* entitled to information, not whether it *was* entitled to information." Resp. Br. at 22. But the statute says the opposite, tying the relief to a past tense, backwards-looking inquiry. The Department ignores the text of FOIA in its Response Brief.[4]

C. The Parties Agree That Mandatory Injunctions Are a Form of Retrospective Relief, and That Is What Appellants Seek.

Early on the Department takes the position that all injunctions are prospective. *See, e.g.*, Resp. Br. at 16, ("Declaratory and injunctive relief are prospective relief."), 17 ("Injunctions operate in the future to correct ongoing violations."). But the Department shifts gears midway through its Response Brief. In Section C, when discussing *J.T. Einoder*, the Department admits that

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[4] Apart from a cursory cite to the statute's text on page 16, the Department does not discuss the text of the statute, or its implications for the form of relief sought by Appellants, anywhere in the Response Brief.

the case "involved a mandatory injunction, a form of relief that operates ***retrospectively***." Resp. Br. at 27 (emphasis in original). The Department recognizes that it was "undisputed" in *J.T. Einoder* that "a mandatory injunction is a form of retrospective relief." Resp. Br. at 28. Appellants agree—mandatory injunctions were at issue in *J.T. Einoder* and do operate retrospectively. But that is precisely the type of injunction that Appellants seek here—a ***mandatory*** injunction.

Illinois courts have recognized that there are two types of injunctions: (1) prohibitory injunctions and (2) mandatory injunctions. *See Cont'l Cablevision of Cook Cty., Inc. v. Miller*, 238 Ill. App. 3d 774, 789 (1992). Determining whether an injunction is mandatory or prohibitory requires examining the effect that the injunction has on the parties. *Id.* "Simply put, a mandatory injunction is one which ***commands the performance of a positive act***." *Id.* (emphasis added) (citing *John Deere Co. v. Hinrichs*, 36 Ill. App. 2d 255, 269 (1962)). A prohibitory injunction, on the other hand, orders a party to refrain from "continuing affirmative acts." *Id.*

Here, there can be little dispute that Appellants seek a mandatory injunction. By giving the circuit court the jurisdiction to "***order the production***" of the "improperly withheld" documents, the legislature created a retrospective remedy allowing courts to "***command[] the performance of a positive act***"—in this case, by the Department. 5 ILCS 140/11(d) (emphasis added); *Cont'l Cablevision*, 238 Ill. App. 3d at 789 (emphasis added). At least

one Illinois court has confirmed this interpretation, describing a lawsuit "requiring the Department [of Conservation] to furnish . . . information" pursuant to FOIA as a "mandatory injunction." *See Schessler v. Dep't of Conservation*, 256 Ill. App. 3d 198, 199 (1994). In the Response Brief, the Department asserts without explanation that mandatory injunctions are "a type of retrospective relief that is not available under FOIA." Resp. Br. at 27. However, this assertion simply cannot be squared with the text of FOIA, and Illinois precedent on the distinction between mandatory and prohibitory injunctions. The parties agree that mandatory injunctions are retrospective to remedy past harms. And the law is clear that Appellants are seeking mandatory injunctions.

D. The Department Apparently Concedes That the Appellate Court Should Not Have Relied on *Kalven*.

The Appellate Court relies heavily on *Kalven v. City of Chicago*, 2014 IL App (1st) 121846 to support its decision in these cases. *Perry*, 2017 IL App (1st) 161780, ¶¶ 29–33, 40, 42; *Inst. for Justice*, 2017 IL App (1st) 162141, ¶¶ 11–15, 22, 24. Indeed, *Kalven* is one of only three supporting cases cited by the Appellate Court. In their briefing, Appellants and the *amici* explain in detail the flaws in the Appellate Court's *Kalven* decision, including clear misinterpretations of this Court's jurisprudence creating a blanket rule for injunctions, which the Appellate Court applied to Appellants' detriment. *See* IJ Br. at 26–30; Perry Br. at 17–19; Amicus Brief, Ill. ALCU, *et al.*, at 8–9.

The Department, on the other hand, did not cite to *Kalven* even one time in the argument section of the Response Brief, nor did it attempt to defend the Appellate Court's reliance on *Kalven*'s reasoning. The Department's silence can only be read as reluctant acknowledgment that the Appellate Court should not have relied on *Kalven* because it was not a sound interpretation of the law.[5]

E. Illinois Courts Do Not Treat Injunctions to Disclose Information Differently.

The Department embeds yet another, somewhat narrower argument into the Response Brief: an injunction requiring the disclosure of information constitutes prospective relief. *See, e.g.*, Resp. Br. at 18 ("[A] law applies so long as it is effective at the time that the court determines, under current law, whether a public body can be ordered to disclose information in the future."). But the concept that injunctions to disclose information are a special category and are automatically prospective does not exist in Illinois case law.

The Department cites two Illinois cases for this special rule: *Hayashi* and *Wisniewski*. Resp. Br. at 15. As IJ has explained, *Wisniewski* is inapposite factually, and indeed its reasoning supports Appellants' position. *See* IJ Br. at 33–34; *see also* Ill. ACLU, *et al.*, Br. at 9–11. It appears that the Department is focused on a partial quote from the *Wisniewski* Court: "disclosure of

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[5] The Department's decision to abandon *Kalven* makes sense. The Appellate Court interpreted *Kalven* to stand for a universal rule that all injunctions are "are prospective forms of relief." *Inst. for Justice*, 2017 IL App (1st) 162141, ¶ 15; IJ Br. at 26–30. But the Department has acknowledged that that "rule" is not always true and there are injunctions that can act retrospectively. Resp. Br. at 27–28.

information 'takes place only in the present or the future . . . . not in the past.'" Resp. Br. at 18 (quoting *Wisniewski*, 221 Ill. 2d at 463). When read in context, the Court is merely explaining that a new law restricting disclosure of information would apply to document requests made ***after*** the effective date of the statute. *See* IJ Br. at 33–34. In contrast, Appellants sought the records at issue (and even filed their lawsuits) ***before*** the effective date of Sections 4-24 and 2105-117. As for *Hayashi*, that case is about a new law that revoked the "license of a health care worker who has been convicted of certain criminal offenses." *Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation*, 2014 IL 116023, ¶¶ 5–8. It has nothing to do with injunctions for the disclosure of information.

II. APPLYING SECTIONS 4-24 AND 2105-117 TO APPELLANTS' PENDING CASES IMPAIRED THEIR RIGHTS—AND THEREFORE CAUSED A RETROACTIVE IMPACT.

A. A New Law Applies Retroactively When It Impairs a Party's Rights.

Over and over again, the Department declares that "the application of a statute that becomes effective during a pending FOIA action is not retroactive." Resp. Br. at 18 (quoting *Landgraf*, 511 U.S. at 273); *see also id*. at 22 (an "intervening statute affecting the availability of prospective relief is not retroactive" (quoting *Landgraf*, 511 U.S. at 273)). As described above, this assertion is largely based on a misunderstanding of the nature of injunctive relief. Injunctions can be used to redress past harm or vindicate a party's rights. 5 ILCS 140/11(d) (FOIA provides litigation to remedy "improperly withheld" documents.). Indeed, this Court has held that applying new laws to

pending litigation is a retroactive application. *See People v. Hunter*, 2017 IL 121306, ¶ 30 (A new law "would apply retroactively" when it applies "to a pending case, *i.e.*, a case in which the trial court proceedings had begun under the old statute but had not yet been concluded.").

The Department's position that applying a new law to pending FOIA litigation is "not retroactive" cannot be reconciled with this Court's case law on "retroactive impact." This Court has held that "[a]n amended statute will be deemed to have a retroactive impact if the 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." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 30; *See Hunter*, 2017 IL 121306, ¶ 20. This retroactive impact test is consistent with Section 4 of the Statute on Statutes that proclaims, "No new law shall be construed to repeal . . . any right accrued, or claim arising under the former law." 5 ILCS 70/4. Most relevant here, the application of a new law is retroactive where it "impairs rights a party possessed."

Appellants devoted substantial time to showing that their rights were impaired by the Appellate Court's ruling to apply the new laws to their pending litigation. *See* IJ Br. at 16–23; Perry Br. at 15–19. The impairment of rights is self-evident. Each Appellant lost their right to the requested information, and lost their pending cause of action to vindicate that right and collect attorney's fees necessary to make them whole. The Illinois FOIA explicitly

states that requesters have a "right" to the information. 5 ILCS 140/1. Moreover, once Appellants' FOIA requests were denied, they accrued a legal cause of action. This Court has held an accrued cause of action represents a vested right that cannot be taken away by a new law. IJ Br. at 17–21. But that is precisely what the Appellate Court did—it stripped away Appellants' right to the requested information and the accrued cause of action to vindicate that right.

B. The Department's Reasons for Why the New Laws Do Not Impair Appellants' Rights Are Meritless.

The Department presents a string of arguments to try to show that there was no impairment of rights and retroactive application of law—each falls apart upon inspection.[6] *First*, the Department posits that "[t]his Court faced the question of whether the future disclosure of information had any retroactive impact in *Wisniewski* and correctly concluded that it did not." Resp. Br. at 18. The Department misconstrues the Court's holding in *Wisniewski*, pulling a couple favorable quotes without providing the full context. *See* IJ Br. at 33–34; Perry Br. at 16–17. In *Wisniewski*, the plaintiff requested the disclosure of documents through discovery ***22 years after*** a statute was

[6] The Department is in a unique position with respect to the "retroactive impact" test because the Appellate Court's Order made a clear mistake. The Appellate Court held that "section 4-24 has no impermissible retroactive effect" because it "does not impose any new liability on past conduct." *Inst. for Justice*, 2017 IL App (1st) 162141, ¶ 28. The problem for the Department in defending the Appellate Court's reasoning is that the "retroactive impact" test has three prongs and the Appellate Court skipped over the most relevant one—impairment of rights.

enacted to protect those (and all) therapeutic medical records from disclosure. 221 Ill.2d at 455–59. Of course, a confidentiality law enacted in 1979 did not retroactively impact the plaintiff's document request in 2002. If IJ made its FOIA request two decades after the enactment of Section 4-24, there would be no question that IJ would have no right to the documents.[7] But *Wisniewski* offers no support to the Department's position on whether the laws here (which went into effect after the requests) were applied retroactively.

Second, the Department argues that Appellants do not have a vested right to the requested information because "they cannot settle on exactly when a right vested." Resp. Br. at 22. To be clear, Appellants invoked their right to the information upon request, had a statutory right to the information five business days later (longer if there was an extension), and also accrued a cause of action against the Department to vindicate that right upon denial. But the precise timing does not matter. The Court could decide that the rights vested any time from the moment of the FOIA request through the filing of the lawsuit and it would not change the outcome of Appellants' cases.

Third, the Department asserts that Appellants' "positions require that they have a vested right in the law not changing" and this cannot be correct because Illinois courts have written that "there is no vested right in the mere

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[7] IJ explained that while the facts in *Wisniewski* are inapposite, the reasoning actually supports Appellants. IJ Br. at 33–34. The Department wholly ignores this part of IJ's brief (and the amicus briefs making a similar point) in its Response. *See* IJ Br. at 33–34; Ill. ACLU, *et al.*, Br. at 9–11.

continuance of a law." Resp. Br. at 24 (quoting *First of Am. Trust Co. v. Armstead*, 171 Ill. 2d 282, 291 (1996)). This argument mischaracterizes Appellants' position. Appellants are not arguing that they have some vague right "in the law not changing." They have a clear statutory right to the information they requested under the Illinois FOIA (and an interrelated right to sue to vindicate their right to the information and seek attorney's fees). This approach is consistent with Illinois law. IJ Br. at 17–23; Perry Br. at 16–17.[8]

Fourth, the Department attempts to defend its position on retroactive impact by presenting a hypothetical whereby an amendment to FOIA was to the requester's benefit. Resp. Br. at 25 (Appellants "would not advocate for applying a retroactivity analysis if an intervening amendment specifically *allowed* the disclosure."). Simply put, the fact that the amendment benefits the requester does not alter the retroactivity analysis. This exact scenario happens on occasion, and the FOIA requester simply drops the pending lawsuit and files a new FOIA request under the new law that permits disclosure.

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[8] The Department also cites *Hayashi* for the proposition that a "statute is not made retroactive merely because it draws upon antecedent facts for its operation." Resp. Br. at 25 (quoting 2014 IL 116023, ¶ 25). That case and that quote are readily distinguishable from the current situation. In *Hayashi*, the Court was satisfied that a new law did not have a retroactive impact because the statute "ha[d] no effect on plaintiffs' right to practice their health care professions prior to" its effective date. *Id.* ¶ 26. The exact opposite is true here. All parties agree—and the Chancery Court ruled—that Appellants had a statutory right to the requested information prior to new laws being enacted. That right to information—which existed before the effective date of the laws—was subsequently nullified by the laws. If anything, the facts of *Hayashi* serve as a contrast that highlights the retroactive impact of the laws in this case.

Finally, the Department asserts that Appellants were not "deprived" of an accrued cause of action because Appellants "still have causes of action under section 11 of FOIA." Resp. Br. at 25. As a threshold matter, the Department does contest in its Response that an accrued cause of action is a vested right that cannot be defeated by a future statute. IJ Br. at 18–21.[9] Now it appears that the Department's argument is that Appellants were not deprived of their ability to file a cause of action against the Department, but only the ability to succeed on that cause of action. This is a hyper-technical argument and one that this Court has rejected: a new law may not "deprive a person of all existing remedies for" an accrued cause of action. IJ Br. at 19–20 (quoting *Moore v. Jackson Park Hosp.,* 95 Ill. 2d 223, 231 (1983)).

In sum, there can be no doubt that Appellants lost something when the new laws were applied to their pending cases. That constitutes a retroactive impact on Appellants, and an impairment of Appellants' rights.

III. THE DEPARTMENT'S RELIANCE ON FEDERAL CASE LAW IS MISPLACED.

Despite making no effort to address the substantial statutory and jurisprudential differences in Illinois and federal law, the Department argues there is no retroactive impact here because "[o]ther courts dealing with the future disclosure of information also have determined that there is no

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[9] Appellants cite to four opinions by this Court to show that a party has a vested right in an accrued cause of action: *Henrich*, *Moore*, *Wilson*, and *Lazenby*. IJ Br. at 18–21. The Department neither responds to this point nor cites any of these cases even one time in its Response.

retroactive application of law." Resp. Br. at 19. The Department cites to two federal cases. *Id.* at 19–22 (discussing *Ctr. for Biological Diversity v. United States Dep't of Agric.*, 626 F.3d 1113 (9th Cir. 2010); *City of Chi. v. United States Dep't of Treasury, Bureau of Alcohol, Tobacco and Firearms* ("*ATF*"), 423 F.3d 777, 783 (7th Cir. 2005)). As Appellants extensively argued, there are glaring differences between Illinois and federal law. *See* IJ Br. at 34–38.

Appellants raised several fundamental differences between federal law and Illinois law in their initial briefs. To start, the Illinois FOIA, unlike the federal FOIA, cements a right to information from public bodies regarding public activities: "the people of this State have a ***right*** to full disclosure of information relating to . . . government activity." 5 ILCS 140/1 (emphasis added). Even though this appeal may turn on Appellants' specific rights, the Department makes no effort to explain or rebut this significant statutory difference. The Department does not mention, let alone address, the fact that Illinois' retroactivity jurisprudence—the heart of this dispute—differs from the federal retroactivity doctrine. *See* IJ Br. at 36–37. The Department never cites Section 4 of the Statute on Statutes—Illinois' statutory presumption against retroactivity—which is why Illinois courts have diverged from federal courts. Moreover, the Department ignores that Illinois law more vigorously protects vested rights from the effects of new laws than federal law. *See* IJ Br. at 37–38 (under Illinois law a party's right to a cause of action vests when the cause of action accrues, while federal law protects causes of action only after a final

judgment). This difference is particularly important because Appellants had accrued causes of action (protected by Illinois but not federal courts) and not final judgments.

Rather than address why federal cases are at all relevant in the face of these differences, the Department simply points to inapplicable federal case law and suggests that it ought to control. Resp. Br. at 19–22. These differences, however, would alter the outcomes in the very federal cases upon which the Department relies. For example, under Illinois' retroactivity doctrine, the statutory amendment in *ATF* would impermissibly "impair" the city's *right* to disclosure of information when it acted. *ATF*, 423 F.3d at 783 (holding that the plaintiff had no "right in the decree entered by the trial court" (internal quotation marks and citations omitted)). The result in *ATF* would also change under Illinois vested rights' jurisprudence because retroactive application of the amended statute destroyed the plaintiff's vested right in its cause of action, which accrued when the government denied its FOIA request. *See id.*

Applying Illinois' retroactivity jurisprudence to federal case law could also dictate different results. *See* IJ Br. at 36–37. Where a federal court would proceed to determine whether a statute would have an "impermissible retroactive effect" even if the legislature had not indicated the statute's temporal reach, *see Biological Diversity*, 626 F.3d at 1117–18, Illinois courts would not move past that first step and instead would find the statute may

only be applied prospectively given Illinois' statutory presumption against retroactivity in such situations. *Caveney v. Bower*, 207 Ill. 2d 82, 95 (2003).[10]

In sum, the Department concedes by its omissions that the relevant Illinois and federal law are materially different, and asks this Court to upend decades of established Illinois case law in favor of federal law. The Department's position disregards this Court's precedent and the statutory text selected by the Illinois General Assembly with no explanation or justification.

IV. THE APPELLATE COURT'S RULINGS WILL CREATE INEQUITABLE CONSEQUENCES AND UNDERMINE THE PURPOSE OF FOIA.

There is something fundamentally inequitable about changing the rules in the middle of the game—or in this case litigation. Both Appellants lost their rights to the requested information and the right to attorney's fees during pending litigation. Moreover, the Appellate Court's rulings will invite undesirable gamesmanship to the court system and undermine effective operation of the Illinois FOIA.

A. The Appellate Court's Orders Would Lead to Inequitable Consequences.

This Court in *J.T. Einoder* wrote that a new law cannot apply retrospectively (i.e. to a pending lawsuit) where it would "result in inequitable

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[10] IJ addressed this exact situation with a Ninth Circuit case, *Southwest Center*, cited by the Appellate Court. IJ Br. at 36–37. Instead of offering a response, the Department moves the goalposts by relying on a different Ninth Circuit case—*Center for Biological Diversity*. *See* Resp. Br. at 19–20. This was to no avail, however, because *Center for Biological Diversity* explicitly relies on, and is just as inapplicable as, *Southwest Center*.

consequences." 2015 IL 117193, ¶ 30. This test applies even though the new law passes other tests and restrictions, and is irrespective of the type of relief being sought or whether there is any retroactive impact or impaired rights.

Both Appellants argued that the Appellate Court's rulings were inequitable to their specific cases. IJ Br. at 23–25; Perry Br. at 19. The Department responded that "there is no inequity in the correct interpretation of statutory rights." Resp. Br. at 28. Appellants disagree that the Appellate Court reached the "correct interpretation." But more to the point, Illinois courts have taken a broad view of equity.[11] Both Appellants had the rules changed, their rights altered, and their expectations uprooted by the application of new laws to their pending litigation. If Section 4-24 was not applied to this pending litigation, IJ would currently have their documents, costs, and attorney's fees.[12] The same is true of Perry. On a fundamental level, litigation by surprise is not fair.

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[11] *Malmoff v. Kerr*, 227 Ill. 2d 118, 125–26 (2007) (Equity "denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men,—the rule of doing to all others as we desire them to do to us.") (alteration in original) (citation omitted).

[12] The Department argues its "abandonment of certain FOIA exemptions on appeal does not concede their merit because it would have continued litigating those exemptions if section 4-24 . . . did not provide a straight-forward outcome." Resp. Br. at 29. Refusing to appeal "meritorious" legal arguments, such that they are now conceded, is a unique legal strategy. Regardless, IJ has a binding, non-appealed order from the Chancery Court articulating that no exemptions available to the Department at the time of IJ's FOIA request had merit. *Inst. for Justice*, 2017 IL App (1st) 162141, ¶¶ 5–6 ("The court reviewed each of the six FOIA exemptions claimed by the Department and found that none of them applied to the subject records. […] On appeal, the Department has abandoned its claim that the requested

But equity is broader than immediate concerns of the current Appellants. The Appellate Court's Orders in *Perry* and *Institute* would profoundly alter the rights of FOIA requesters in Illinois, increase the demands on the courts, and undermine the purpose of Illinois FOIA.

B. The Appellate Court's Order Violates Public Policy and Is Contrary to the Purpose of FOIA.

Just as the Department dismisses the inequities furthered by its position, it also offers almost no explanation for why this Court ought to affirm the Appellate Court's opinions where they undermine the express purpose of the Illinois FOIA—that "all persons are entitled to full and complete information regarding" the public bodies that "represent them." 5 ILCS 140/1.

The Department's response omits any mention of the serious concern that the Appellate Court's rulings will chill both FOIA requesters and their attorneys. *See* IJ Br. at 40–42. Nor does the Department make any effort to address the significant burden that the ruling will place on Illinois courts by turning FOIA litigation into a race to and through the courthouse. *Id.* These are real concerns raised over and over again by *amici* writing to this Court.

- "[T]his ruling magnifies the costs and risks for the *amici curiae* to litigate against even the most egregious FOIA denials . . . . 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." Amicus Br., Ill. ACLU, *et al.*, at 12.
- "If new exemptions are applied retroactively, fewer people . . . will be willing to shoulder the costs and expense of litigation to vindicate the

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documents were exempt from disclosure pursuant to the six enumerated FOIA exemptions upon which it originally relied.").

public's right to know, given that they may initiate litigation with a valid or even clearly meritorious claim only to have the legislature take away the right to the requested documents in the midst of litigation." Amicus Br., RCFP at 10.

- "Another consequence of allowing the Appellate Court's decision to stand will be increased incentive by public bodies to lobby the legislature to amend FOIA to add exemptions for records sought by individuals that the public body does not want to disclose." Amicus Br., Ill. Policy Inst. & Edgar Cty. Watchdogs at 10.

- "Where a journalist, or indeed anyone, seeks information that could disclose unfavorable or embarrassing information about public officials or government conduct, it may be in certain officials' best interest—not the public's—to amend FOIA in order to prevent disclosure." Amicus Br., RCFP at 7.

Despite concerns raised by Appellants and the *amici*, the Department's lone response is that Appellants should not be "worried that public bodies will try to extinguish specific FOIA requests by lobbying the legislature to pass disclosure exemptions." Resp. Br. at 34. But the Department offers no explanation for why public bodies would not be incented to do exactly that when they receive unwelcome or embarrassing FOIA requests. If the Department had any reason to believe these policy concerns are unjustified or overblown, it would have raised it in their brief. It did not.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Institute for Justice respectfully requests that this Court reverse the Appellate Court's Order and reinstate the Chancery Court's grant of summary judgment. Plaintiff-Appellant Perry requests that this Court reverse the Appellate Court's Opinion and remand to the Chancery Court.

Dated: February 28, 2018 Respectfully submitted,

By: _____

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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 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 20 pages.

Attorney

CERTIFICATE OF FILING/SERVICE

I, Jeffery Lula, an attorney, certify that on February 28, 2018, I caused the **JOINT REPLY BRIEF OF PLAINTIFF-APPELLANTS INSTITUTE FOR JUSTICE; CHRISTOPHER J. PERRY AND PERRY & ASSOCIATES, LLC** to be filed with the Supreme Court of Illinois through its e-filing system.

I, Jeffery Lula, further certify that on February 28, 2018, I caused the **JOINT REPLY BRIEF OF PLAINTIFF-APPELLANTS INSTITUTE FOR JUSTICE; CHRISTOPHER J. PERRY AND PERRY & ASSOCIATES, LLC** to be served on the parties through Illinois' e-filing system. In addition, I further certify that I caused the foregoing to be emailed to all primary and secondary email addresses by the persons named below on February 28, 2018 before 5:00 p.m.

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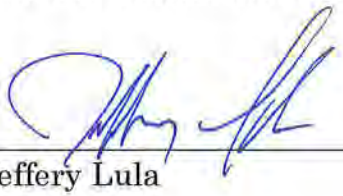
Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.



Jeffery Lula

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In The Supreme Court Of Illinois

INSTITUTE FOR JUSTICE, Plaintiff-Appellant v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellee.	On 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, Illinois, County Department, Chancery Division, No. 14 CH 19381 Hon. J. Rodolfo Garcia, *Judge Presiding*
CHRISTOPHER J. PERRY and PERRY & ASSOCIATES, LLC, Plaintiff-Appellants v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellee.	On 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, Illinois, County Department, Chancery Division, No. 14 CH 17994 Hon. Rita M. Novak, *Judge Presiding*

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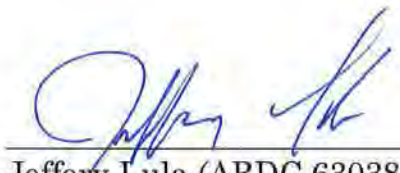

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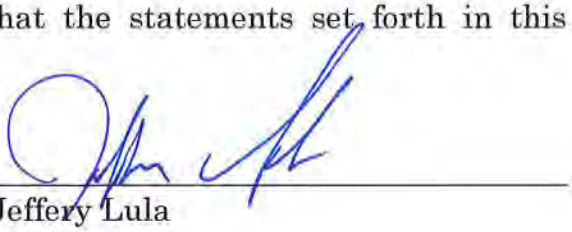

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