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

BRIEF OF *AMICUS CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANT

Andrew D. Prins
(admitted *pro hac vice*, ARDC No. 6327926)
Elana Nightingale Dawson
(ARDC No. 6306642)
Genevieve P. Hoffman
(admitted *pro hac vice*, ARDC No. 6327927)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
elana.nightingaledawson@lw.com
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press ("the Reporters Committee") is an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and freedom of information litigation since 1970. Since its founding, the Reporters Committee has played a role in hundreds of significant press freedom cases before federal and state courts. The news media relies on freedom of information laws to obtain public records necessary for reporting on government activities, and the Reporters Committee regularly files amicus briefs in cases that relate to the public's right to information and the newsgathering rights of journalists. This is such a case. The Reporters Committee files this brief in support of plaintiff-appellant the Institute for Justice in order to emphasize the strong public interests at stake and the importance to the news media and the public of maintaining a robust freedom of information regime.

INTRODUCTION

The Reporters Committee submits this brief because it believes that the First District's ruling undermines the purpose and efficacy of Illinois's

Freedom of Information Act, 5 ILCS 140/1 *et seq*. ("FOIA"). Public access to government records has long been regarded as essential to the maintenance of democratic government, and Illinois's FOIA embodies this basic tenet. The First District's ruling applying a new FOIA exemption retroactively to pending litigation is directly contrary to this tenet. If permitted to stand, the consequences of the First District's ruling could reach well beyond this case. The retroactive application of new FOIA exemptions without explicit direction from the General Assembly is inconsistent with the State's public policy of openness and accessibility of public records, as stated in FOIA itself, and threatens to corrode the democratic principles FOIA safeguards. Such a rule undermines transparency, accountability, and the rule of law by creating adverse incentives for government officials to prohibit retroactively the disclosure of unfavorable or politically inconvenient records, chilling future FOIA requests and further weakening these values. The public policy interests at stake in this case necessitate reversal of the First District's decision, and the adoption of a clear-statement rule on retroactivity to fortify FOIA.

ARGUMENT

I. A RULE PERMITTING THE RETROACTIVE APPLICATION OF NEW FOIA EXEMPTIONS WOULD UNDERMINE THE WELL-ESTABLISHED PUBLIC POLICY OF THIS STATE

Both the language of FOIA itself and courts' interpretation of FOIA clearly demonstrate Illinois's public policy of transparency and accountability in government. By applying a new FOIA exemption retroactively to pending litigation, even though the exemption contained "no language suggesting that its temporal reach was intended to be retroactive," *Inst. for Justice v. Dep't of Fin. & Prof'l Regulation*, 2017 IL App (1st) 162141-U, ¶ 33 (Delort, J. dissenting), the First District's ruling has undermined this public policy.

A. Illinois's Public Policy Recognizes That Freedom Of Information Laws Promote Transparency Essential For A Democratic Society

Representative democracy requires transparency and accessibility to thrive. Citizens must be informed about how public officials conduct government business so that they can both monitor the government and hold it accountable. The lack of such information, in turn, threatens the ability of citizens to make decisions about how to participate in public affairs and when to take civic action. *See* Sarah Klaper, *The Sun Peeking Around the Corner: Illinois' New Freedom of Information Act as a National Model*, 10

Conn. Pub. Int. L.J. 63, 78 (2010). As state and federal courts have consistently recognized, freedom of information laws are vital to promoting transparency. *See, e.g.*, *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (referring to the federal FOIA statute, 5 U.S.C. § 552, and noting that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society"); *Kish v. City of Akron*, 2006-Ohio-1244, ¶ 17 (noting that "[s]uch statutes . . . reinforce the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor").

When the federal FOIA was first enacted in 1966, the United States became only the second country in the world to adopt a freedom of information regime. *See* Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1367 (2016). Journalists were at the forefront of the push for transparency that led to the Act's adoption. *Id.* at 1369–71 (discussing the news media's role in the enactment of the federal FOIA). And it was widely understood that the news media would play an essential role in informing the public about the contents of public records and about government activities revealed through those records. *Id.* Today, in addition to the federal FOIA, all fifty states (and the District of Columbia) have adopted some kind of

open records law granting citizens vital rights of access to public records, and more than one hundred countries around the world have followed suit. *See, e.g.*, *Herald Publ'g Co. v. Barnwell*, 351 S.E.2d 878, 881 (S.C. Ct. App. 1986) (noting that all fifty states have adopted open records laws); *see also* Joe Regalia, *The Common Law Right to Information*, 18 Rich. J. L. & Pub. Int. 89, 91–92 (2015) (same); Klaper, *supra*, at 80–100 (Appendix A) (comparing provisions of FOIA statutes from all fifty states and the District of Columbia); Kwoka, *supra*, at 1367 (noting the adoption of FOIAs worldwide).

Illinois's FOIA expressly embraces the fundamental principles that have long animated the push for transparency and accessibility in democratic government; indeed, the first section of the statute declares that it is "the public policy of . . . Illinois that all persons are entitled to full and complete information" regarding public affairs "[p]ursuant to the fundamental philosophy of the American constitutional form of government." 5 ILCS 140/1. And it expressly recognizes that such full and complete information "is necessary to enable the people to fulfill their duties of . . . monitoring government to ensure that it is being conducted in the public interest." *Id.*

Consistent with these values, the statute recognizes the public's right to full disclosure of information, and instructs courts to construe limitations

on disclosure narrowly. *Id.* (noting that "[t]he provisions of this Act shall be construed in accordance with [the] principle" that "the people of this State have a right to full disclosure of information" and that restraints on this right of access are "limited exceptions"). Likewise, this Court has consistently stated that "under FOIA, 'public records are presumed to be open and accessible,'" *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 410 (2009) (citation omitted), and, consistent with this presumption, the statute contemplates broad disclosure. *Id.* at 410–11; *see, e.g.*, *Lieber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill. 2d 401, 407–08 (1997); *see also Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (2009). The language of FOIA and this Court's decisions reflect the well-established public policy of openness and accessibility in Illinois government.

B. The First District's Rule Undermines This Public Policy

The First District's ruling threatens to undermine this public policy and the essential democratic values it serves by creating incentives for government officials to circumvent the presumption of transparency, thereby chilling future FOIA requests.

1. The First District's Rule Creates Adverse Incentives For Government Entities

The consequences of the First District's decision for the public's right to information about the functioning of their government could have

consequences far beyond the relatively narrow request at issue in this case. The news media relies on information obtained through FOIA requests when investigating government activities in order to inform the public. 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. As Justice Delort, who dissented below, has previously pointed out, if a FOIA plaintiff's right to government records does not vest when the FOIA request is first made, government bodies who wish to cover up embarrassing or scandalous information will be encouraged "to stall FOIA responses until some future time when the legislature might amend the statute in a favorable manner, or to actively lobby for an amendment" that would prohibit disclosure. *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 36 (Delort, J., specially concurring). Permitting the retroactive exemption of potentially unfavorable information does nothing to serve the interests of the public.

Similarly, the First District's ruling opens the door for interest groups to lobby the legislature to prevent the disclosure of unfavorable information. The First District's rule thus empowers the government to deny the public and the press access to information necessary to fulfilling their government

"watchdog" roles, contrary to the clearly stated intent of the statute. Not only does this hamstring government accountability mechanisms, it also erodes foundational principles of the rule of law: impersonality and judicial independence. The rule of law as an ideal is not satisfied where lawmakers enact laws to further their own personal interests or whims. *See* Kenneth Henley, *The Impersonal Rule of Law*, 5 Can. J.L. & Juris. 299, 299–301 (1992).

These risks are not hypothetical. As the plaintiff pointed out in its petition for leave to appeal, the circumstances surrounding this case raise these specters. *See* Pl.'s Pet. for Leave to Appeal at 16. The amendment exempting from disclosure the precise records plaintiff requested was adopted shortly after plaintiff's request had been denied and plaintiff filed suit to compel disclosure. *See Inst. for Justice*, 2017 IL App (1st) 162141-U, ¶¶ 2–3. Moreover, similar circumstances have arisen in at least two other cases, in which statutory amendments have been adopted exempting from disclosure the precise records plaintiffs sought. *See Perry v. Dep't of Fin. & Prof'l Regulation*, 2017 IL App (1st) 161780, ¶¶ 1, 14–17; *Korner v. Madigan*, 2016 IL App (1st) 153366, ¶¶ 4–6. The First District's ruling will only further incentivize this concerning behavior by guaranteeing that any

new exemption will apply to then pending requests, including the very request that sparked official ire.

2. The First District's Rule Could Chill Future FOIA Requests

A rule permitting the retroactive application of new FOIA exemptions in circumstances like these will also have a chilling effect on future FOIA requesters, exacerbating the consequences of the adverse incentives described above. As a practical matter, FOIA statutes, including Illinois's, place the burden of vindicating the public's statutory right to obtain records largely on the FOIA requester. If a government entity is not forthcoming with the requested records, the requester can either forgo obtaining the requested records or pursue further action, usually in the form of costly litigation that can take years. Such litigation—and indeed, the entire process of obtaining records through FOIA requests—is already unnecessarily difficult for individuals and members of the news media in general, and in Illinois in particular. A 2007 report by the Better Government Association and the National Freedom of Information Coalition gave Illinois an "F" grade on freedom of information responsiveness. *See* Charles Davis, *Report: Grading the United States on FOIA Responsiveness*, Better Gov't Ass'n (Nov. 1, 2008), https://tinyurl.com/yd23hb6j (follow "the Results (PDF)" hyperlink to *Results and Criteria of BGA/NFOIC survey*). And a

2015 ranking by the Center for Public Integrity similarly gave Illinois an "F" on public access to information. Pam G. Dempsey, *Illinois Gets D+ Grade in 2015 State Integrity Investigation*, Center for Public Integrity (updated Nov. 12, 2015), *archived at* https://perma.cc/9KS5-FXZR.

The First District's retroactivity rule threatens to magnify these problems. If new exemptions are applied retroactively, fewer people—citizens or local journalists—will be willing to shoulder the costs and expense of litigation to vindicate the public's right to know, given the risk 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. This is a particular problem for budget-constrained local newspapers, which face declining circulation and print revenues but which continue to conduct the bulk of costly government-targeted investigative journalism. Newspapers will be less likely to spend time and money on protracted and uncertain FOIA litigation as they struggle to come up with funds for this kind of "watchdog" reporting. *See* Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 Utah L. Rev. 193, 203–06 (2016).

Attorneys will also be less likely to take on FOIA cases without charging fees to clients, because the retroactivity rule erodes the attorney fee

incentive. At present, attorneys are incentivized to take on FOIA cases largely because plaintiffs are entitled to costs and attorney's fees if they prevail. *See* 5 ILCS 140/11(i) (providing for the award of reasonable attorney's fees and costs). But if the legislature may intervene midstream to short circuit a favorable litigation outcome, the likelihood of a successful case diminishes and the risk to litigating attorneys increases. The result, as one can imagine, is that attorneys will be less willing to expose themselves to the risks inherent in FOIA litigation.

The number of FOIA requests, and the success rate of those requests, may fall accordingly. Without the looming threat of potentially successful litigation, Illinois government entities will be less motivated to comply with FOIA requests, dealing a direct blow to transparency and accountability. Secrecy breeds corruption. In the wake of the Watergate scandal, Chief Justice Earl Warren described secrecy as "the incubator for corruption" and "cancerous to the body politic." *See* Earl Warren, *Governmental Secrecy: Corruption's Ally*, 60 A.B.A. J. 550, 550–51 (1974). Reports already indicate that, given the decline in investigative reporting, state and local public officials across the nation know they are being watched less closely. *See* Carroll, *supra*, at 205–06 & n.76. The First District's rule ensures that this trend will continue, and perhaps accelerate, in Illinois, which already

has one of the highest rates of public corruption in the nation. On average, Illinois sees 51 public corruption convictions a year—nearly one per week. *See* Alyssa Harmon, *Illinois's Freedom of Information Act: More Access or More Hurdles?*, 33 N. Ill. U. L. Rev. 601, 621–22 (2013). A strong FOIA statute that is vigorously enforced is an invaluable tool for the public, allowing it to engage in government reform. The First District's ruling threatens to hollow out the state's FOIA system, jeopardizing the very principles the statute was intended to preserve.

II. GIVEN THE IMPORTANT INTERESTS AT STAKE, THE COURT SHOULD ADOPT A CLEAR-STATEMENT RULE FOR ALL AMENDMENTS TO FOIA

As the plaintiff argues, and for the additional reasons discussed above, the new FOIA exemption at issue here should be considered a "substantive" amendment. *See* Pl.'s Pet. for Reh'g at 4–10 (arguing that Section 4-24 is a substantive amendment); *see also* Pl.'s Pet. for Leave to Appeal at 8–10. But even if the amendment at issue here could be classified as "procedural," the Court should decline to apply it retroactively. Because of the fundamental democratic values protected by FOIA and the public policy interests at stake, the Court should instead adopt a clear-statement rule that, absent explicit legislative direction otherwise, *all* amendments to FOIA, even procedural ones, must be applied prospectively.

"Judicially created clear-statement rules are based on a presumption that a particular result is disfavored, thus requiring laws to make a clear statement that such a result is intended." *Alaska R.R. Corp. v. Native Vill. of Eklutna*, 142 P.3d 1192, 1208–09 (Alaska 2006) (Matthews, J., dissenting). The purpose of a clear-statement rule is "the protection of weighty and constant values, be they constitutional or otherwise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted). Courts have adopted clear-statement rules to protect fundamental democratic values, deep-seated legal traditions or presumptions, and the expectations and reliance interests of those bound by a statute's terms. *See, e.g.*, *United States v. Bass*, 404 U.S. 336, 350 (1971) (employing a clear-statement rule to protect principles of federalism); *Cal. Cannabis Coal. v. City of Upland*, 401 P.3d 49, 64 (Cal. 2017) (requiring a clear statement before construing a statutory provision to constrain the state's initiative power); *Nevares v. M.L.S.*, 2015 UT 34, ¶¶ 35–37 (requiring a clear statement to overcome the presumption against extraterritoriality); *Comm'r of Envtl. Prot. v. Mellon*, 945 A.2d 464, 470 (Conn. 2008) (requiring a clear statement before construing a statute to depart from the "American rule" on attorney's fees); *see also generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45

Vand. L. Rev. 593 (1992) (cataloging the Supreme Court's clear-statement rules, including rules on federalism, separation of powers, and extraterritoriality). Employing a clear-statement rule in such "sensitive areas" "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349; *see also* Eskridge & Frickey, *supra*, at 631 (noting that clear-statement rules "can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly").

FOIA likewise implicates such sensitive areas. As discussed above, government transparency is essential to ensuring that the public is informed about government activities. An informed public, in turn, is vital to the health of any democracy. The retroactive application of FOIA amendments thus implicates—and endangers—transparency, accountability, and the rule of law: the same sorts of fundamental democratic values that, in other similar contexts, have justified a clear-statement rule.

Moreover, adopting a clear-statement rule on retroactivity in the FOIA context would provide benefits to the public and judiciary alike. Courts will have the assurance that, when they apply FOIA amendments retroactively, it is because the legislature "specifically and directly" considered the critical

values at stake and determined how those values should be balanced. *See* Eskridge & Frickey, *supra*, at 631. More importantly, a clear-statement rule will establish clear lines of accountability: the public will know when the legislature has intentionally decided to shield government information from public light. This will aid FOIA's transparency and accountability-promoting functions, consistent with the statute's presumption of openness.

The Statute on Statutes does not preclude the adoption of a clear-statement rule here. Illinois courts have interpreted Illinois's Statute on Statutes as providing a "default" rule for the application of statutory amendments that do not indicate temporal effect. Under this rule, "substantive" statutory amendments will only be applied prospectively, whereas "procedural" amendments are applied retroactively. *See* 5 ILCS 70/4; *see also Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 405–07 (2009) (citing 5 ILCS 70/4). But the default rule for procedural amendments need only be applied "so far as practicable." *See* 5 ILCS 70/4. And the rule does not apply when it would be inconsistent with the clearly stated public policy in a later enacted statute. *See* 5 ILCS 140/1; *see also Caveney v. Bower*, 207 Ill. 2d 82, 93–95 (2003) (noting that the rules in the Statute on Statutes will not be given "operative effect" where a "contrary intent is plainly manifested in the later enactment" (citation omitted)). The rule thus has no application

here. Applying a default rule of retroactivity even to just those amendments deemed "procedural" would directly threaten FOIA's continued viability and the public policy goals of openness and transparency manifested therein. Application of the default rule to procedural FOIA amendments would thus be neither "practicable," *see* 5 ILCS 70/4, nor consistent with the public policy interests reflected in the FOIA statute.

CONCLUSION

Freedom of information laws are necessary to a functioning democracy because they enable citizens to monitor and participate in government. A rule that assumes the retroactive application of FOIA exemptions will frustrate FOIA's essential functions. Accordingly, even if the Court agrees with the First District's conclusion that the amendment at issue here is "procedural," it should decline to apply that procedural amendment retroactively. Instead, the Court should adopt a clear-statement rule for FOIA in order to protect the fundamental interests in transparency and accountability reflected in the FOIA statute.

Dated: December 6, 2017

Respectfully submitted,

/s/ *Elana Nightingale Dawson*

Andrew D. Prins
(admitted *pro hac vice*,
ARDC No. 6327926)
Elana Nightingale Dawson
(ARDC No. 6306642)
Genevieve P. Hoffman*
(admitted *pro hac vice*,
ARDC No. 6327927)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
elana.nightingaledawson@lw.com

*Admitted to practice in California only. All work supervised by a member of the DC Bar.

Counsel for Amicus Curiae

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 or words contained in 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 17 pages.

/s/ *Elana Nightingale Dawson*
Elana Nightingale Dawson

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NOTICE OF FILING

TO: Jeffery J. Lula; Kyle L. Voils; Haris Hadzimuradovic; Kirkland & Ellis LLP, 300 North LaSalle, Chicago, IL 60654 (312) 862-2000 Email: jeffery.lula@kirkland.com; kyle.voils@kirkland.com; hhadzimuratovic@kirkland.com

John J. Ladle, P.C.; Gregory Frank Ladle; Attorneys at Law, 177 N. State Street, Suite 300, Chicago, IL 60601 (312) 782-9026 Email: jladle-law@att.net; gladle-law@att.net

Aaron T. Dozeman, Assistant Attorney General, 100 West Randolph Street, 12th Floor, Chicago, IL 60601 (312) 793-1473; 110 West Randolph Street, 13th Floor, Chicago, IL 60601 (312) 814-5179 Email: CivilAppeals@atg.state.il.us; adozeman@atg.state.il.us

Jeffrey M. Schwab; Jacob H. Huebert; James J. McQuaid; Liberty Justice Center, 190 S. LaSalle St., Suite 1500, Chicago, IL 60603 (312) 263-7668 Email: jschwab@libertyjusticecenter.org; jhuebert@libertyjusticecenter.org; jmcquaid@libertyjusticecenter.org

PLEASE TAKE NOTICE that on December 6, 2017, the Reporters Committee for Freedom of the Press electronically filed in the Supreme Court of Illinois a Brief of Amicus Curiae Reporters Committee for Freedom of the Press in Support of Appellant, a copy of which is hereby served upon you.

Dated: December 6, 2017

/s/ *Elana Nightingale Dawson*

Elana Nightingale Dawson
(ARDC No. 6306642)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
elana.nightingaledawson@lw.com

CERTIFICATE OF SERVICE

The undersigned certifies that on December 6, 2017, the BRIEF OF AMICUS CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLANT was filed with the Supreme Court of Illinois through its electronic filing system, and that copies of the above-listed Brief were served by electronic mail upon the following counsel for the parties to all primary and secondary email addresses listed below:

Jeffery J. Lula
Kyle L. Voils
Haris Hadzimuratovic
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
jeffery.lula@kirkland.com
kyle.voils@kirkland.com
hhadzimuratovic@kirkland.com
Counsel for Plaintiff-Appellant

John J. Ladle, P.C.
Gregory Frank Ladle
Attorneys at Law
177 N. State Street, Suite 300
Chicago, IL 60601
(312) 782-9026
jladle-law@att.net
gladle-law@att.net
Counsel for Plaintiff-Appellant in Case No. 122411

Aaron T. Dozeman
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, IL 60601
(312) 793-1473

110 West Randolph Street, 13th Floor
Chicago, IL 60601
(312) 814-5179
CivilAppeals@atg.state.il.us
adozeman@atg.state.il.us
Counsel for Defendant-Appellee

Jeffrey M. Schwab
Jacob H. Huebert
James J. McQuaid
Liberty Justice Center
190 S. LaSalle St., Suite 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjusticecenter.org
jhuebert@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org
Counsel for Amici Illinois Policy Institute & Edgar County Watchdogs

Additionally, the Brief will be served via the Court's electronic filing system on all counsel registered for that system. The undersigned will cause 13 copies of the Brief to be sent to the Clerk of the Court.

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 to the best of my knowledge, information, and belief.

/s/ *Elana Nightingale Dawson*
Elana Nightingale Dawson