IN THE CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT
KANKAKEE COUNTY, ILLINOIS

JAMES R. ROWE, KANKAKEE COUNTY STATE'S ATTORNEY, and MICHAEL DOWNEY, KANKAKEE COUNTY SHERIFF,	)	
Plaintiffs,	)	
v.	)	Case No. No. 22-CH-16 Consolidated by Supreme Court Order Rowe v. Raoul; No. 129016
KWAME RAOUL, ILLINOIS ATTORNEY GENERAL, JAY ROBERT PRITZKER, GOVERNOR OF ILLINOIS, EMANUEL CHRISTOPHER WELCH, SPEAKER OF THE HOUSE, DONALD F. HARMON, SENATE PRESIDENT,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Dated: November 23, 2022

NOW COME the Plaintiffs James R. Rowe, et al. and in response to Defendant's Motion for summary judgment pursuant to section 2-1005 against the Plaintiffs James R. Rowe, et al., and in support of said motion state as follows:

INTRODUCTION

Defendants contend at the outset of their Memorandum that "the policy issues" relating to P.A. 101-652 that have "been the subject of extensive debate among elected officials and members of the public" "are not the subject of this case." (Def. Brief, pp. 1, 3) But the policy issues underlying this legislation cannot be divorced from its language – and the statutory language, along with the way in which lawmakers rammed the 764-page P.A, 101-652 through the General Assembly in 2 days, is what created the constitutional infirmities at the core of this litigation.

P.A. 101-652 provides, for example, that a defendant who is not brought to trial within 90 days "***shall not be denied pretrial release***.**"** 725 ILCS 5/110-6.1(i). The statute does not have exceptions for violent offenders and others who are a threat to the community at large, nor does it address the fact that there are backlogs of at least six months at the Illinois State Police crime lab in processing tests for criminal cases. *See* 730 ILCS 5/5-4-3a. Unlike the speedy trial statute which provides exceptions for late lab results, P.A. 101-652 provides none. *See* 725 ILCS 5/103-5. Thus, the most serious offenders will be released and unlikely to return to court when facing a long prison term. Further, if a defendant violates a court order to return to face trial, the Act unconstitutionally eliminates the court's authority to issue a warrant, instead requiring the judge to first issue a toothless "order to show cause" that must be personally served regardless of the numerous risks and implications to law enforcement. 725 ILCS 5/110-3.

The above provisions, and many others, absolutely infringe on the judiciary's inherent authority and is a clear violation of the separation of powers. The abolition of monetary bail

violates the bail and the crime victim provisions of the Illinois Constitution. The hurried passage of the bill and its discordant provisions violated the strictures in the Illinois Constitution that a statute must receive three readings in each chamber and address only one subject. These are not mere perfunctory check marks for Defendants to disregard by whim; they are fundamental protections to guard against exactly the sort of legislative maneuvering that leads to constitutionally infirm statutes like the one at issue here. The policy choices made here occurred in the middle of the night in the context of a monumental bill impossible to comprehend, reviewed by few, and passed without committee and public hearings.

The real policy at issue here is whether the Defendants should be allowed to intentionally flout the express language of the Constitution as well as its policy underpinnings, which are designed to protect the public, our system of governance, and transparency in the passage of legislation. The answer is no.

ARGUMENT

I. THE ACT VIOLATES THE SINGLE-SUBJECT RULE

A. The Subject of Public Act 101-652 is "Criminal Law," Not "Criminal Justice Reform"

As a threshold matter, Defendants misstate the subject of Public Act 101-652 ("P.A. 101-652"). The General Assembly states the subject of P.A. 101-652 in plain, unambiguous language: "AN ACT concerning criminal law." The legislature and the statutory language determine the subject of the bill, not lawyers making after-the-fact rationalizations in summary judgment briefs.

People v. Wooters, 188 Ill.2d 500 (1999), is directly on point. The defendants in *Wooters* attempted a similar last-ditch maneuver to redefine the subject of a bill as "law enforcement related" despite the legislature having christened the bill, an act "in relation to crime." *Id*. at 513-15. Recognizing that "analysis under the single subject rule is akin to statutory construction," the

Supreme Court in *Wooters* rejected the defendants' recharacterization, pointing out that "[t]he General Assembly unequivocally indicated that 'crime' formed the core of [the bill's] subject matter." *Id.* at 513-15, 516.

Here, although the sponsors made passing mention of "criminal justice reform" in urging passage, Pl. Exs. 5 & 7, their few statements absolutely cannot supplant the plain language of the legislation. *See People v. Burndice*, 211 Ill.2d 264, 271 (2004) (rejecting State's reliance on legislative history in arguing that an amendment to the SEIA was in a matter involving inmate suits, observing that "[t]hough the State maintains that the defendant ignores that 'it is absolutely clear from the legislative history that the [amendment to the SEIA] was directed at inmate suits brought against DOC employees,' the State ignores that it is also absolutely clear the plain language…is not limited to such suits…If we must pierce the clouds of the legislative process to divine the intent in enacting a single provision, perhaps the relation of that provision to the remainder of the act is less than 'natural and logical.'"); *see also People v. James*, 246 Ill.App.3d 939, 948 (1st Dist. 1993) (statute not "interpreted by its sponsor's comments when introducing legislation, nor is it interpreted by the statements of senators or representatives who voted to pass the legislation formulating the statute," but rather "by its language, which if certain and unambiguous, must be given effect as written."). The plain language of P.A. 101-652 "unequivocally" states that its subject is "criminal law."

Defendants' reliance on *People v. Boclair* is misplaced. *Boclair,* 202 Ill.2d 89 (2002). There, the Illinois Supreme Court found that a bill with an unduly expansive subject title — "criminal justice and correctional facilities" — is "not necessarily dispositive" of its content or its relationship to a single-subject and that the bill could be resolved under a more specific subject, the "criminal justice system." *Id.* at 110. The court reasoned, "[o]therwise, nothing would be left

of the single subject rule beyond the creativity of legislative drafters to make titles of acts as broad as possible *Id.* at 110; *see also Johnson v. Edgar*, 176 Ill.2d 499, 517-518 (1997) (finding the subject "public safety" too broad). *Boclair* and its progeny, when considered in light of *Wooters,* applies only to the first step of a single-subject analysis and only if the legislature's chosen subject is "overly broad." In this situation, the bill can still withstand a single-subject challenge if a more specific, legitimate subject is proposed that relates to all provisions. When the legislature has "unequivocally" identified an appropriately specific subject, that "chosen" subject is controlling.

Here, in contrast, P.A. 101-652 expressly states that it concerns the sufficiently specific and legitimate subject "criminal law." Criminal law is defined as "[t]he body of law defining offenses against the community at large, regulating how suspects are investigated, charged, and tried, and establishing punishments for convicted offenders." Black's Law Dictionary, 431 (9th ed. 2009). In this case, the provisions discussed below do not relate to criminal law. None of these provisions define criminal offenses, regulate how suspects are criminally investigated, charged, and tried, or establish punishments for convicted offenders. This constitutes the "smoking gun," and is irrefutable, and decisive evidence of a single-subject violation. Ultimately, as shown below, the Act fails under either standard.

B. Public Act 101-652's Contains Discordant Provisions Unrelated to Criminal Law or Criminal Justice Reform

Even if this Court accepts the Defendants' recharacterization of P.A. 101-652's subject as "criminal justice reform," it still violates the single-subject rule. The criminal justice system is defined as "the collective institutions through which an accused offender passes until the accusations have been disposed of and the assessed punishment concluded," and "typically has three components: law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers), and corrections (prison officials, probation officers, parole

officers.)" *Id.* To "reform" is "to put or change into an improved form or condition," and "to amend or improve by change of form or removal of faults or abuses." Reform, *Merriam-Webster*, 2022, https://www.merriam-webster.com/dictionary/reform. The unambiguous language of the statute provides that the subject is "criminal law," and not the "umbrella of the criminal justice reform." As shown below, whether viewed in terms of "criminal law" or "criminal justice reform," the same discordant provisions that fall far afield of the statute's actual subject of "criminal law" likewise fall outside the subject of "criminal justice reform" urged by Defendants' lawyers.

1. No Representation Act

Defendant's contention that the subject matter of the No Representation Act is criminal justice reform because the Act implicates Illinois Department of Corrections (IDOC) prisoners is tenuous and directly contradicted by supreme court case law. *See People v. Cervantes,* 189 Ill.2d 80, 84 (1999); *see also Wooters,* 188 Ill.2d 500. In *People v. Cervantes*, 189 Ill.2d 80, 84 (1999), the Court held that the creation of the Secure Residential Youth Care Facility Licensing Act (Licensing Act) fell outside the Safe Neighborhoods Act's subject of "neighborhood safety" where the provisions requiring IDOC to establish regulations for secure residential youth facilities merely established licensing procedures and did not relate to rehabilitation or penalties:

> Contrary to the assertions of the State, none of the provision of the Licensing Act refer to the rehabilitation of juvenile offenders or implementation of increased juvenile penalties. Instead, the statute sets forth a litany of administrative rules and procedures comprising a comprehensive licensing scheme for the purpose of promoting private ownership of these facilities.

Cervantes, 189 Ill.2d at 95-96; *see also, e.g., Wooters*, 188 Ill.2d at 512, 514 (fact that sheriffs' deputies enforced foreclosures did not make the amendments to the Illinois Mortgage Foreclosure Act (IMFA) related to crime; this indirect link did not transform notice of evictions and related procedures "into legislation concerning 'crime.'").

Though the No Representation Act mentions inmates housed by the criminal justice system, as in *Cervantes* and *Wooters*, the operation of the Act has no effect whatsoever on the criminal justice system, its operations, or inmates. As in *Cervantes,* the No Representation Act has no bearing on traditional subjects of legislative concern relating to inmates, such as rehabilitation, good-time credit, sentencing length, accommodations, security, or discipline policy. Rather, it merely creates a clerical responsibility for IDOC regarding reporting an inmate's last known address. No single right or interest of an inmate has been altered or created. Nothing has changed regarding inmates' voting rights or otherwise; IDOC inmates cannot vote. Ill. Const. art. III, § 2; 10 ILCS 5/3-5. Rather, the No Representation Act affects legislators creating the district maps, the politicians and parties who must adhere to the maps, and the location of registered voters within those maps. It has no "natural and logical" connection to criminal law or criminal justice reform. *People v. Burdice*, 211 Ill.2d 264, 267-68 (2004) (dispositive question under single-subject analysis is "whether the individual provisions of the Act have a 'natural and logical' connection to that subject.") (citing *People v. Boclair*, 202 Ill.2d 89 (2002)).

2. Treatment Act

Nothing in the amendments to the Treatment Act changes the responsibilities, authority, or duties of a law enforcement agency, especially regarding their role in the criminal justice system (crime prevention, criminal investigations, arrests, or charging of criminal defendants). At the outset, it is worth noting that the Treatment Act was created by P.A. 100-1025 and its subject was "AN Act concerning substance use disorder treatment."

The amendments to the Treatment Act require merely that law enforcement be "included" in the Treatment Act. Merely "including," informally or otherwise, law enforcement in a government sponsored activity or program is not necessarily a manifestation of the criminal justice system.

Legislative sessions and county board meetings include the participation of law enforcement. The Treatment Act requires merely that law enforcement be "included." Including a law enforcement agency could be as simple as receiving input on the design of the program or securing a pledge of assistance with participants as needed. Indeed, community caretaking functions are those "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute…, such as helping children find their parents, mediating noise disputes, responding to calls about missing persons or sick neighbors, or helping inebriates find their way home." *People v. McDonough*, 239 Ill.2d 260, 269 (2010).

Simply because the "deflection programs" that might be created by "other first responders" are to "include a law enforcement agency" does not transform the provision to criminal justice reform. The provision is not oriented toward that system through which "an accused offender passes until the accusations have been disposed of and the assessed punishment concluded." Rather, its purpose is to offer tools to "adequately address and manage substance abuse use and mental health disorders" and "prevent arrest and conviction records …." 5 ILCS 820/5. Defendants seem to grasp this point, as they concede the purpose of these amendments is to provide treatment "to addicts as an alternative to the criminal justice system." Def. Brief, p. 9. In other words, the purpose of the Treatment Act and amendments cannot constitute a reform to the criminal justice system because their very purpose is to create and expand an alternative system, distinct and separate from the criminal justice system. *Id*.

3. Section 4.1 Retaliatory Provisions

Defendants' sole argument is that new Section 4.1 falls within the subject of criminal justice reform because it includes the following clause: "a person who engages in prohibited retaliatory action under section (a) is subject to the following penalties: a fine of no less than $500 and no

more than $5,000, suspension without pay, demotion, discharge, civil, or criminal prosecution, or any combination of these penalties, as appropriate." Defendants do not even attempt to defend the remaining provisions of new Section 4.1.

New Section 4.1 does not create a new criminal offense; it neither designates a class of offense nor sets forth a penalty. New Section 4.1 principally is concerned with creating a process by which retaliation for whistleblower claims are investigated and redressed internally by the governmental body. Defendants nowhere suggest that a government supervisor engaging in any form of "retaliatory action" (e.g., frequent staff changes, refusal to assign meaningful work, moving an employee's office, or any "adverse change" such as limiting the number of accessible paperclips) is now subject to arrest and criminal prosecution. Nor can they. The purpose of this section is to clarify for auditing officials, state's attorneys, and the courts that new Section 4.1 does not preclude independent civil or criminal redress of improper governmental action or retaliatory action. Rather, in addition to the remedial measures an auditing official can take in subsection (f) (*i.e*. reinstate or reimburse the employee), and the fines set forth in subsection (g), violations can also be redressed through an independent civil offense or criminal offense where the conduct amounts to a civil or criminal offense. Subsection (g) is merely making plain that the new Section 4.1 does not diminish officials' current authority to address "retaliatory action."

Moreover, the legislature's choice to codify new Section 4.1 as 50 ILCS 105/4.1 so that it follows 50 ILCS 105/4 clearly evidences that the legislature did not intend to create a new criminal offense. Section 105/4 of the Prohibited Political Activities Act is the penalty provision for the Act. Section 105/4 provides that any person holding office "who violates any provision of the preceding sections, is guilty of a Class 4 felony." Had the legislature intended for 105/4 to apply to 105/4.1 it would have codified the section differently. In other words, if the legislature had

intended for new Section 4.1 to be a criminal offense, it would have used language analogous to section 105/4. Further, if the legislature's intent was to subject violators of the new Section 4.1 to criminal prosecution, it would have *required* the auditing official to turn over all substantiated investigations to the State's Attorney as these would amount to crimes. But section (d) merely states that auditing officials "*may* transfer" a report "if an *auditing official* deems it appropriate." (emph. added).

Defendants' argument boils down to the proposition that the mere mention of the word "criminal" transforms this provision relating to retaliatory action into one relating to criminal law or to criminal justice reform, arguing that it is not the court's function to "parse legislation at an atomic level." Def. Brief, p. 10. Such a toothless standard would essentially eliminate "the single subject rule as a meaningful constitutional check on the legislature's actions." *Johnson v. Edgar*, 176 Ill.2d 499, 517-518 (1997).

New Section 4.1 is concerned with creating a process by which retaliation for whistleblower claims are investigated and redressed internally by the governmental body. Any overlap with the criminal justice system is either ancillary (police departments, state's attorney's offices, and court administration are government bodies to which New Section 4.1 also applies) or incidental (i.e. criminal prosecution not pursuant to New Section 4.1 may arise from an investigation into "retaliatory action"). Whether considered separately or collectively, the new Section 4.1 cannot fairly be interpreted as relating to criminal law or even criminal justice reform.

4. The CRRA and Amendments to the PLRA and Attorney General Act

For purposes of the CRRA and the Attorney General Act, Plaintiffs incorporate the arguments from their Memorandum in Support of Motion for Summary Judgment. Pl. Brief, pp. 8-10. With respect to the PLRA, further discussion is warranted as *County of Kane v. Carlson,* 116 Ill.2d 186

(1987), is directly on point. In *Carlson*, the Kane County Chief Judge sued to declare the PLRA unconstitutional as the Act, among other things, violated the single-subject clause. *Id.* at 214. The court held:

> The Act provides a comprehensive scheme governing collective bargaining among public employees, *and* the chief judge has not pointed to anything in the Act that fails to pertain to this broad field. We do not believe that the Act violates the single subject requirement.
>
> The chief judge makes the related argument that a later amendment, Public Act 84-1104 violated the single subject requirement. The amendatory act concerned the collective bargaining rights of peace officers and firefighters and the pensions of peace officers and made a number of general changes applicable to all public-employee labor relations. Contrary to the chief judge's argument, we believe that all the matters in the amendatory act pertained to public employment and public labor relations, and therefore the amendatory act did not violate the single-subject requirement. (emph. added). *Id.*

Thus, the Illinois Supreme Court has already ruled that the subject of the PLRA and even amendments modifying the bargaining rights and conditions of law enforcement officers pertain to "public employment and public labor relations"—not criminal law, let alone criminal justice reform. *Carlson* should be the final nail in the coffin for Defendants' repeated urging that any provision of P.A. 101-652 that makes mention of or refers to someone with a role in the criminal justice system is a criminal justice reform measure.

C. The Single-Subject Rule Was Designed to Prevent Precisely the Sort of Discordant Legislation Passed Through a Rushed Legislative Process That Occurred Here

Defendants seek to sidestep the ramifications of the single-subject analysis by arguing that the mere breadth and scope of a piece of legislation is not determinative. Def. Brief, pp. 6-7, relying on *Arangold Corp. v Zehnder*, 187 Ill.2d 341 (1999). In *Arangold*, the Supreme Court rejected the trial court's ruling that provisions within a bill must be "related to each other," holding instead that a bill's provisions must be related to a single subject. *Id.* at 354-356. That is exactly what Plaintiffs have demonstrated here: various provisions throughout this massive piece of legislation do not

relate to the statute's defined subject of "criminal law" or to "criminal justice reform" as urged by Defendants. Defendants also ignore two points. First, Plaintiffs must only establish that a single provision of P.A. 101-652 is unrelated to the subject of criminal law and criminal justice reform. *See Wooters*, 188 Ill.2d at 511-512 (although "several sections of the Act do relate to our criminal code" statute violated single-subject rule as "*[o]ne* section, however, is unrelated to crime"); *see also Coordinated Transport, Inc. of Ill. v. Barrett,* 412 Ill. 321, 326-327 (1952)("It has been said that there can be no surer test…than that *none* of the provisions of an act can be read as relating or germane to any other subject….)(emph. added). Second, while the length and number of provisions of a bill "is not determinative of its compliance with the single subject rule, the variety of its contents certainly is." *Johnson*, 176 Ill.2d at 516.

Illinois laws are codified by organizing all statutory provisions into chapter, act, article, and section. 25 ILCS 135/5.04. Here, the 764-page bill creates four new legislative acts, and amends 12 chapters, 22 acts, and more than 45 sections of the Illinois Compiled Statutes. Moreover, the massive scope of this legislation and the rushed manner of its enactment — which deprived lawmakers of the ability to read the entire bill, let alone digest and debate it before its passage — are precisely the sort of legislative maneuvers the single-subject clause is designed to prevent. Indeed, the Supreme Court has repeatedly looked at the procedural and legislative process of a bill's enactment in overturning legislation on single-subject grounds. *See, e.g., People v. Reedy*, 295 Ill.App.3d 34, 38-40 (2d Dist. 1998); *Wooters,* 188 Ill.2d at 511-513; *Johnson*, 176 Ill.2d at 502-506; *Burndice*, 211 Ill.2d at 268-269; *Cervantes*, 189 Ill.2d at 85-91. Although the First Amended Complaint and Plaintiffs' Brief discuss the rushed enactment and exponential growth of P.A. 101-652 in detail, it is worth noting that the legislation was called for a vote at 5 a.m., even

though lawmakers had little more than an hour to read the Bill—which was pointed out by Senator McClure who stated to the bill's chief sponsor:

> Senator Sims, we just got this, as you know, a very short time ago, so *I am literally still going through this as we are speaking*. So some of the questions are really not gotcha questions. *I really am trying to ascertain what's in the bill*. Pl.'s Ex. 5, pp. 87-88. (emph. added).

As Senator McClure pointed out: "[T]this sort of thing should not be done in the waning hours of a lame-duck session. We should have had committee hearings. We should've allowed people to testify. We should have done this right." *Id.* at 98.

Defendants make no attempt to justify the hurried and haphazard passage of P.A. 101-652, or even attempt to argue that the process was an orderly one in which the issues presented by the bill were clearly grasped and intelligently discussed. Instead, Defendants simply contend this did not constitute "logrolling" – tacking on measures that could not pass independently into a larger bill – by trying to distinguish the process here from *Johnson.* According to Defendants, the court in *Johnson* "confronted a clear case of legislative logrolling; the bill at issue combined an unpopular environmental impact fee on fuel sales, which previously had failed to pass on its own." Def. Brief, p. 11. But Defendants fail to mention that the elimination of cash bail in fact "failed to pass on its own" in 100th legislative session. In February 2017, then-Representative Christian Mitchell (now Deputy Governor) introduced HB 3421, legislation that would have ended cash bail and created "pretrial release." That bill languished in the Rules Committee and died at the end of session on January 8, 2019. Pl. Ex. 6. Indeed, as in *Olender, Reedy*, and *Johnson*, discussed in Plaintiffs' Brief, logrolling is evident here with lawmakers having "tacked on" the many, significant, and far-reaching amendments to HB 3653 at the 11th hour. Evidence of logrolling is further found in the fact that the original version of the bill — consisting of 7 pages and solely involving inmate voting rights — unanimously passed the House 110-0 with strong bi-partisan support on April 3, 2019.

In stark contrast, when it was returned from the Senate essentially unrecognizable with an additional 750 plus pages, the bill received only the bare minimum 60 votes to pass, with 50 nays and not the three-fifths that would be needed to approve a constitutional referendum. 1/13/2021 Roll Call, Ex. A attached hereto.

Both the substance and the process relating to the passage of P.A. 101-652 confirms that it is replete with provisions that violate the single-subject rule. Whether assessed under the subject of "criminal law" assigned to this enactment by the General Assembly or reviewed under the "criminal justice reform" label attached by Defendants' attorneys, P.A. 101-652 cannot withstand scrutiny under the single-subject clause of the Illinois Constitution.

II. PUBLIC ACT 101-652 VIOLATES THE SEPARATION OF POWERS DOCTRINE AND MUST BE STRUCK DOWN AS UNCONSTITUTIONAL BECAUSE IT PROHIBITS JUDGES FROM PROPERLY EXERCISING THEIR INHERENT AUTHORITY

Defendants argue that Plaintiffs' separation of powers claims should be rejected because: (1) Plaintiffs cannot show the pretrial release provisions are unconstitutional under every set of facts; and (2) the pre-trial release provision does not "unduly" infringe on the judiciary's inherent power recognized in *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74 (1975); Def. Brief, pp. 28, 30. Defendants provide an incorrect standard for addressing a facial challenge and misstate the holdings of *Elrod* and the other cases upon which they rely.

A. Defendants Misstate the Test for A Facial Challenge

A separation of powers claim requires a binary analysis — a statute either unduly infringes on a separate branch of government or it does not. A statute does not only sometimes unduly intrude on the inherent functions of another branch. In this regard, a separation of powers challenge is like a single-subject challenge, in that the essential question to be decided is simply whether the General Assembly had the lawful authority to adopt the legislation, as written, in the first place.

See e.g., *Meier, Facial Challenges and Separation of Powers,* Indiana Law Journal, Vol. 85, p. 1558 (Fall 2010) (arguing that when addressing separation of powers challenges to a federal statute, courts should not "pick and choose" the constitutional applications from unconstitutional applications).

Plaintiffs easily meet their burden because a legislative prohibition of monetary bail in all instances clearly violates the constitution's express mandate of separation of powers. Specifically, because under section 110-1.5 all judges will be categorically prohibited from even considering in their discretion a monetary component to the conditions of release, the judiciary's inherent authority to set or deny bond will necessarily be infringed in all cases if P.A. 101-652 becomes effective. This is true even if a judge would ultimately decide not to include a monetary component.

Notably, none of the cases upon which Defendants rely involved separation of powers challenges. Def. Brief, p. 30. *Thompson* and *Hartrich* both involved eighth amendment claims, *Napleton* addressed a due process challenge, and *Oswald,* a property tax exemption. Although the Supreme Court in *Davis v. Brown*, 221 Ill.2d 435, 442-43 (2006) and *In re Derrico G.*, 2014 IL 114463, ¶ 57, stated the general rule for distinguishing facial challenges from as-applied challenges, in neither case did the court speculate or consider hypotheticals when addressing specific separation of powers challenges raised by the parties. *See Davis*, 221 Ill.2d at 448-50; *Derrico G.*, at ¶¶ 75-85. Rather, the court in each case addressed the plain language of the statute at issue and considered how it functioned in light of the pre-existing case law regarding the particular government actors at issue. *Id.*

The Illinois Supreme Court has never engaged in the type of "as applied" analysis proposed by Defendants in cases involving a facial challenge. To the contrary, in the litany of cases in which the court has struck down legislation for violating the separation of powers doctrine, the court

analyzed the issues in precisely the same manner it did in *Davis* and *In re Derrico G.*, *See e.g. Best v. Taylor Mach. Works*, 179 Ill.2d 367, 410-16 (1997) (striking statute placing a mandatory limit on damages for non-economic injuries in tort cases; this encroached upon long-standing and "fundamental[] judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law"); *id.* at 438-49 (striking same statute for mandating extensive discovery in certain personal injury cases; "[e]valuating the relevance of discovery requests and limiting such requests to prevent abuse or harassment are, we believe, uniquely judicial functions"); *People v. Warren*, 173 Ill.2d 348, 367-71 (1996) (striking statute prohibiting imposition of a civil contempt finding by a judge presiding over a domestic relations matter following a conviction for unlawful visitation interference; power to hold someone in contempt of court "inheres in the judicial branch of government" and "legislature may not restrict its use"); *Murneigh v. Gainer*, 177 Ill.2d 287, 301-07 (1997) (striking statutes requiring Illinois courts to issue orders for collection of blood from certain convicted sex offenders and to enforce them through contempt power; "legislatively prescribed contempt sanction [wa]s not consistent with the exercise of the court's traditional and inherent power"); *People v. Joseph*, 113 Ill.2d 36, 41-45 (1986) (striking the statute requiring that post-conviction petitions be assigned to a judge other than who presided over defendant's trial as this "encroached upon a fundamental[] judicial prerogative"; legislature lacks "power to specify how the judicial power shall be exercised under a given circumstance" and is "prohibited from limiting or handicapping a judge in the performance of his duties").

B. Defendants Cannot Salvage the Act's Separation of Powers Violations Through Their Cramped Interpretation of the Judiciary's Inherent Authority

Plaintiffs' opening brief sets forth the fundamental ways in which P.A. 101-652 violates the separation of powers doctrine by infringing on the courts' inherent authority. Defendants' attempt

to unduly narrow the scope of separation of powers principles fails because, by wholly prohibiting a judge's mere consideration of a monetary component as a condition of pre-trial release and in many instances removing judicial discretion entirely, P.A. 101-652 clearly "unduly encroaches upon the judicial authority."

1. Infringement on Judiciary Through Elimination of Monetary Bail

It is well settled that the power to set or deny bond is inherent within the judicial power as a key component of the court's ability to "preserve the orderly process of criminal procedure." *Elrod*, 60 Ill.2d at 79. Defendants concede this inherent judicial power, but argue it is "narrow" in scope. Def. Brief, p. 31 (arguing that authority to deny pre-trial release may ***only*** be exercised "(1) 'to prevent interference with witnesses or jurors,' (2) 'to prevent the fulfillment of threats,' and (3) 'if a court is satisfied by the proof that an accused will not appear for trial regardless of the amount or conditions of bail.'"), quoting *Elrod*, 69 Ill.2d at 79-80. In other words, Defendants assume that the court's inherent authority in this area is limited to the sole question of whether a particular person accused of committing a crime should either be released pending trial or detained without bond. Defendants ignore that the inherent judicial authority necessarily includes the obligation and responsibility to consider all possible conditions of bond which might allow the accused to be safely released while also ensuring his appearance at trial.

One such condition, utilized in Illinois since its founding and by common law jurisdictions for centuries, is monetary bail, because it provides a strong incentive for the accused to abide by all the terms and conditions of pre-trial release. As the Supreme Court recognized in *People ex rel. Gendron v. Ingram,* 34 Ill.2d 623, 626 (1966), "[r]equiring a bond with sufficient sureties is premised on the assumption that economic loss to the accused, his family or friends, will assure his appearance for trial." P.A. 101-652 removes that option and prohibits its consideration, a clear

violation of the separation of powers doctrine. Indeed, Defendants implicitly recognize the fatal impact of *Elrod* on the Act's viability, reserving their right to "ask the Illinois Supreme Court to overrule or limit" it. Def. Brief, p. 33.

Moreover, Defendants ignore that in *Elrod*, the Court was construing a provision of the Illinois Constitution of 1970 which has since been ***twice amended*** by the citizens of Illinois for the specific purpose of vesting the judiciary with ***additional*** authority to withhold the opportunity for pre-trial release. Pl. Brief, p. 24 (discussing 1982 and 1986 amendments). Thus, under the current constitution, the judiciary's inherent authority to set or deny bond is necessarily broader than it was when *Elrod* was decided. It was precisely for this reason that in *People v. Bailey*, 167 Ill.2d 210, 241 (1995), the Supreme Court described this inherent authority as the "authority to impose bail" and the "powers of the court to admit persons to bail."

2. Infringement on Judiciary's Ability to Detain Defendants

P.A. 101-652 is also directly at odds with the court's inherent authority by setting specific parameters that instruct the judiciary when it can or cannot detain an individual. *First,* the Act prohibits a court from detaining a defendant or revoking a defendant's pretrial release in all non-110-6.1 cases (*i.e.*, the vast majority of offenses in the Criminal Code), even if it finds that the defendant will interfere with witnesses, fulfill a prior threat, or not appear for trial for some reason other than "willful flight" – which is a much more difficult standard to meet than risk of flight. *See* 725 ILCS 5/110-1(e) ("Willful flight means planning or attempting to intentionally evade prosecution by concealing oneself. Simple past non-appearance in court alone is not evidence of future intent to evade prosecution."). *Second*, even in section 110-6.1 cases, the General Assembly has chiseled away at the judiciary's inherent authority by requiring the court to apply specific, offense-by-offense factors created by the legislature as set forth in 110-6.1(e)(2) and (e)(3). *Third*,

it eliminates altogether the court's authority to set or deny bond for those defendants merely cited or summoned by officers pursuant to section 109-1.

3. Infringement on Judiciary Through Procedural Rules

Defendants' argument that the legislature has previously enacted procedural statutes implicating this inherent judicial authority without violating the separation of powers doctrine, Def. Brief, p. 32, discussing Article 110 of the Code of Criminal Procedure, fails to recognize that P.A. 101-652 goes much further than simply setting out procedures by which the court's inherent authority to set bail can be exercised. *See Murneigh,* 177 Ill.2d at 312 (legislature cannot enact provisions "not consistent with the exercise of the court's traditional and inherent power"). The General Assembly, through P.A. 101-652, has declared the conditions of release judges will be permitted to impose and how those conditions will be enforced, specifically precluding the courts from fully exercising their discretion by imposing any monetary conditions of bond (725 ILCS 5/110-1.5), or issuing arrest warrants if an accused fails to return to court (725 ILCS 5/110-3, as amended by P.A. 101-652). These provisions are akin to the mandatory legislative remitter struck down by the Supreme Court in *Best* and the statutory prohibition on civil contempt findings declared unconstitutional in *Warren,* because they unduly interfere with the judiciary's inherent authority by removing long-standing judicial discretion and replacing case-by-case judicial determinations with legislatively mandated outcomes. *See Murneigh,* 177 Ill.2d at 303.

Defendants attempt to justify the legislature's efforts to thoroughly restructure the system of bond and pre-trial release by likening the Act's effects to the provisions setting out mandatory minimum sentences. Def. Brief, p. 33. This analogy falls flat because those statutes are enacted pursuant to the "undoubted legislative power to define crimes and fix punishments," which when exercised, "necessarily limit the discretion of courts when imposing sentence." *People v. Taylor*,

102 Ill.2d 201, 208 (1984). Thus, although imposing sentence is an inherently judicial act, criminal sentencing also necessarily involves the valid exercise of legislative power. Once the legislature goes beyond the proper exercise of its own authority and mandates that an inherent judicial power be exercised in a particular manner, the separation of powers doctrine is implicated. *See People v. Davis*, 93 Ill.2d 155, 162 (1982) (statutory requirement that judges in felony cases "shall set forth [their] reasons for imposing the particular sentence" as a mandatory construction would violate separation of powers).

4. Infringement on the Judiciary Through New Discovery Obligations

Contrary to Defendants' claim, the new disclosure obligations in P.A. 101-652 do not merely supplement the Supreme Court's discovery rules; they conflict with them. Under section 110-6.1(c), a petition for the denial of pre-trial release must be filed either at the first court appearance or within 21 days of the arrest, and the hearing must be held no later than 48 hours after the filing of the petition. Also, the prosecution must tender discovery to the defense "prior to the hearing." 725 ILCS 5/110-6.1(f). All of this is well before any formal charging instrument is filed by the prosecution. *See* 725 ILCS 5/109-3.1(b). Supreme Court Rule 411 makes clear that discovery obligations do not yet apply at this stage of the proceeding: "[t]hese rules shall be applied in all criminal cases *wherein the accused is charged* with a felony." (emph. added). Further, the rules *"*shall become applicable *following* indictment or information…and shall not be operative prior to or in the course of any preliminary hearing." Sup. Ct. R. 411 (emph. added). Moreover, the Committee Comments to the Rule expressly caution that "[t]he use of the extensive discovery procedures prescribed in these rules at preliminary stages of the criminal trial would serve no valid purpose, and their use is confined to post-indictment procedures." Section 110-6.1(f) cannot be reconciled with Rule 411. *See People v. Peterson*, 2017 IL 120331, ¶ 31 ("where an irreconcilable

conflict exists between a legislative enactment and a rule of this court on a matter within the court's authority, the rule will prevail"); *Best*, 179 Ill. 2d at 444 (statute mandating certain disclosures in personal injury lawsuits was unconstitutional under separation of powers principles because it conflicted with the Court's discovery rules and judicial authority to control discovery process).

When, as here, the legislature has encroached upon a fundamentally judicial prerogative, the Illinois Supreme Court has "not hesitated to protect the court's authority." *Murneigh,* 177 Ill. 2d at 303. This Court should protect the authority of the judiciary here and conclude that the provisions of P.A. 101-652 identified by Plaintiffs violate the separation of powers doctrine.

III. PUBLIC ACT 101-652 VIOLATES THE ILLINOIS CONSTITUTION'S BAIL PROVISION

A. Plaintiffs Have Standing

Defendants seek to avoid a discussion on the merits by attempting to assert that Plaintiffs do not have standing to address the matter of P.A. 101-652 violating constitutional bail provisions. Defendants concede they are only raising this defense as to this section. Def. Brief, pp. 17-19. It is Defendants' burden to establish lack of standing. *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill.2d 217, 252 (2010). However, as explained below, Plaintiffs have clear standing to bring forward these claims.

"In order to have standing to bring a constitutional challenge, a person must show himself to be within the class aggrieved by the alleged unconstitutionality." *In re M.I.*, 2013 IL 113776, ¶ 32 (citing *People v. Morgan*, 203 Ill.2d 470 (2003)). Furthermore, a challenger to the constitutionality of a law must show that they are "directly or materially affected" by the statute or in instant danger of harm due to the enforcement of the statute. *Id*. Plaintiffs, elected State's Attorneys and Sheriffs, are in a unique position as the representatives of not only their offices but the citizens of their respective counties. In this way, they are uniquely qualified to challenge unconstitutional

legislation in a way the average citizen cannot. Furthermore, Plaintiff State's Attorneys have taken an oath to uphold and defend the Illinois Constitution and are "…under no duty to refrain from challenging…" an unconstitutional act of the legislature. *People ex rel. Miller v. Fullenwider*, 329 Ill. 65, 75 (1928). If the Court were to determine that these Plaintiffs do not have standing in this factual scenario, it becomes difficult to imagine a plaintiff who would have standing to bring a declaratory action before P.A. 101-652 goes into effect.

As shown throughout the First Amended Complaint, Plaintiffs are directly and materially affected by the provisions of P.A. 101-652 as they relate to pretrial release. Pursuant to the versions of 725 ILCS 5/109-1(b)(4) and 725 ILCS 5/110-6.1, effective January 1, 2023, the State (which in criminal proceedings is represented by that county's State's Attorney) is the only entity permitted to petition the court to deny pretrial release and must abide by the requirements in those sections. The individual State's Attorneys who have brought these actions are regulated by these provisions and have a clear interest in their constitutionality, as well as a cognizable injury should they be tasked with enforcing an unconstitutional act.

Additionally, the government has a substantial and undeniable interest in ensuring criminal defendants are available for trial. *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). As discussed above with respect to the separation of powers, P.A. 101-652 severely restricts the ability to detain a defendant. *See supra* at II. Without the ability to secure the defendant's presence through traditional means, Plaintiffs will undoubtedly be faced with individuals who do not appear for court. These failures to appear will lead to delays in cases, increased workloads, expenditures of additional funds, and in many instances, an inability to obtain defendant's appearance in court. Moreover, even if detained, a defendant shall be released if the trial does not occur within 90 days— an impracticability in many cases, and an impossibility in the vast majority. Pl. Brief, p.

19. These injuries occasioned by the enforcement of an unconstitutional law, pled in the complaint, *see* Pl. First Amend. Comp. ¶¶ 97, 98, 100, 101, are cognizable injuries which provide constitutional standing to Plaintiff State's Attorneys.

Plaintiff Sheriffs also are injured in sufficient measure to establish constitutional standing. Sheriffs and their deputies are obligated by law to serve and execute all orders within their counties. 55 ILCS 5/3-6019; Pl. First Amend. Comp. ¶ 96. In the place of the long-standing practice of issuing warrants when defendants fail to appear, P.A. 101-652 mandates that the court instead initially issue an "order to show cause." 725 ILCS 5/110-3. These orders are the only means to initially get a defendant back in court after a failure to appear and must be served by the Sheriff's Office at least forty-eight hours before the hearing. Unlike arrest warrants, orders to show cause do not authorize the use of force to gain entry into the defendant's dwelling, or even command the individual to open the door, nor authorize taking the defendant into custody. And, if the Sheriff is unable to serve a defendant personally, as abode service is not authorized, the exercise will be all for naught. 725 ILCS 5/110-3(b). As a result, the Plaintiff Sheriffs must expend resources and endanger their employees in a futile attempt to secure the presence of an unwilling criminal defendant. This will undoubtably lead to increased overtime, staffing needs, and other costs. More important, it puts Sheriffs' staffs at increased risk pursing an exercise in futility. Aside from the toothless nature of the orders to show cause, as they are court orders and not arrest warrants, their information will not be entered into the Law Enforcement Agencies Data System (LEADS) as would be typically done. *See* 55 ILCS 5/3-6019. Thus, law enforcement will be increasingly faced with the scenario in which they will conduct what is believed to be a simple traffic stop because nothing appears in LEADS, when in fact the driver is a fugitive from justice. This is not simply a police dispute, as Defendants urge, but a clear matter of law enforcement safety.

Although Defendants try to argue that the challenged pretrial release portions affect only criminal defendants, as shown above, Plaintiffs' conduct is clearly regulated by the pretrial release provisions and their rights impacted. As such, *Lujan* supports Plaintiffs' position. Plaintiffs are not arguing that the law is an unlawful regulation of others, but rather, that they themselves are unlawfully regulated by the pre-trial provisions of P.A. 101-652. *Lujan v. Defs of Wildlife*, 504 U.S. 555 (1992). Whether the Act is unconstitutional is not an "abstract question," and those injured by its provisions have the right to challenge them in court.

B. Defendants are Proper Parties to This Action

Defendants further contest Plaintiffs' ability to challenge the pretrial detention provisions of P.A. 101-652 by asserting that no "actual controversy" exists between the Parties and therefore, presumably, a declaratory judgment action is inappropriate. However, Defendants ignore the essential purpose behind a declaratory judgment action, to address issues pre-enforcement or before the parties have taken positions adverse to their own interests. "Declaratory judgments are designed to settle and fix the rights of the parties before there has been an irrevocable change in their positions in disregard of their respective claims of right, and the procedure should be used to afford security and relief against uncertainty with a view to avoiding litigation, not toward aiding it." *Drayson v. Wolff,* 277 Ill.App.3d 975, 979 (1st Dist. 1996). The underlying purpose of section 2-701 is "to allow the court to address a controversy one step sooner than normal, after a dispute has arisen but prior to any action which gives rise to a claim for damages or other relief." *Kranzler v. Kranzler,* 2018 IL App (1st) 171169, ¶53. The burden is on Defendants to address issues of justiciability. *Madison Cnty. on Behalf of Cnty. & People of Madison Cnty. v. Illinois State Bd. of Elections,* 2022 IL App (4th) 220169, ¶51.

Defendants occupy the top levels of state government and therefore are able to represent State interests. The Illinois Constitution makes clear that "[t]he Governor shall have the supreme executive power and shall be responsible for the faithful execution of the laws." Ill. Const. art. V, § 8. Given this, it is commonplace for the Governor to be a party defendant in a suit for declaratory judgment and seeking injunctive relief. *See*, *e.g., Tully v. Edgar*, 171 Ill.2d 297 (1996); *Chicago National League Ball Club, Inc. v. Thompson*, 108 Ill.2d 357 (1985); *People ex rel. Illinois Federation of Teachers v. Lindberg*, 60 Ill.2d 266 (1975); *Livingston v. Ogilvie*, 43 Ill.2d 9 (1969); *People ex rel. Engle v. Kerner*, 33 Ill.2d 11 (1965); *Jorgensen v. Blagojevich*, 211 Ill.2d 286, 310 (2004).

The Attorney General, by virtue of his position as Chief Legal Officer of the State (as well as the provisions in P.A. 101-652 directly concerning his office) is also a proper party defendant in this case. *See Doe v. Scott*, 321 F.Supp. 1385, 1387 (N.D. Ill. 1971), *vacated sub nom*. *Hanrahan v. Doe*, 410 U.S. 950 (1973), and *vacated sub nom*. *Heffernan v. Doe*, 410 U.S. 950 (1973). The Illinois Supreme Court made this point eminently clear in *People v. Massarella*, 72 Ill.2d 531 (1978), which discusses the power of the office of Attorney General in depth. *Id.* at 534-35 (in discussing broad Attorney General powers, noting that "the common law gave to the Attorney General the competence to control all litigation on behalf of the State including intervention in and management of all such proceedings," that "under the 1870 Illinois Constitution, the Attorney General not only retained his common law powers and duties but also could not be deprived of them by the legislature," and that it was "beyond dispute that the 1970 Constitution has kept those powers intact.").

Defendants' cited authorities are distinguishable and do not support their position. In *Cahokia*, for example, the essential relief requested by the plaintiff school districts was a court order

requiring the Governor to provide them with additional public funding; something that the Governor had no power to do under the Constitution's grant of the power of the purse to the Legislature. *Cahokia Unit Sch. Dist. No. 187 v. Pritzker*, 2021 IL 126212, ¶¶ 39-41. *Illinois Press Ass'n v. Ryan*, 195 Ill.2d 63, 67–68 (2001), concerned an action against the Governor in his capacity as chief executive, but had no nexus whatsoever between the Governor and the subject of the suit—the actions of the legislative branch's ethics commission. Here, in contrast, the Governor who is charged with "the faithful execution of the laws" is alleged to have signed into law a statute that is facially unconstitutional. A Colorado case distinguishing *Ryan, Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008), makes precisely this point. As is the case with the Colorado governor in Ryan, the Governor in Illinois is the supreme executive charged with faithful execution of the laws. Defendants' reliance on *Doe v. Holcomb* and *Sherman v. Cmty. Consol. Sch. Dist.* is likewise misplaced. Both cases address whether the defendants could be sued on 11th Amendment grounds, which has no application in state court declaratory actions. *Doe v. Holcomb*, 883 F.3d 971, 976 (7th Cir. 2018); *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 440 (7th Cir. 1992).

The public policy ramifications of Defendants' position further demonstrate their fallacious reasoning. Defendants assert that the pretrial release provisions may only be challenged after they have taken effect. Under their view, there would be no way for anyone to challenge any action of the legislature dealing with courts pre-enforcement and thus any statute regardless of how violative of the Illinois Constitution must go into effect before it can be challenged – even a massive statute with an unprecedented "big, bold, complex transformational agenda." Pl's Ex. 5, p. 85. In any event, Defendants misstate what Plaintiffs are seeking. Plaintiffs are not asking that any Defendant be restrained from enforcing P.A. 101-652. Rather, they seek an order from this Court enjoining

the Act because of its constitutional infirmities. It is impossible to imagine other proper defendants at this juncture. As representatives of the top levels of Government who negotiated, passed, and signed this massive law, Defendants are the proper parties in this consolidated litigation.

C. The Act Violates the Constitution's Bail Provision

Plaintiffs, in their opening brief, demonstrated the several ways in which P.A. 101-652 deviates from and contradicts the express language of the Illinois Constitution's bail provision. Ill. Const. art. I, §9; Pl. Brief, pp. 23-29. Namely, P.A. 101-652 creates new classes of offenses exempt from bail which are not included in the Constitution; it utterly abolishes monetary bail as an option for a judge to utilize to ensure a criminal defendant's appearance in court; and contradicts the constitutional standard regulating when a defendant may be held without bail (when the court determines that "release of the offender would pose a real and present threat to the physical safety of any person"). Ill. Const. art. I, §9.

Our state Supreme Court has "repeatedly held that the legislature cannot enact legislation that conflicts with the provisions of the constitution unless the constitution specifically grants it such authority." *In re Pension Reform Legis.*, 2015 IL 118585, ¶ 81. "It is through the Illinois Constitution that the people have decreed how their sovereign power may be exercised, by whom and under what conditions or restrictions." *Id.* at ¶ 79. "Where rights have been conferred and limits on governmental action have been defined by the people through the constitution, the legislature cannot enact legislation in contravention of those rights and restrictions." *Id*. Thus, the bail-related statutory scheme of P.A. 101-652 is invalid.

At the core of Defendants' memorandum is a fundamental misapprehension—that the bail provision exists to confer a right on criminal defendants. Def. Brief, p. 21. In fact, as evidenced by the case law cited by *all* parties, the purpose of the bail provision is much broader. Indeed, the law

review article cited by Defendants recognizes this. Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 329–30 (1982) ("Bail acts as a reconciling mechanism to accommodate both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial.").

Bail exists, as it has for centuries, to balance a defendant's rights with the requirements of the criminal justice system, assuring the defendant's presence at trial, and the protection of the public. The cases cited by Defendants which are binding on this Court reinforce this point. *See Stack v. Boyle*, 342 U.S. 1, 4-5 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty…Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused."); *People v. Purcell*, 201 Ill.2d 542, 550 (2002)("The object of bail is to make certain the defendant's appearance in court and bail is not allowed or refused because of his presumed guilt or innocence.").

To the extent Defendants argue that P.A. 101-652 effectuates the text and purpose of the bail provision to ensure that criminal defendants can access pretrial release, Defendants ignore all the above and the fact that the Act strips courts of the authority to ever consider monetary bail as a condition of pretrial release in every case, except a few interstate situations. It must be repeated that P.A. 101-652 contains the following provision: "**Abolition** of monetary bail. On and after January 1, 2023, the requirement of posting monetary bail is **abolished**, except as provided in the Uniform Criminal Extradition Act, the Driver License Compact, or the Nonresident Violator Compact which are compacts that have been entered into between this State and its sister states." 725 ILCS 5/110-1.5 (effective 1/1/23) (emph. added). Further, many of the statutes amended by

P.A. 101-652 represent efforts to erase the word "bail" out of multitudinous Codes, criminal and otherwise. Thus, it is not that Plaintiffs seek to require monetary bail in every case; instead, it is Defendants who seek to eradicate monetary bail as a judicial consideration in every Illinois case.

The strawman argument put forth by Defendants that it is somehow Plaintiffs' position that monetary bail is a prerequisite for every pretrial release flows from Defendants' fundamental misunderstanding of the bail provision and of Plaintiffs' position. In fact, Defendants concede "[t]he fact that criminal defendants are generally eligible to have a court set monetary bail." Def. Brief, p. 24. This reduces Defendants' arguments, concerning whether "sureties" constitute financial or economic securities with regard to bail, to mere squabbling. It is Defendants who seek to abolish monetary bail and "eviscerate the law as we know it today"; it is, in fact, Plaintiffs who seek to "restore the traditional understanding of pretrial release." Def. Brief, p. 25.

Defendants engage in revisionist history by claiming that Plaintiffs' position runs contrary to history. In fact, as discussed above, the authorities Defendants cite undermine this contention. "Bail, the pretrial release of a criminal defendant after security has been taken for the defendant's future appearance at trial, has for centuries been the answer of the Anglo-American system of criminal justice to a vexing question: what is to be done with the accused…between arrest and final adjudication." Verrilli, Jr., *supra* at 328, 329–30. "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." *Stack v. Boyle*, 342 U.S. 1, 5.

Also against Defendants is the constitutional history. The Illinois Constitution of 1870, largely consistent with the current Constitution, provided: "All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great; and the

privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Ill. Const. 1870 art. II, §7. As discussed in Plaintiffs' opening brief, the current constitutional provision has been twice amended to expand the categories of offenders who may be denied bail based on a judge's determination of dangerousness. Pl. Brief, p. 24. The Legislature, through P.A. 101-652, improperly attempted to amend the Constitution in contravention of Ill. Const. art XIV, §2.

Even the legislative history is against Defendants. As notes above, according to the Senate Sponsor, P.A. 101-652 constituted a "big, bold, complex transformational agenda." Pl. Ex. 5, p. 85. Indeed, although Defendants rely on *Graham v. Illinois State Toll Highway Auth*., 182 Ill.2d 287 (1998), there the subject of the lawsuit was the Illinois Toll Authority—a creature of statute. Thus, the legislature had the power to impose fiscal or other restrictions on the Authority's operations, subject to constitutional limitations. *Id.* at 300. Here, in contrast, the challenge is to provisions in violation of the Constitution and is not merely a creature of the Illinois General Assembly.

IV. IN ENACTING PUBLIC ACT 101-652, THE GENERAL ASSEMBLY VIOLATED THE THREE READINGS RULE SET FORTH IN ILLINOIS CONSTITUTION ARTICLE IV, SECTION 8(D)

Having fully briefed this issue in their Brief (Pl. Brief, pp. 29-32), Plaintiffs will not brief this issue further; however, Plaintiffs do not abandon this claim.

V. THE ACT VIOLATES THE CRIME VICTIMS' SECTION

The Constitution does not limit the ability to assert victims' constitutional rights to victims alone. Defendants claim that Plaintiffs lack standing to enforce victims' rights, alleging "The constitutional text is clear that only '[t]he victim has standing to assert the rights enumerated' in the amendment." Def. Brief, p. 27. However, the "only" is an addition by Defendants and is not

present in the constitutional text. Further, Defendants' claim that State's Attorneys lack standing to assert victims' rights is belied by 725 ILCS 120/4.5(c-5)(3), which codifies crime victims' constitutional rights, and states, in part: "The *prosecuting attorney*, a victim, or the victim's retained attorney may assert the victim's rights." (emph. added). Further, a handbook published by the Attorney General's Office, one of the Defendants in this case, cites to 725 ILCS 120/4.5(c-5)(3) and advises "The prosecuting attorney and the victim's retained attorney may assert the victim's rights on behalf of the victim in the criminal case." Raoul, Kwame, *Enforcement of Crime Victim's Rights: A Handbook for Prosecutors and Advocates*, p. 8 (2021). It goes on to note, "Section 4.5(c-5)(4) places the primary responsibility to enforce a victim's right on the prosecuting attorney." *Id.* Crime victims' rights may also be asserted by filing a complaint for mandamus, injunctive, or declaratory relief in the jurisdiction in which the victim's right is being violated or where the crime is being prosecuted. 725 ILCS 120/4.5(c-5)(4)(F). Plain statutory language, as well as an instructional handbook published by the Attorney General make clear that Plaintiffs have standing to show that P.A. 101-652 is unconstitutional as it applies to the Crime Victims' Rights Amendment.

Defendants claim that the Crime Victims' Rights Amendment enumerates rights that "are primarily concerned with process." Def. Brief, pp. 27-28. However, Defendants pay little attention to the right Plaintiffs are seeking to enforce with this case: "[t]he right to have the safety of the victim and the victim's family considered in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction." Ill. Const. art. I, § 8.1(a)(9). Defendants rely on two cases to argue that the Crime Victims' Rights Amendment does not make substantive changes to the criminal justice system. In *People v. Nestrock*, the appellate court determined that even though victims possess constitutionally

protected rights, a trial court cannot balance the victim's rights versus the defendant's rights when ruling on a motion to suppress illegally obtained evidence. 316 Ill.App.3d 1, 10 (2d Dist. 2000). However, unlike rules for determining the admissibility of evidence, the right asserted in the present case, "the right to have the safety of the victim and the victim's family considered in denying or fixing the amount of bail," is explicitly stated in the crime victims' rights amendment. Defendants' reliance on *People v. Gomez-Ramirez* 2021 IL App (3d) 200121, is similarly misguided. In *Gomez-Ramirez*, the State sought to subpoena the constitutionally protected health information of the victim. *Id.* at ¶¶ 3-4. In determining that the State was not entitled to that information, the court noted the crime victims' rights amendment was "intended…to serve as a shield to protect the rights of victims" and that it "offers crime victims an avenue by which they can assert their rights." *Id.* at ¶ 29. The ability to shield, protect, and assert those rights is exactly what P.A. 101-652 unconstitutionally strips away.

VI. THE ACT IS VAGUE AS IT DOES NOT GIVE PROPER NOTICE OF ITS EFFECTS

A statute must define "the criminal offense with sufficient certainty that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *People v. Taylor*, 138 Ill.2d 204, 211 (1990). As stated in Plaintiffs' Brief, P.A. 101-652 is teeming with inconsistent and conflicting provisions, undefined terms, ambiguous language, and amorphous standards. 725 ILCS 109-1(a-1) states that "law enforcement shall issue a citation in lieu of custodial arrest, upon proper identification, for those accused of traffic and Class B and C criminal misdemeanor offenses, or of petty business offenses, who pose no obvious threat to the community or any person, or who have no obvious medical or mental health issues that pose a risk to their own safety..." The word obvious is defined as "easily discovered, seen or understood; readily perceived by the eye or the intellect; plain; patent;

apparent; evident; clear; manifest." *Black's Law Dictionary* 972 (5th ed. 1979). The statute puts the onus on law enforcement to make this determination, a medical diagnosis, with little or no training in mental health, maybe a seminar at best. The Court does not permit a lay witness to opine with respect to an area of scientific, technical or other specialized knowledge. M. Graham, *Handbook of Illinois Evidence,* § 701.1 (2022 ed.). However, the statute here is specifically requiring law enforcement officers who have no specialized training in the medical field to make these decisions that may result in the detention of a citizen.

The uncertainty that the Plaintiff Sheriffs will face in enforcing this and many of the provisions of P.A. 101-652 is immense. The challenges they will face are heightened even more considering 720 ILCS 33-3(a)(2), which subjects an officer to the risk of prosecution for official misconduct if he "knowingly performs an act which he knows is forbidden by law to perform." Under P.A. 101-652, the officers must make an assessment, well beyond the question "has this person committed a crime," but the officer now must decide "does this person pose an obvious threat to the community or any person." The use of the word "obvious" in the statute is inherently vague and subjective. Yet, the statute is applying "obvious" as the standard that can subject a law enforcement officer to not only criminal penalties but possible civil liability. This is not a speculative issue but one that will arise during every encounter between law enforcement and citizens.

VII. DEFENDANTS' ARGUMENT THAT PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION LACKS MERIT

Defendants' contention that the court should reject Plaintiffs' request for a preliminary injunction is baseless. Defendants concede that the pre-trial release provisions have not yet taken effect. A preliminary injunction would preserve the status quo as to the challenged pre-trial provisions should this Court find that the Act is constitutional. As to the provisions that already

have taken effect, Defendants argue that no injunction of any type is warranted in order to maintain the status quo, "because the equities tilt strongly in factor of their continued enforcement during the pendency of the case." Def. Brief, p. 34. Under this reasoning, a statute that is clearly unconstitutional but has been in effect cannot be challenged because it would disturb the "equities" – despite the inequities and injustices that result from an unconstitutional statute. As courts have repeatedly recognized, the term "'status quo' has been the subject of countless, often inconsistent, interpretations." *Kalbfleisch v. Columbia Community Unit School Dist. Unit No. 4,* 396 Ill.App.3d 1105, 1117 (5th Dist. 2009). Preserving the status quo is often "done by keeping all actions at rest, but sometimes it happens that the status quo is not a condition of rest but, rather, is one of action and the condition of rest is exactly what will inflict the irreparable harm." *Kalbfleisch*, 396 Ill. App.3d at 1117; *see also, e.g., Kolstad v. Rankin*, 179 Ill.App.3d 1022, 1034 (4th Dist. 1989) (maintaining status quo fulfilled when the immediate but durational relief requested will "prevent a threatened wrong or the further perpetration of an injurious act."). Indeed, in *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶ 69, cited by Defendants, the court denied a preliminary injunction where plaintiffs challenged restrictions under the FOID Act noting that "there are strong public interests in preventing" individuals such as "felons and the mentally ill" "from possessing firearms" and without the FOID Act's requirements there would be no way "to identify at least some of the persons who should not acquire firearms." Here, in contrast, the "strong public interests" weighs in favor of a preliminary injunction given the safety interests at issue under P.A. 101-652 identified by Plaintiffs.

Defendants also make a last-ditch argument that an injunction is unwarranted because the named Defendants do not enforce the challenged provisions; "rather, those provisions are enforced by judges in individual proceedings." Def. Brief, p. 35. As discussed *supra,* Defendants have

enforcement responsibilities rendering this argument unavailing. Under Defendants' flawed reasoning, Plaintiffs only apparent recourse would be to seek to enjoin a judge from applying the Act.

The internal inconsistencies in Defendants' arguments show their illogical reasoning. On the one hand, Plaintiffs contend there is no justiciability because the pre-trial release provisions have not yet taken effect. On the other hand, Defendants argue Plaintiffs cannot challenge the portions of the Act already in effect as precluded by undefined and unidentified "equities." They are wrong on both counts. An injunction, preliminary or otherwise, is an appropriate remedy to enjoin this unconstitutional Act from taking effect.

CONCLUSION

For the reasons stated in its brief in support of Plaintiffs' Motion for Summary Judgment and its response, the consolidated Plaintiffs request that this Court enter summary judgment in its favor.

WHEREFORE, the Consolidated Plaintiffs, respectfully requests that this Court:

a) Grant its Motion for Summary Judgment.

b) Declare that Public Act 101-652 is unconstitutional.

c) Enter an order restraining the enforcement of the Act.

d) Grant any additional relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ James W. Glasgow
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Dated: November 23, 2022

Exhibit A

NO. 2

STATE OF ILLINOIS
ONE HUNDRED FIRST
GENERAL ASSEMBLY
HOUSE ROLL CALL
HOUSE BILL 3653
CD CORR-RELEASEE-REENTRY INFO
CONCUR IN SENATE AMENDMENTS
CONCURRENCE

Jan 13, 2021

60 YEAS		50 NAYS		0 PRESENT	
Y	Ammons	Y	Gordon-Booth	NV	Pappas
E	Andrade	N	Grant	Y	Ramirez
N	Bailey	Y	Greenwood	N	Reick
N	Batinick	Y	Guzzardi	N	Reitz
N	Bennett	N	Haas	Y	Rita
N	Bourne	N	Halbrook	Y	Robinson
N	Brady	Y	Halpin	Y	Scherer
NV	Bristow	N	Hammond	N	Severin
E	Bryant	Y	Harper	Y	Slaughter
Y	Buckner	Y	Harris	Y	Smith
N	Burke	Y	Hernandez,Barbara	N	Sommer
N	Butler	Y	Hernandez,Elizabeth	N	Sosnowski
N	Cabello	Y	Hoffman	N	Spain
Y	Carroll	N	Hurley	Y	Stava-Murray
Y	Cassidy	Y	Jones	N	Stephens
N	Caulkins	Y	Kalish	N	Stuart
N	Chesney	N	Keicher	N	Swanson
Y	Collins	Y	Kifowit	Y	Tarver
E	Connor	Y	LaPointe	Y	Thapedi
Y	Conroy	Y	Lilly	N	Ugaste
N	Costa Howard	Y	Mah	N	Unes
Y	Crespo	Y	Manley	Y	Villa
Y	Croke	N	Marron	Y	Walker
N	D'Amico	Y	Mason	Y	Walsh
N	Daugherty	Y	Mayfield	N	Weber
N	Davidsmeyer	N	Mazzochi	E	Wehrli
Y	Davis	N	McCombie	Y	Welch
Y	Delgado	N	McSweeney	N	Welter
NV	DeLuca	N	Meier	Y	West
N	Demmer	Y	Meyers-Martin	N	Wheeler
Y	Didech	N	Miller	N	Wilhour
N	Durkin	Y	Moeller	Y	Williams,Ann
A	Edly-Allen	Y	Morgan	Y	Williams,Jawaharial
Y	Evans	N	Morrison	Y	Willis
Y	Flowers	N	Moylan	N	Windhorst
Y	Ford	N	Murphy	N	Yednock
N	Frese	Y	Mussman	Y	Yingling
Y	Gabel	Y	Ortiz	Y	Zalewski
Y	Gong-Gershowitz	N	Ozinga	Y	Mr. Speaker
Y	Gonzalez				

E - Denotes Excused Absence