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.

KWAME RAOUL, Attorney General of Illinois; JB PRITZKER, Governor of Illinois; EMANUEL CHRISTOPHER WELCH, Speaker of the House; and DONALD F. HARMON, President of the Senate,

Defendants.

No. 2022 CH 16

Hon. Thomas W. Cunnington

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Kankakee County State's Attorney and Sheriff have challenged the constitutionality of Public Act 101-652, known as the Safety, Accountability, Fairness and Equity-Today ("SAFE-T") Act. The Court should deny plaintiffs' motion for summary judgment and enter judgment for defendants. On the merits, plaintiffs cannot meet their heavy burden to show that the SAFE-T Act as a whole or its pretrial release provisions in particular violate the Illinois Constitution. Plaintiffs also cannot show they have their standing to attack the act's pretrial release provisions, which govern criminal defendants—not state's attorneys and sheriffs—or that any named defendant has authority to enforce those provisions. For all these reasons, defendants are entitled to judgment as a matter of law.

ARGUMENT

I. Plaintiffs Cannot Prevail on Their Challenges to the Entire SAFE-T Act.

A. The SAFE-T Act Does Not Violate the Single Subject Rule.

Defendants have shown that plaintiffs' single subject claim fails because each of the SAFE-T Act's provisions they challenge has a natural and logical connection to the legitimate single subject of the criminal justice system. D. Mem. at 5–12. Plaintiffs' contrary conclusion is unpersuasive. First, they base their argument on the wrong single subject. Second, they continue to mischaracterize the provisions challenged in their complaint. Third, the additional provisions they challenge for the first time in their motion also relate to the criminal justice system.

1. Plaintiffs Have Identified the Wrong Single Subject.

The first step in analyzing a single subject claim is to "determine whether the act, on its face, involves a legitimate single subject." *People v. Sypien*, 198 Ill. 2d 334, 339 (2001). "[T]he term 'subject' is to be liberally construed in favor of upholding the legislation, and the subject

may be as comprehensive as the legislature chooses." *People v. Cervantes*, 189 Ill. 2d 80, 84 (1999). But "an act's title is not necessarily dispositive of its content or its relationship to a single subject." *People v. Boclair*, 202 Ill. 2d 89, 109 (2002). Put another way, an act's legitimate single subject may be something other than the subject set forth in its title. *E.g., Wirtz v. Quinn*, 2011 IL 111903, ¶ 32 (holding state is "not limited solely to the contents of the title of an act in offering a single subject rationale" and analyzing act titled "[a]n Act concerning revenue" for compliance with legitimate single subject of "capital projects"); *People v. Olender*, 222 Ill. 2d 123, 140 (2005) (analyzing act titled "[a]n Act in relation to governmental regulation" for compliance with legitimate single subject of "revenue to the state and its subdivisions").

Here, the SAFE-T Act is titled "[a]n Act concerning criminal law." Pub. Act 101-652. As the Illinois Supreme Court has made clear, however, the act's legitimate single subject may be something other than criminal law. All that matters to the constitutional analysis is whether the subject identified is "not so broad that the [single subject] rule is evaded as a meaningful constitutional check on the legislature's actions"; it is irrelevant whether that subject actually appears in the act's title. *Wirtz*, 2011 IL 111903, ¶ 32 (cleaned up).

Ignoring these authorities, plaintiffs' analysis in support of their single subject claim focuses solely on whether the SAFE-T Act's provisions relate to the subject set forth in its title—*criminal law*. P. Mem. at 4 (arguing the SAFE-T Act "addresses multitudes of subjects with no natural or logical connection to criminal law"). This is the wrong subject. As defendants explained in their motion, the subject of the SAFE-T Act is the *criminal justice system*. D. Mem. at 7. The Illinois Supreme Court has repeatedly held this is a legitimate single subject for constitutional purposes. *E.g., Boclair*, 202 Ill. 2d at 110 ("the criminal justice system[ ] is [a subject] we have already deemed legitimate for single subject purposes"); *see Sypien*, 198 Ill. 2d

at 339; *People v. Malchow*, 193 Ill. 2d 413, 428 (2000); *People v. Reedy*, 186 Ill. 2d 1, 12 (1999).

Because the criminal justice system is a legitimate single subject, and because the subject identified in the SAFE-T Act's title is constitutionally irrelevant, the statute satisfies step one of the single subject analysis. *See Wirtz*, 2011 IL 111903, ¶¶ 32–33. The Court should therefore proceed to step two of the analysis and determine whether each of the challenged SAFE-T Act provisions has a natural and logical connection to the criminal justice system. *See id.* Plaintiffs' motion provides no assistance because it analyzes a different question—whether the challenged provisions relate to the narrower subject of criminal law. Plaintiffs cannot carry their "substantial burden" to show the SAFE-T Act's provisions "bear no natural or logical connection to [the] single subject" of the criminal justice system when they have failed to conduct the correct inquiry. *Malchow*, 193 Ill. 2d at 429. For this reason alone, defendants are entitled to judgment as a matter of law on plaintiffs' single subject claim.

2. Plaintiffs Continue to Mischaracterize the SAFE-T Act's Provisions They Challenged in Their Complaint.

Plaintiffs' complaint identifies four provisions of the SAFE-T Act they contend are not naturally and logically connected to a legitimate single subject: (1) the No Representation Without Population Act, which amends chapter 730 of the Illinois Compiled Statutes (titled "Corrections") to require prisoners to be counted, for legislative redistricting purposes, as residents of their last known street address prior to incarceration, rather than as residents of the correctional facility where they are incarcerated; (2) amendments to the Community Law Enforcement Partnership for Deflection and Substance Use Disorder Treatment Act ("Treatment Act"), which allow law enforcement agencies to work with additional partners to provide treatment options to addicts as an alternative to the criminal justice system; (3) new section 10 of the Attorney General Act, which authorizes the Attorney General to investigate and obtain relief

for certain unlawful conduct by law enforcement officers; and (4) new section 4.1 of the Public Officer Prohibited Activities Act, which creates a criminal offense and penalties for retaliation against a local government employee or contractor who brings to light improper governmental action, including law enforcement misconduct. Complaint ¶ 69.

Defendants have shown how each of these provisions has a natural and logical connection to the criminal justice system—and explained plaintiffs could reach a contrary conclusion only by mischaracterizing them or omitting critical portions. D. Mem. at 7–11. Plaintiffs' brief renews their attack on these provisions while continuing to obscure their relation to criminal justice. The Court should reject plaintiffs' unsupported attempts to muddy the waters.

Start with the No Representation Without Population Act, which amends chapter 730 of the Illinois Compiled Statutes titled "Corrections." "Merely because the provision involves [the Department of Corrections] and inmates," plaintiffs argue, "does not mean it relates to criminal law for purposes of the single-subject clause." P. Mem. at 7. In fact, the Illinois Supreme Court has held repeatedly that legislation addressing prisoners and correctional facilities *does* relate naturally and logically to the criminal justice system. *E.g., Boclair*, 202 Ill. 2d at 110; *Malchow*, 193 Ill. 2d at 428–29. In *Boclair*, the court held provisions of an act requiring the executive to provide the legislature certain information about prisoners and correctional facilities related naturally and logically to the criminal justice system. 202 Ill. 2d at 111–12; *see People v. Dorris*, 319 Ill. App. 3d 579, 583 (4th Dist. 2001) ("The Code [of Criminal Procedure], Criminal Code, and the Unified Code [of Corrections] are dedicated, in their entirety, to addressing issues involving the 'criminal justice system'; therefore, it is axiomatic [that amendments to them] pass muster under Illinois' single subject rule."). Plaintiffs' citation to *Cervantes*, 189 Ill. 2d at 94–98, is inapposite. That case does not analyze whether amendments to the Uniform Code of

Corrections relate naturally and logically to the criminal justice system; the question there was whether those amendments related to the separate subject of "neighborhood safety." *Id.*

Plaintiffs have little to say about the SAFE-T Act's amendments to the Treatment Act, which authorize fire departments and emergency medical services providers to collaborate with law enforcement agencies on "deflection programs" designed to divert addicts from the criminal justice system. 5 ILCS 820/5, 10, 15(a). Plaintiffs merely assert, without explanation, that this "is distinct from policing or criminal justice." P. Mem. at 7. One sentence is insufficient to carry plaintiffs' "substantial burden" to show these amendments "bear no natural or logical connection to [the] single subject" of the criminal justice system. *Malchow*, 193 Ill. 2d at 429.

As for the SAFE-T Act's amendments to the Attorney General Act, which authorize the Attorney General to investigate and pursue remedies when law enforcement agencies engage in a pattern or practice of depriving people of their constitutional or statutory rights, 15 ILCS 205/10(a), (b), (c), (d), plaintiffs insist there is no connection to "criminal law" because the Attorney General must pursue those remedies by filing a *civil* lawsuit. P. Mem. at 8–9. This assertion again misstates the pertinent subject and, worse, misapplies the Illinois Supreme Court's holding in *People v. Burdunice*, 211 Ill. 2d 264 (2004). The act challenged there contained several provisions relating to the criminal justice system and a provision authorizing the Attorney General to file counterclaims in civil suits against state employees. *Id.* at 268–69. The court held the latter provision did not relate to the criminal justice system—not because it concerned civil proceedings per se, but rather because the *subject matter* of those civil proceedings concerned *all* state employees, not only those involved in the criminal justice system. *Id.* at 270–71. In fact, the court suggested the provision authorizing the Attorney General to file civil counterclaims *would* have passed single subject muster had it been limited, as

intended, to civil suits brought by prisoners against Department of Corrections employees. *Id.*

Here, by contrast, the subject matter of the Attorney General's civil suit authority relates only to the criminal justice system. New section 10 of the Attorney General Act authorizes the Attorney General to file suit when he "has reasonable cause to believe" that a state or local government has "engage[d] in a pattern or practice of conduct by officers"—defined to mean all types of *law enforcement* officers—"that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of Illinois." 15 ILCS 205/10(a), (b), (c), (d). Plaintiffs do not dispute the conduct of law enforcement officers is naturally and logically connected to the criminal justice system. Thus, the problem identified in *Burdunice*—civil suit authority covering subjects other than the criminal justice system—is simply not present in the SAFE-T Act. *See Malchow*, 193 Ill. 2d at 429 (amendment to Code of Civil Procedure requiring Department of Corrections to provide notice of civil settlements with prisoners related to the criminal justice system).

Further, the single subject rule permits the legislature to articulate a purpose and also "provide the means necessary to accomplish" it. *Cutinello v. Whitley*, 161 Ill. 2d 409, 424 (1994). In other words, the legislation "may include all matters germane to its general subject, including the means reasonably necessary or appropriate to" achieve its goals. *People ex rel. Gutknecht v. City of Chicago*, 414 Ill. 600, 607–08 (1953). Here, the legislation's purpose is to eliminate certain unlawful conduct by law enforcement officers—a subject that plainly relates to the criminal justice system. The legislature chose to accomplish that purpose by authorizing the Attorney General to investigate and prosecute such conduct. Under longstanding authority, this does not violate the Illinois Constitution. *E.g., Wirtz*, 2011 IL 111903, ¶¶ 33–34.

That leaves the SAFE-T Act's amendments to the Public Officer Prohibited Activities

Act. New section 4.1 of that statute creates a criminal offense and penalties for certain acts of retaliation against local government employees who act as whistleblowers. 50 ILCS 105/4.1(a), (g), (i). There can be no serious dispute that legislation creating a criminal offense relates naturally and logically to the criminal justice system. *E.g., Boclair*, 202 Ill. 2d at 113 ("Unquestionably, substantive criminal law . . . fall[s] squarely under the umbrella of the criminal justice system."); *People v. Jones*, 318 Ill. App. 3d 1189, 1192 (4th Dist. 2001).

Plaintiffs tacitly concede this, although they attempt to elide it by asserting the provision "regulates conduct that is *primarily* non-criminal in nature." P. Mem. at 6 (emphasis added). Plaintiffs' issue with new section 4.1 is that it includes other matters in addition to creating a criminal offense for acts of retaliation—namely, requirements that local governments "adopt written policies and procedures prohibiting retaliation" and "designate someone to serve as their 'auditing official,'" a position tasked with receiving and responding to complaints of misconduct, inefficiency, and waste. *Id.* Both of these additional requirements plainly relate to the criminalized act of retaliation—and there are two reasons why they do not cause new section 4.1 to violate the single subject rule.

First, while the Illinois Constitution requires each *provision* of a public act to relate naturally and logically to a single subject, *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 356 (1999), it does not require this of every last detail *within* each such provision, *Wirtz*, 2011 IL 111903, ¶¶ 35–38. In *Wirtz*, for example, the challenged act concerned capital projects. *Id.* ¶ 35. Plaintiffs pointed out that some of the revenue raised by the act was allocated not to the capital projects fund but rather to the general revenue or common school funds. *Id.* ¶¶ 36–37. Even so, the Illinois Supreme Court held the act was constitutional:

> [I]t is not the function of this court to trace the origin and destination of every dollar amount cited in Public Act 96-34. Rather, our task is to decide whether

> Public Act 96-34, *as a whole*, is devoted to a single subject and, therefore, constitutional. In doing so, we bear in mind that the single subject rule is construed liberally and "is not intended to handicap the legislature by requiring it to make unnecessarily restrictive laws." Applying that principle here, we see no provision in the Act which *stands out* as being constitutionally unrelated to the single subject of capital projects.

Id. ¶ 38 (emphasis added and citation omitted). The court indicated it would have reached a contrary conclusion only if there were "'smoking gun' provisions in Public Act 96-34 which *clearly* violate the intent and purpose of the single subject rule." *Id.* ¶ 42 (emphasis added).

Here, new section 4.1 is not such a "smoking gun." The provision creates a criminal offense and penalties for certain acts of retaliation against local government whistleblowers, which undeniably relates to the criminal justice system. That the provision also addresses noncriminal matters related to the criminalized act of retaliation does not undermine this relationship—or compel a conclusion that the SAFE-T Act "as a whole" no longer relates to a single subject. *Wirtz*, 2011 IL 111903, ¶ 38. To rule otherwise would disregard the Illinois Supreme Court's holding that the single subject rule "does not impose an onerous restriction on the legislature's actions" and "leaves the legislature with wide latitude in determining the content of bills." *Johnson v. Edgar*, 176 Ill. 2d 499, 515 (1997).

Second, legislation does not violate the Illinois Constitution when it "provide[s] the means necessary to accomplish" a legislative purpose that otherwise complies with the single subject rule, *Cutinello*, 161 Ill. 2d at 424, and the provisions plaintiffs discuss do just that. In *Wirtz*, for example, the Illinois Supreme Court held a provision "authoriz[ing] a study on the effect of the lottery on Illinois families" did not render unconstitutional a public act concerning capital projects. 2011 IL 111903, ¶ 34. This was so, the court explained, because the study related to—and thus helped to effectuate—other provisions of the act expanding the sale of lottery tickets to raise money for the capital projects fund. *Id.*

The noncriminal provisions of new section 4.1 fall within this category. They relate to, and provide an appropriate means to accomplish the purpose of, the provision criminalizing retaliation against local government whistleblowers. Requiring local governments to "adopt written policies and procedures prohibiting retaliation" complements the new criminal offense by providing an additional means to discourage such conduct. And requiring local governments to designate an "auditing official" to respond to whistleblowers' complaints likewise complements the new criminal offense by providing an additional means to encourage whistleblowers to step forward. For all these reasons, new section 4.1 does not violate the single subject rule.

3. The Additional Provisions Plaintiffs Challenge in Their Motion Have a Natural and Logical Connection to the Criminal Justice System.

Plaintiffs' motion raises—for the first time—single subject challenges to three additional provisions of the SAFE-T Act. None of these challenges has merit.

First, plaintiffs attack Article 4 of the SAFE-T Act, which enacted the Task Force on Constitutional Rights and Remedies Act ("Remedies Act"), formerly codified at 20 ILCS 5165 but repealed as of January 1, 2022. Pub. Act 101-652, § 4-20; P. Mem. at 10. The Remedies Act created a task force "to develop and propose policies and procedures to review and reform constitutional rights and remedies, including qualified immunity for peace officers," Pub. Act 101-652, § 4-5, with support from the Illinois Criminal Justice Information Authority, *id.* § 4-10(c). Plaintiffs suggest these constitutional rights and remedies might include some unrelated to "criminal law," P. Mem. at 10, but the text of the statute shows otherwise. By highlighting "qualified immunity for peace officers"—a doctrine that clearly relates to the *criminal justice system*—the legislature indicated its intent that the constitutional rights and remedies considered by the task force should be of the same nature. *Cf. Bd. of Trs. v. Dep't of Human Rights*, 159 Ill. 2d 206, 211 (1994) ("the class of unarticulated persons or things will be interpreted as those

'others such like' the named persons or things"). And if there were any doubt about the Remedies Act's connection to criminal justice, the legislature provided "[t]he Illinois Criminal Justice Information Authority shall provide administrative and technical support to the Task Force and be responsible for administering its operations, appointing a chairperson, and ensuring that the requirements of the Task Force are met." Pub. Act 101-652, § 4-10(c). Plaintiffs cannot show the repealed Remedies Act was unrelated to the criminal justice system.

Plaintiffs' attack on section 10-116 of the SAFE-T Act likewise fails. That provision amends section 14(i) of the Illinois Public Labor Relations Act to change the disputes an arbitrator may resolve in a collective bargaining impasse between a public body and its "peace officers," a term defined to include "any persons who have been or are hereafter appointed to a police force, department, or agency and sworn or commissioned to perform police duties." 5 ILCS 315/3(k), 14(i). In other words, the amendments to section 14(i) address labor disputes with law enforcement officers like police officers and sheriff's deputies. Law enforcement officers are essential components of the criminal justice system—and addressing these labor disputes is therefore critical to the system's functioning. Indeed, it is difficult to understand why plaintiffs have challenged this provision; their brief merely asserts, without explanation, that "[n]one of this relates in any way to criminal law." P. Mem. at 10–11. That "argument" does not meet their substantial burden.

Plaintiffs attack section 10-307 of the SAFE-T Act, which amends the Crime Victims Compensation Act to clarify who is a "victim," 740 ILCS 45/2, which victims are entitled to compensation, *id.* § 2.5, the contents of a victim's claim for compensation, *id.* § 7.1, and the Attorney General's role in processing those claims, *id.* §§ 4.1, 6.1, 7.1. P. Mem. at 8–9. To their credit, plaintiffs do not dispute there is a connection between crime victims and the criminal

justice system. *Cf. Burdunice*, 211 Ill. 2d at 268–69 (amendments to Violent Crime Victims Assistance Act, 725 ILCS 240, relate to criminal justice system). Their complaint, rather, is that crime victims' compensation is technically a *civil* matter. P. Mem. at 8–9. But as shown above, the Illinois Supreme Court recognizes some civil matters *do* possess a natural and logical connection to the criminal justice system. *E.g., Malchow*, 193 Ill. 2d at 429 (prisoners' lawsuits); *see People v. Majors*, 308 Ill. App. 3d 1021, 1033 (4th Dist. 1999) ("civil immunity for hospital personnel . . . who obtain blood or urine for evidentiary purposes . . . upon the request of a law enforcement officer"). This is one of them. Providing compensation to crime victims relates naturally and logically to the criminal justice system.

Finally, plaintiffs insist the provisions challenged in their complaint and motion are only "a few of the myriad examples demonstrating how Public Act 101-652 fails to adhere to single-subject clause." P. Mem. at 6. But it is their burden to *demonstrate* the SAFE-T Act violates the Illinois Constitution, *e.g., Malchow*, 193 Ill. 2d at 429, and by definition they cannot do so with respect to provisions they have not even mentioned, much less developed any argument against. In sum, plaintiffs have not carried their "substantial burden" to show the SAFE-T Act's provisions lack a "natural or logical connection to" the criminal justice system. *Id.*[1]

B. The SAFE-T Act Is Not Unconstitutionally Vague.

Plaintiffs contend the SAFE-T Act is unconstitutionally vague on its face. To prevail on this facial challenge, plaintiffs must show the act is impermissibly vague in *every application* in a manner that violates their rights to life, liberty, or property. *Vill. of Hoffman Estates v. Flipside,*

[1] The Court must reject plaintiffs' claim in Count VI under the "three readings requirement" in Article IV, section 8(d) of the Illinois Constitution because even plaintiffs "recognize that this Court is bound to reject" this claim "under the enrolled-bill doctrine." P. Mem. at 31; *see* D. Mem. at 12–14. The Court also must reject plaintiffs' claim in Count I (P. Mem. at 23, 29) because the SAFE-T Act did not amend or purport to amend the Illinois Constitution. *See* D. Mem. at 5.

Hoffman Estates, Inc., 455 U.S. 489, 495 (1982); *City of Chicago v. Morales*, 177 Ill. 2d 440, 448 (1997), *aff'd*, 527 U.S. 41 (1999). Instead, plaintiffs offer only speculative allegations that a handful of isolated provisions could raise interpretive questions under a hypothetical set of facts. These assertions do not show the SAFE-T Act is unconstitutionally vague on its face.

At the outset, plaintiffs lack standing to bring this claim because they do not allege any infringement on *their* rights resulting from the SAFE-T Act's allegedly vague provisions. Outside the specific context of the First Amendment to the U.S. Constitution, plaintiffs making a facial vagueness challenge must establish that the challenged statute is ambiguous *as to whether their own conduct has been prohibited*—not that the statute is vague in a hypothetical case applied to *another person*. *See, e.g.*, *Morales*, 527 U.S. at 56; *People v. Jihan*, 127 Ill. 2d 379, 386 (1989) (when "no first amendment issue is involved" a litigant "does not have standing to argue that the statute might be vague as applied to someone else"). Plaintiffs rely only on hypotheticals involving selected provisions, without showing that those supposed ambiguities affect *any* cognizable legal interest that is *personal to them*. Such allegations are not sufficient for standing. *People v. Einoder*, 209 Ill. 2d 443, 453 (2004).

Plaintiffs also fail to identify even one statutory provision that is impermissibly vague. In their brief, plaintiffs rely on just two examples. First, they allege a purported contradiction between subsections (a) and (f) of 725 ILCS 5/109-1, which both require the in-person appearance of defendants at hearings relating to pretrial release. P. Mem. at 33. Rather than try to explain how these subsections supposedly contradict one another, plaintiffs merely note that the Administrative Office of the Illinois Courts is working on guidance to implement these

provisions. *Id*.[2] And not only is there not inconsistency in these provisions, but the Illinois Supreme Court has conclusively held that a defendant being required to appear audiovisually, rather than in-person, does not itself implicate the right to due process. *People v. Lindsey*, 201 Ill. 2d 45, 57 (2002). Because the subject matter of the allegedly vague provisions does not affect anyone's right to due process, any purported vagueness with respect to these provisions cannot serve as a basis to invalidate the statute.

Second, plaintiffs cite amended 725 ILCS 5/103-3.5(a), requiring that "Persons who are in police custody shall have the right to communicate free of charge with an attorney of his or her choice and members of his or her family as soon as possible upon being taken into police custody, but no later than 3 hours of arrival at the first place of detention. Persons in police custody must be given access to use a telephone via a landline or cellular phone to make 3 telephone calls." Pub. Act 101-652, § 10-255; P. Mem. at 33–34. Plaintiffs do not identify any vagueness in this provision itself; instead, they speculate about possible cases where a detainee might be transferred to another facility or no one answers the phone. P. Mem. at 34. But a vagueness challenge demands more than "what-ifs." *People v. Diestelhorst*, 344 Ill. App. 3d 1172, 1187 (5th Dist. 2003) ("[A]n act is not unconstitutionally vague merely because one can conjure up a hypothetical which brings the meaning of some terms into question."). Amended section 103-3.5(a) has a clear and straightforward meaning: persons in police custody may make three phone calls to legal counsel or family within three hours of arriving at the place of

[2] Plaintiffs' complaint notes that a different statutory provision, 725 ILCS 5/106D-1(a), allows the chief judge of a circuit court to promulgate rules allowing audiovisual appearances in hearings to set conditions of pretrial release. These provisions are not contradictory. Section 5/109-1(f) is mandatory (creating a right to appear in person) while section 5/106D-1(a) is permissive (giving courts discretion to permit audiovisual appearances), meaning the chief judge can comply with both simultaneously. And any tension between these provisions does not make either *vague*; rather, they must "be construed in harmony" by reading the provision that is both "more recently enacted" and "more specific" to take precedence over the prior and more general provision. *In re Craig H.*, 2022 IL 126256, ¶ 26.

detention. This "core of understandable meaning" refutes plaintiffs' vagueness challenge. *Trs. of Ind. Univ. v. Curry*, 918 F.3d 537, 540 (7th Cir. 2019).

Finally, plaintiffs cite information provided by committees working on the implementation of the SAFE-T Act's pretrial release provisions to argue that there are unresolved "interpretive considerations." P. Mem. at 34–35. Plaintiffs assert, without citation to authority, that this commonplace process of reviewing statutes and promulgating interpretive guidance is evidence of unconstitutional vagueness. But statutes are not facially void whenever they raise an interpretive question; if they were, no statute would be valid. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) ("[P]erfect clarity and precise guidance have never been required . . . ."); *United States v. Williams*, 553 U.S. 285, 306 (2008) ("Close cases can be imagined under virtually any statute."). Any unresolved issues of interpretation can and will be raised by litigants who, unlike plaintiffs, have standing to raise them, and they will be resolved by courts employing the familiar tools of statutory interpretation. Because plaintiffs cannot meet their burden to show that the SAFE-T Act as a whole is unconstitutionally vague in *all* applications, as required to sustain a facial vagueness challenge, *see Hoffman Estates*, 455 U.S. at 495, their motion for summary judgment on vagueness grounds must be denied.

II. Plaintiffs Cannot Prevail on Their Challenges to the SAFE-T Act's Pretrial Release Provisions.

A. Plaintiffs' Challenges to the SAFE-T Act's Pretrial Release Provisions Are Not Justiciable.

As defendants explained, D. Mem. at 17–20, plaintiffs' challenges to the SAFE-T Act's pretrial release provisions are not justiciable because these provisions do not injure plaintiffs and because defendants have no role in enforcing them. Plaintiffs advance no contrary argument.

First, plaintiffs lack standing to challenge the SAFE-T Act's pretrial release provisions

because those provisions govern criminal defendants—not state's attorneys and sheriffs. D. Mem. at 19. Indeed, if plaintiffs' roles as law enforcement officers were sufficient to establish standing here, they would have standing to challenge virtually every Illinois statute relating to the criminal justice system *simply because they disagree with the legislature's policy choices*. This result cannot be reconciled with Illinois Supreme Court precedent holding that "courts [must] decid[e] actual, specific controversies and not abstract questions." *In re Estate of Wellman*, 174 Ill. 2d 335, 344 (1996).

Second, because the SAFE-T Act's pretrial release provisions are enforced by *judges* in individual criminal cases and not by any of the named defendants, the proper forum for plaintiffs to raise these constitutional challenges is in those individual criminal cases. D. Mem. at 21.

In addition to these insurmountable justiciability problems, plaintiffs' arguments on the merits also fail because, for the reasons explained below, the SAFE-T Act's pretrial release provisions do not violate any aspect of the Illinois Constitution.

B. The SAFE-T Act's Pretrial Release Provisions Do Not Violate the Illinois Constitution's Bail Provision.

Plaintiffs contend the SAFE-T Act's pretrial release provisions violate Article I, section 9 (the bail provision) and section 8.1 (the crime victims' rights amendment) of the Illinois Constitution. Their arguments misconstrue the nature of these constitutional rights and disregard the history and precedent underlying these provisions.

1. The Bail Provision Authorizes Pretrial Release Without Monetary Bail.

Article I, section 9 provides that "[a]ll persons shall be bailable by sufficient sureties." This bail provision confers a right on criminal defendants to access pretrial release (subject to certain exceptions) without requiring courts to impose monetary bail. Plaintiffs' interpretation

would transform an important constitutional protection for criminal defendants into its exact opposite: a bail *mandate* that forbids release without payment. Just as importantly, this novel interpretation would contradict Illinois's current system of pretrial release on personal recognizance, under which courts routinely release criminal defendants without imposing monetary bail. The Court should reject plaintiffs' argument because it contradicts the text, history, and purpose of the bail provision.

At the outset, because the Constitution's bail provision grants *criminal defendants* the right to access pretrial release, plaintiffs are not proper parties to bring any challenges under the bail provision because they do not possess individual rights protected by this provision. *See* D. Mem. at 21–22. Plaintiffs' motion for summary judgment fails on this basis alone.

Apart from plaintiffs' lack of standing to bring this claim, it founders on a basic premise: Article I, section 9 protects the liberty interests of criminal defendants and does not make pretrial release contingent upon payment of money. The bail provision is located in the Illinois Constitution's Bill of Rights alongside other critical protections for criminal defendants, including the rights to due process, legal counsel, and confrontation of witnesses, as well as the right against self-incrimination. *See* Ill. Const. art. I, §§ 2, 8, 10. As a historical matter, the requirement that "all persons shall be bailable by sufficient sureties" is a centuries-old protection for defendants who are entitled to a presumption of innocence. *See* D. Mem. at 22. No court has ever held that this right to the opportunity for pretrial release, now found in dozens of state constitutions, somehow also *forbids* pretrial release *without* monetary bail. Plaintiffs' novel interpretation therefore has no basis in either the text or history of the right to bail.

Plaintiffs' reading of the bail provision would also vitiate the system of personal recognizance that has been the default method of pretrial release in Illinois for decades. *See* D.

Mem. at 24–25 (citing 725 ILCS 5/110-5(a-5) and 725 ILCS 5/110-2). Importantly, and contrary to plaintiffs' allegations, release on personal recognizance is different from bail because it is not backed by any security. *See* 725 ILCS 5/102-19. Plaintiffs' novel interpretation of Article 1, section 9 would require this Court to strike down not just the bail reform provisions of the SAFE-T Act, but also the current and longstanding system of pretrial release, radically upending the operation of Illinois criminal courts.

In support of this unprecedented interpretation, plaintiffs point to the words "sufficient sureties" in Article I, section 9. P. Mem. at 20. But those words do not imply that monetary bail is mandatory. The Illinois Supreme Court has held that "sufficient sureties" are simply the assurances necessary to ensure the defendant's appearance in court. *People ex rel. Gendron v. Ingram*, 34 Ill. 2d 623, 626 (1966). The SAFE-T Act ensures there are such assurances in place for anyone granted pretrial release. Pub. Act 101-652, § 10-255 (amending 725 ILCS 5/110-5(a) to require courts to impose conditions of pretrial release that "will reasonably assure the appearance of defendant as required"); *see also id.* (amending 725 ILCS 5/110-4 to permit denial of pretrial release "when the defendant has a high likelihood of willful flight"). This conforms to the meaning that "surety" carries in this context: "A formal assurance; esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking." *Surety*, Black's Law Dictionary (11th ed. 2019). At the same time, plaintiffs' suggestion that a surety is inherently monetary is erroneous on its face, as it depends on defining a surety as a *person* who is liable to pay the debts of another. P. Mem. at 26. No court in Illinois has interpreted the bail provision to require a separate individual to be liable for the bail amount; on the contrary, the Illinois Supreme Court has upheld the statute prohibiting the use of professional sureties, negating the idea that a "surety" must be a separate individual who agrees to be liable for the bond amount.

Gendron, 34 Ill. 2d at 626. Plaintiffs' definition contradicts the meaning of "sufficient sureties" used in the system of pretrial release in Illinois for more than half a century. The pretrial release provisions of the SAFE-T Act are therefore consistent with both the existing system of pretrial release and the plain meaning of the bail provision, both of which allow pretrial release without monetary bail.

2. The SAFE-T Act Does Not Conflict with the Bail Provision's Enumerated Exceptions.

Plaintiffs alternatively argue that the SAFE-T Act alters the standards that courts must apply in determining whether to detain a defendant. P. Mem. at 23–24. This argument rests on a fundamental misunderstanding of the requirements of the bail provision. Article I, section 9 establishes an individual right to access pretrial release that can be limited only in enumerated circumstances if the prosecution meets its burden to show that a defendant should be detained (including by showing that a defendant is charged with an identified offense). But the bail provision does *not* require courts to detain defendants charged with such offenses, nor does it preclude the legislature from expanding defendants' ability to access pretrial release beyond the constitutional minimum that the bail provision establishes.

The structure of the bail provision demonstrates that it protects the liberty interests of criminal defendants by setting a floor, rather than a ceiling, on the ability to access pretrial release. *See* D. Mem. at 25. The provision begins by establishing defendants' right to access release pending trial, then lists several narrowly defined potential exceptions to that right. The Illinois Supreme Court has held that pursuant to this structure, by default, a defendant is eligible for pretrial release unless the prosecution demonstrates that an exception should apply. *See People v. Purcell*, 201 Ill. 2d 542, 550 (2002); *People v. Salgado*, 353 Ill. App. 3d 605, 611 (3d Dist. 2004) ("The Illinois Constitution creates a rebuttable presumption that a defendant is

eligible for bail."). In *Purcell*, the court struck down a statute that placed the burden to show eligibility for pretrial release on the defendant, explaining the bail provision creates a crucial protection for defendants that can be rebutted only on a sufficient showing by the prosecution. 201 Ill. 2d at 550.

The bail provision confers on defendants a right to pretrial release and imposes a concomitant burden on the prosecution if it wants release to be denied. The bail provision does not, as plaintiffs suggest, *require* pretrial release under any circumstances or confer upon courts any authority over certain defendants they do not already possess. For that reason, it is entirely constitutional for the legislature to broaden access to pretrial release, conferring additional rights upon defendants above and beyond the rights conferred on them by this provision—including for defendants charged with an offense enumerated under the provision.

Plaintiffs' argument that the SAFE-T Act "divests the courts of the ability to detain individuals they would otherwise have the authority and discretion to [d]etain," P. Mem. at 25, rests on a misapprehension. Plaintiffs read section 9 to confer on courts some independent authority to detain individuals charged with the enumerated offenses, but the section does no such thing. The list of enumerated offenses on which plaintiffs focus simply outlines the circumstances under which prosecutors can permissibly *seek* pretrial release on dangerousness grounds; they do not grant the judiciary any independent authority to detain anyone. *See Purcell*, 201 Ill. 2d at 550 ("[O]ur constitution expressly protects the right of a defendant to bail unless certain circumstances exist . . . ."). And by broadening the circumstances in which criminal defendants can access pretrial release, the SAFE-T Act only bolsters the right to liberty above and beyond the baseline set by the bail provision. *Cf. Am. Legion v. Am. Humanist Ass'n,* 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (government has authority to "safeguard

individual rights above and beyond the rights secured" in the constitutional text).

The principle that the bail provision protects defendants' right to liberty also dispenses with plaintiffs' argument based on semantic differences between the text of Article I, section 9 and certain provisions of the SAFE-T Act. *See* P. Mem. at 25. These provisions require the prosecution to prove that a defendant poses a threat to "a specific person" or "an identifiable person" when it seeks pretrial detention on dangerousness grounds. *See* Pub. Act 101-652, § 10-255 (amending 725 ILCS 5/110-6.1). That is entirely consistent with the constitutional text, which permits the detention of a defendant who "would pose a real and present threat to the physical safety of any person." Ill. Const. art. I, § 9. And regardless, the language used in the SAFE-T Act only serves to *expand* the circumstances where defendants can access pretrial release, which the legislature may permissibly do without violating the Constitution.

Finally, plaintiffs suggest that the bail reform provisions of the SAFE-T Act would authorize detention of some defendants—such as certain misdemeanor defendants—who would otherwise be eligible for release under the language of Article I, section 9, because they do not fall within one of the enumerated exceptions to the right conferred by that section. P. Mem. at 25. Plaintiffs lack standing to bring this claim, which instead must be raised in a criminal case by a party alleging a deprivation of his or her own rights. This argument also fails on the merits. Amended 725 ILCS 5/110-6.1(a)(4) does not authorize the detention of defendants charged with *misdemeanor* domestic battery; instead, it refers generally to the domestic battery statute, 720 ILCS 5/12-3.2, which encompasses both felonies and misdemeanors. "If reasonably possible, a statute must be construed so as to affirm its constitutionality and validity." *People v. Greco*, 204 Ill. 2d 400, 406 (2003). The reference to domestic battery charges in 725 ILCS 5/110-6.1(a)(4) can be reasonably interpreted to mean *felony* domestic battery, consistent with the bail provision.

Thus, plaintiffs' arguments that the SAFE-T Act violates section 9 are without merit.

3. The Crime Victims' Rights Amendment Does Not Mandate Monetary Bail.

Plaintiffs contend the crime victims' rights amendment requires courts to impose monetary bail because it establishes "[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." P. Mem. at 26. Plaintiffs lack standing to assert violations of the crime victims' rights amendment, which, in any event, does not create a bail mandate.

First, state's attorneys and sheriffs do not have standing to assert rights that belong only to crime victims. Ill. Const. art. I, § 8.1(b) (providing "victim has standing to assert the rights enumerated" and "[n]othing in this section shall be construed to alter the powers, duties, and responsibilities of the prosecuting attorney"); *see also People v. Gomez-Ramirez*, 2021 IL App (3d) 200121, ¶ 29 (rejecting argument that amendment expands prosecutors' authority).

Second, this argument lacks merit. The crime victims' rights amendment creates certain procedural rights for crime victims, but it does not impose any substantive changes to the criminal justice system. *See* D. Mem. at 27–28; *see also People v. Nestrock*, 316 Ill. App. 3d 1, 10 (2d Dist. 2000) (it is "obvious" that amendment does "not alter the fundamental principles on which our legal system is based"). Moreover, plaintiffs' argument has no basis in the text of section 8.1(a)(9). The phrase "denying or fixing the amount of bail" simply requires that, in the circumstances when a court either sets a monetary bail amount or denies bail altogether, the safety of the victim and the victim's family must be "considered." That is, section 8.1(a)(9) merely identifies a factor courts must apply in relevant circumstances; it does not make monetary bail a mandatory component of pretrial release. The lack of textual support for plaintiffs'

interpretation is laid bare by the fact that the *existing* system of release on personal recognizance permits courts to release individuals without "fixing the amount of bail."

Finally, plaintiffs contend that the SAFE-T Act's pretrial release provisions "deprive[ ] the court of its constitutional duty" to protect the interests of crime victims. P. Mem. at 27. In reality, the opposite is true: the statute safeguards the numerous procedural protections owed to crime victims under section 8.1. *See, e.g.*, Pub. Act 101-652, § 10-255 (amending 725 ILCS 120/4.5 to implement the rights of crime victims, including "the right to have the safety of the victim and the victim's family considered in determining whether to release the defendant"). Because the SAFE-T Act conforms to both sections 8.1 and 9 of Article I of the Illinois Constitution, plaintiffs' motion for summary judgment should be denied.

C. The SAFE-T Act's Pretrial Release Provisions Do Not Violate the Separation of Powers Doctrine.

Defendants have shown that plaintiffs' separation of powers claim fails for two independent reasons. First, plaintiffs cannot demonstrate the SAFE-T Act's pretrial release provisions are unconstitutional under every conceivable set of circumstances, as they must to prevail on their facial challenge. D. Mem. at 30–32. Second, plaintiffs cannot demonstrate the SAFE-T Act's pretrial release provisions infringe *unduly* on an inherent judicial power, as they must to establish a separation of powers violation. *Id.* at 32–33. Plaintiffs' motion fails to address either of these defects. To the contrary, it reveals a fundamental misunderstanding of both the nature of their constitutional claim and the separation of powers doctrine in particular.

1. Plaintiffs Have Not Shown the SAFE-T Act's Pretrial Release Provisions Are Unconstitutional Under Every Conceivable Set of Circumstances.

Plaintiffs broadly proclaim that the SAFE-T Act "violates [a] bedrock principle underlying our system of governance by depriving the courts of their inherent authority to

administer and control their courtrooms," P. Mem. at 12—and they insist "the appropriateness of bail rests with the authority of the court and may not be determined by legislative fiat," *id.* at 16. These are assertions that the statute is unconstitutional under any set of facts—the hallmarks of a facial challenge. "[A] facial challenge requires a showing that the statute is unconstitutional under any set of facts, *i.e.*, the specific facts related to the challenging party are irrelevant." *People v. Thompson*, 2015 IL 118151, ¶ 36. Notably, plaintiffs do not rely on specific facts relating to themselves or a criminal defendant—as they would in an as-applied challenge, which necessarily would arise in a criminal case where a defendant was seeking release.

Because plaintiffs' separation of powers claim is a facial challenge to the SAFE-T Act's pretrial release provisions, they must satisfy the "particularly heavy" burden to "establish that under no circumstances would the challenged act be valid." *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 33. Their motion does not attempt to do so. Plaintiffs merely mention a few circumstances where they think the SAFE-T Act's pretrial release provisions run afoul of the separation of powers doctrine without showing that these provisions violate the separation of powers doctrine in all conceivable circumstances. *See* P. Mem. at 17–18. "The fact that a statute may operate invalidly under some circumstances is insufficient to establish facial invalidity; a statute is facially unconstitutional only if *no* set of circumstances exists under which [it] would be valid." *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002) (cleaned up).

For example, plaintiffs speculate that a judge might wish to deny pretrial release to a criminal defendant who is "pathologically violent," has committed "heinous crimes," and is not susceptible to any combination of pretrial release conditions "sufficient to ensure [his] presence in court." P. Mem. at 17. Plaintiffs posit that the SAFE-T Act would force the judge to release this defendant if, in this hypothetical, he was not charged with one of the crimes enumerated in

amended 725 ILCS 5/110-6.1(a), *id.* (citing Pub. Act 101-652, § 10-255), a list that includes virtually all violent felonies. But the SAFE-T Act cannot be found to violate the separation of powers doctrine in *all* instances because it expressly allows a judge to deny pretrial release if the defendant *is* charged with one of the crimes enumerated in amended 725 ILCS 5/110-6.1(a) and otherwise satisfies that section's requirements.

Plaintiffs also speculate a judge might wish to detain a defendant who has violated the conditions of his pretrial release in a way that causes a significant risk "of harm to public safety." P. Mem. at 18. Plaintiffs suggest the inherent power of the judge, in this hypothetical, would allow her to revoke the defendant's pretrial release for those reasons alone—whereas under the SAFE-T Act, plaintiffs continue, she could do so only if the defendant is subsequently charged with a new felony or class A misdemeanor. *Id.* (citing Pub. Act 101-652, § 10-255 (amending 725 ILCS 5/110-6(a), (b))). But there are plainly circumstances where the SAFE-T Act does not infringe on separation of powers—for instance, if the defendant *is* subsequently charged with a felony or class A misdemeanor, or if the defendant violates a pretrial release condition on a mere technicality and poses no risk to anyone.

All of this means that plaintiffs' facial challenge on separation of powers grounds cannot succeed. If there is "any imaginable set of circumstances" in which the SAFE-T Act can be applied without violating the separation of powers doctrine, then plaintiffs' facial challenge must fail. *In re M.T.*, 221 Ill. 2d 517, 536 (2006); *see Curielli v. Quinn*, 2015 IL App (1st) 143511 ¶¶ 33–34 ("A facial challenge fails if there is any situation in which the statute could be validly applied [without violating separation of powers]."). As this discussion shows, there are many circumstances where there is no conflict between the SAFE-T Act and courts' inherent judicial power, and thus no separation of powers violation. *See, e.g., People v. Taylor*, 102 Ill. 2d 201,

208 (1984) ("Only when a statute unduly infringes on the judicial authority will it be declared to be invalid."). Plaintiffs' facial challenge to the pretrial release provisions therefore fails.

2. The SAFE-T Act's Pretrial Release Provisions Do Not Infringe Unduly on an Inherent Judicial Power.

Plaintiffs' separation of powers claim independently fails because they cannot establish that the SAFE-T Act's pretrial release provisions infringe *unduly* on an inherent judicial power. First, plaintiffs misunderstand the separation of powers doctrine, which causes them to overlook the "undue infringement" standard. Second, plaintiffs misinterpret the nature of the inherent (but limited) judicial power recognized in *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74, 79–80 (1975), "to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure" and is "supported by sufficient evidence to show that it is required."

i. Plaintiffs Misunderstand the Separation of Powers Doctrine.

Start with plaintiffs' misunderstanding of the separation of powers doctrine. Relying on stray dicta from a single case, plaintiffs insist "[t]he Illinois Supreme Court has held that if 'power is judicial in character, the legislature is expressly prohibited from exercising it.'" P. Mem. at 12 (quoting *People v. Jackson*, 69 Ill. 2d 252, 256 (1977)). But this is not the law and never has been. Consistently across centuries, the Illinois Supreme Court has held to the contrary—that the separation of powers doctrine "does not mean that the legislative, executive, and judicial power should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other," *Field v. People ex rel. McClernand*, 3 Ill. 79, 83–84 (1839), and "was not designed to achieve a complete divorce between the three departments of a single operating government." *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 174 (1974). "Inevitably, there will be areas in which the separate spheres of government overlap, and in which certain functions are shared." *In re Derrico G.*, 2014 IL 114463, ¶ 76.

Applying this longstanding interpretation of the separation of powers doctrine, the Illinois Supreme Court has "consistently recognized that the legislature, which is vested with the power to enact laws, may also enact legislation which governs judicial practices, as long as it does not *unduly* infringe upon the powers of the court." *People v. Warren*, 173 Ill. 2d 348, 367 (1996) (emphasis added). Accordingly, the court will "[uphold] legislative enactments pertaining to judicial practice that do not *unduly* encroach upon inherent judicial powers." *People v. Bainter*, 126 Ill. 2d 292, 303 (1989) (emphasis added). "Only when a statute *unduly* infringes on the judicial authority will it be declared to be invalid." *Taylor*, 102 Ill. 2d at 208 (emphasis added).

Here, plaintiffs contend the SAFE-T Act violates the separation of powers doctrine because "the administration of the justice system"—which, they say, includes "the setting of bail"—"is an inherent power of the courts upon which the legislature may not infringe." P. Mem. at 16. But as the cases quoted above make clear, not all overlap is unconstitutional. The critical question is not whether the SAFE-T Act *infringes* on an inherent judicial power but rather whether it does so *unduly*. On this point, however, plaintiffs have nothing to say. They make no argument that the statute infringes *unduly* on an inherent judicial power.

As "the [parties] challenging the constitutionality of [the SAFE-T Act]," plaintiffs bear "the burden of establishing its invalidity." *DeLuna v. St. Elizabeth's Hosp.*, 147 Ill. 2d 57, 67 (1992). And because plaintiffs' constitutional challenge is grounded in the separation of powers doctrine, that burden requires them to establish that the SAFE-T Act's pretrial release provisions infringe *unduly* on an inherent judicial power. *Id.* at 68–69. By definition, plaintiffs cannot carry a burden they have made no effort to satisfy. Their failure to offer any argument about why the alleged infringement is *undue* means they cannot prevail on their separation of powers claim.

ii. Plaintiffs Misinterpret the Inherent Judicial Power Recognized in *Hemingway*.

Compounding this error, plaintiffs also seriously overstate the breadth of the judicial power recognized by the Illinois Supreme Court in *Hemingway*. The court held Illinois judges possess the inherent power, "as an incident of their power to manage the conduct of proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure" and is "supported by sufficient evidence to show that it is required." 60 Ill. 2d at 79–80. The case articulates three circumstances where judges may exercise this power—(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"—and one circumstance where the power does not apply—"preventive detention of one charged with a criminal offense for the protection of the public." *Id.* at 80.

Equally important, *Hemingway* also recognizes the legislature has a significant role to play in regulating the standards and procedures governing pretrial release—a role that has long operated in harmony with the judiciary's exercise of its inherent power. *Hemingway* cites approvingly, for example, to section 110-10 of the Code of Criminal Procedure, in effect since 1964, which "defines the conditions that may be imposed on admitting a defendant to bail before conviction." 60 Ill. 2d at 82. And it closes by observing the Code of Criminal Procedure's pretrial release provisions, "together with the conclusions of this court contained in this opinion," will allow for "an appropriate balance [to] be achieved between the right of an accused to be free on bail pending trial and the need of the public to be given necessary protection." *Id.* at 84.

Two conclusions are apparent from a careful reading of the Illinois Supreme Court's opinion in *Hemingway*. First, the inherent judicial power it recognizes is modest and

circumscribed; it applies only in particular circumstances, and only when there is a sufficient factual predicate. Second, the judiciary does not wield supreme or exclusive power when it comes to the standards and procedures governing pretrial release; rather, the legislature is authorized to regulate these standards and thus limit the courts' discretion in applying them.

The legislature and judiciary's shared responsibility for pretrial release is thus analogous to their shared responsibility for criminal sentencing. "It is, of course, indisputable that the power to impose sentence is exclusively a function of the judiciary." *People v. Davis*, 93 Ill. 2d 155, 161 (1982). But it does not follow that the legislature violates the separation of powers doctrine when it "exercise[s] [its] acknowledged power to fix punishments for crimes" and thereby "necessarily limit[s] the discretion of courts when imposing sentence." *Taylor*, 102 Ill. 2d at 208. Consistent with the Illinois Constitution, "'[t]he legislature may authorize the court to exercise broad discretion in the imposition of sentences by providing for the fixing of sentences within prescribed minimum and maximum years. Or the legislature may restrict the exercise of judicial discretion in sentencing, such as by providing for mandatory sentences.'" *Id.* Put another way, the legislature is authorized to articulate a general framework for criminal sentencing, and the judiciary is authorized to apply that framework to particular cases. This is why it does not offend the Illinois Constitution even when the legislature eliminates the judiciary's discretion entirely in certain cases—by requiring the court, for example, to impose a sentence of life imprisonment on anyone convicted of murdering more than one person. *Id.* at 208–09.

For decades, the legislature and judiciary have shared responsibility for pretrial release in precisely the same way. The legislature has enacted general standards and procedures governing pretrial release. 725 ILCS 5/art. 110. And the judiciary has applied those standards and procedures to particular defendants who appear before the court for a hearing—with the inherent

judicial power recognized in *Hemingway* serving as a backstop in a narrow set of circumstances. No one has suggested the legislature's role in this process violates the separation of powers doctrine. *See Graham v. Ill. State Toll Hwy. Auth.*, 182 Ill. 2d 287, 312 (1998) ("[T]he historical practice of the legislature may aid in the interpretation of a constitutional provision."). The SAFE-T Act does nothing to upset this balance. It merely replaces one set of legislative standards and procedures with another. *See* Pub. Act 101-652, § 10-255.[3]

Plaintiffs' contrary conclusion—that the SAFE-T Act's pretrial release provisions are unconstitutional—rests on a misinterpretation of the inherent judicial power recognized in *Hemingway*. They insist the Illinois Supreme Court in that case "expressly recognized that the court has the *ultimate authority* in determining the appropriateness of bail." P. Mem. at 14 (emphasis added). As the discussion above demonstrates, however, no plausible reading of *Hemingway* supports this conclusion, which is inconsistent with current practice. Plaintiffs' sweeping interpretation of the case would foist upon the judiciary an unprecedented responsibility to set the general standards and procedures governing pretrial release—and would deny that authority to the legislature, which has exercised it for decades without contest.[4]

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[3] This relationship is consistent with the description of legislative and judicial power in *People v. Hawkinson*, 324 Ill. 285 (1927), a case relied on by plaintiffs, P. Mem. at 12. "Legislative power is the power to enact laws, or declare what the laws shall be. Judicial power is the power which adjudicates upon the rights of citizens, and to that end construes and applies the law." *Hawkinson*, 324 Ill. at 287.

[4] Plaintiffs also assert, incorrectly, that "[t]he Illinois Supreme Court has specifically held that bail is 'administrative' in nature." P. Mem. at 13 (citing *Hemingway*, 60 Ill. 2d at 79). *Hemingway* does not hold this, and the word "administrative," although purportedly a quote, does not appear in the court's opinion. Plaintiffs also omit crucial information when they contend *Hemingway* acknowledges a judicial power "'to impose sanctions for the violation of conditions imposed upon a defendant's release'" *Id.* at 14 (quoting 60 Ill. 2d at 83–84). As plaintiffs note, *Hemingway* holds this power derives from the judiciary's "inherent authority 'to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction.'" *Id.* But plaintiffs neglect to mention the court's holding that this power also derives from the legislature's grant of authority to "increase or alter the conditions of the bail bond" upon the violation of a pretrial release condition. 60 Ill. 2d at 83–84. This is yet another example of the Illinois Supreme Court's recognizing the overlap between the legislature and judiciary in the field of pretrial release.

Plaintiffs fare no better with the other Illinois cases they cite in support of an inherent judicial power "to set bail" without interference from the legislature. Complaint ¶ 134. *People v. Bailey*, 167 Ill. 2d 210, 239–40 (1995), merely reiterates *Hemingway*'s holding and again acknowledges the legislature's role in regulating pretrial release. And *People ex rel. Davis v. Vazquez*, 92 Ill. 2d 132, 147–48 (1982), does not concern an inherent judicial power.

Plaintiffs' out-of-state cases are also unhelpful. *State v. Smith*, 527 P.2d 674, 677 (Wash. 1974), is inapposite because in Washington, "the legislature has delegated to [the supreme] court the power to prescribe rules for bail pending appeal." *See* Wash. Super. Ct. Crim. R. 3.2. There is no parallel in Illinois, where these rules have traditionally been prescribed by the legislature. *See* 725 ILCS 5/art. 110. And *Gregory v. State ex rel. Gudgel*, 94 Ind. 384, 388–89 (1884), merely holds the power to *apply* bail rules to particular criminal defendants cannot be delegated to a county clerk. That principle is irrelevant here, where the SAFE-T Act's pretrial release rules are applied by judges. *E.g.,* Pub. Act 101-652, § 10-255 (amending 725 ILCS 5/110-6.1).

As for *United States v. Crowell*, No. 06-M-1095, 2006 WL 3541736 (W.D.N.Y. Dec. 7, 2006), it is an outlier whose reasoning has been authoritatively rejected. *E.g., United States v. Arzberger*, 592 F. Supp. 2d 590, 606–07 (S.D.N.Y. 2008). At issue in these cases was a federal statute requiring courts to impose certain conditions when releasing criminal defendants charged with child pornography offenses. Those defendants argued "that Congress violated the separation of powers by legislating in an area that is the province of the courts." *Id.* at 607. The *Arzberger* court rejected this "ambitious argument" for reasons similar to those set forth above. In the federal system, as in Illinois, "there are numerous areas in which the responsibilities of the branches overlap," the court explained. *Id.* "For example, although criminal sentencing is a core judicial function, Congress may nevertheless play a substantial role, for example by prescribing

mandatory minimum sentences." *Id.*[5] Accordingly, the court found the judiciary's role in setting bail conditions is not "exclusive"—and so the challenged statute did not violate the separation of powers doctrine. *Id.*; *see also, e.g., United States v. Gardner*, 523 F. Supp. 2d 1025, 1034–36 (N.D. Cal. 2007) ("*Crowell* provides no definitive authority" for its conclusion that "regulating a field already immersed in legislative prescription and which does not substantially alter the fundamental function of the court, constitutes a violation of the separation of powers").

That leaves *People v Johnston*, 121 N.Y.S.3d 836 (Cohoes City Ct. Feb. 3, 2020). But the case does not support plaintiffs' expansive arguments. It holds "it was fitting and proper for the legislature to set the standard, a high standard, that a court must employ in determining conditions of pre-trial release." *Id.* at 845. The court's only quarrel with the legislature was that it denied the judiciary authority to impose monetary bail as a condition of release for criminal defendants charged with certain crimes even when "the least restrictive condition to ensure defendant's return to court requires the setting of bail." *Id.* This narrow holding does not support plaintiffs' attack on the SAFE-T Act's pretrial release provisions in their entirety. To the extent some portions of *Johnston* can be read more broadly, the court's reasoning suffers the same flaw as *Crowell*'s—it fails to acknowledge the legislature's traditional role in regulating the standards and procedures governing pretrial release. *See People v. Standish*, 135 P.3d 32, 44–46 (Cal. 2006) (legislature did not violate separation of powers doctrine by eliminating judges' discretion to impose bail as condition of pretrial release).

As this discussion establishes, plaintiffs have misinterpreted the inherent judicial power

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[5] Thus, *Crowell* is also inconsistent with Illinois Supreme Court precedent. Plaintiffs cite *Crowell* for the proposition that when the legislature "has imposed a specific rule that must be applied," it has unconstitutionally "'commandeered the court into acting as its agent.'" P. Mem. at 17–18 (quoting 2006 WL 3541736, at *11). But the Illinois Supreme Court rejected this reasoning in *Taylor*, 102 Ill. 2d at 208–09, when it held the legislature does not violate the separation of powers doctrine by requiring the courts to impose a particular sentence (life imprisonment) in particular circumstances (double murder).

recognized by the Illinois Supreme Court in *Hemingway*. It is a modest power applicable in three specific circumstances, not an all-encompassing power to regulate the standards and procedures governing pretrial release without interference from the legislature. To the contrary, *Hemingway* acknowledges the legislature's authority to set those standards and thus limit the courts' discretion in applying them in particular cases. And the legislature has exercised this authority for decades without any suggestion of a separation of powers problem. As with criminal sentencing, both the legislature and judiciary have a role to play in the field of pretrial release—the legislature enacts general standards, which the judiciary applies to particular defendants. Plaintiffs' contrary reading of *Hemingway* is inconsistent with its text and this tradition.

iii. Plaintiffs Have Not Identified Any Aspect of the SAFE-T Act's Pretrial Release Provisions that Infringes Unduly on an Inherent Judicial Power.

After correcting for plaintiffs' misunderstanding of the separation of powers doctrine and misinterpretation of the inherent judicial power recognized in *Hemingway*, it becomes clear the portions of the SAFE-T Act they believe to be unconstitutional are, in fact, nothing of the sort. Plaintiffs' errors fall into two categories. First, some of the SAFE-T Act provisions they point to simply do not implicate the inherent judicial power recognized in *Hemingway*. Second, plaintiffs have not shown that the other provisions they discuss infringe *unduly* on that power.

Plaintiffs' arguments about amended 725 ILCS 5/110-3 fall into the first category. *See* P. Mem. at 21–22. When a criminal defendant fails to comply with a pretrial release condition, the SAFE-T Act authorizes a judge to issue a warrant for his arrest (contrary to plaintiffs' incorrect assertion on page 21 of their brief)—but only if the defendant first fails to appear at a hearing to show cause. Pub. Act 101-652, § 10-255 (amending 725 ILCS 5/110-3(c)). Sensibly, the statute provides "a failure to appear shall not be recorded until the defendant fails to appear at the

hearing to show cause" and a defendant who does show up for that hearing should not have held against him any prior failures to appear. *Id.* (amending 725 ILCS 5/110-3(d)). Plaintiffs cite no precedent in *Hemingway* or elsewhere that endorses an inherent judicial power to handle allegations of pretrial release violations in a particular manner.

The same goes for plaintiffs' arguments about amended 725 ILCS 5/110-6.1(i), which provides a criminal defendant denied pretrial release "shall be brought to trial on the offense for which he is detained within 90 days after the date on which the order for detention was entered" or otherwise be released pending trial. Pub. Act 101-652, § 10-255. Plaintiffs insist this "restriction severely inhibits the court's authority to control its calendar and the administration of its trial proceedings." P. Mem. at 19. They neglect to mention it was not introduced by the SAFE-T Act but, to the contrary, has been the law in Illinois since at least 1988. *See* 725 ILCS 5/110-6.1(f); Pub. Act. 85-1209. Plaintiffs cite to nothing in *Hemingway* that suggests a speedy trial requirement infringes in any way on an inherent judicial power.[6]

This leaves the remainder of plaintiffs' arguments, which reduce to the proposition that judges enjoy an untrammeled authority to detain any criminal defendant they wish and impose whatever pretrial release conditions they like. In particular, plaintiffs complain judges can detain only certain criminal defendants under amended 725 ILCS 5/110-6.1. P. Mem. at 17–18.[7]

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[6] The requirement is conceptually similar to 725 ILCS 5/103-5(d), which requires a criminal defendant to be tried within a specified period of time or "be discharged from custody or released from the obligations of his bail or recognizance." Courts have rejected arguments that speedy trial requirements violate the separation of powers doctrine. *See, e.g., United States v. Brainer*, 691 F.2d 691, 696–99 (4th Cir. 1982).

[7] Relatedly, plaintiffs complain law enforcement officers are not required to bring arrestees who are ineligible for pretrial detention before a judge for a hearing under amended 725 ILCS 5/109-1. P. Mem. at 22–23. This provision does not, as plaintiffs suggest, delegate to law enforcement officers the judicial authority to make decisions about whether to impose pretrial detention in a particular case. *Id.* It merely requires officers to release (or not to arrest) people who, by law, are categorically ineligible for pretrial detention. Pub. Act 101-652, § 10-255 (amending 725 ILCS 5/109-1(a-1), (a-3)).

Plaintiffs also complain judges cannot impose monetary bail as a condition of pretrial release under new 725 ILCS 5/110-1.5. *Id.* at 20. And they complain judges can revoke pretrial release only in certain circumstances under amended 725 ILCS 5/110-6. *Id.* at 18.

None of this infringes *unduly* on the inherent judicial power recognized in *Hemingway*. As shown above, the legislature has long played a role in regulating the standards and procedures governing pretrial release, while the judiciary applies those standards to particular criminal defendants who appear before it for a hearing. *E.g.,* 725 ILCS 5/110-2 (limiting when court may impose monetary bail); 725 ILCS 5/110-5(a) (requiring court to consider certain matters in determining conditions of release); 725 ILCS 5/110-5(a-5) (imposing "presumption that any conditions of release imposed shall be non-monetary"); *see Graham*, 182 Ill. 2d at 312 ("[T]he historical practice of the legislature may aid in the interpretation of a constitutional provision.").

Against this backdrop, if the SAFE-T Act's pretrial release provisions infringe on an inherent judicial power, the infringement cannot be said to be *undue*. Just as the separation of powers doctrine is not violated when the legislature limits judges' discretion by requiring them to impose a life sentence for certain convictions, *Taylor*, 102 Ill. 2d at 208, it likewise is not violated when the legislature limits judges' discretion by denying them authority to detain certain criminal defendants, impose certain conditions of pretrial release, and revoke pretrial release in certain circumstances, *accord Standish*, 135 P.3d at 44–46. The SAFE-T Act simply reflects the people's will, expressed through their elected representatives, to draw these lines differently than prior legislatures have done. Plaintiffs cannot show this violates the Illinois Constitution.

In sum, plaintiffs' separation of powers claim fails for two independent reasons. They have not shown the SAFE-T Act's pretrial release provisions are unconstitutional under every conceivable set of circumstances, as they must to prevail on their facial challenge. And because

they misunderstand the separation of powers doctrine and misinterpret the inherent judicial power recognized in *Hemingway*, plaintiffs have not shown the SAFE-T Act's pretrial release provisions infringe *unduly* on an inherent judicial power, as they must to establish a separation of powers violation. For either reason, defendants are entitled to judgment as a matter of law.

Finally, plaintiffs are not entitled to a preliminary injunction because a preliminary injunction is not a cause of action, *Kopnick v. JL Woode Mgmt. Co.*, 2017 IL App (1st) 152054, ¶ 34, and the Court lacks authority to enjoin defendants from enforcing a statute they do not, and cannot, enforce, *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000). *See* D. Mem. at 34–35. And in their motion, plaintiffs make no effort to show they can satisfy the elements for a preliminary injunction, which it is their burden to carry. *See Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 387 (1985).

CONCLUSION

The Court should deny plaintiffs' motion and enter judgment for defendants.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, hereby certify that I will cause to be served copies of the foregoing *Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment* via electronic mail upon those listed below on November 23, 2022:

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Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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