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

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

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

In view of the express language of Public Act 101-652, its legislative history, the Illinois Constitution, and the governing case law, the Plaintiffs are entitled to summary judgment on all counts set forth in their First Amended Complaint.

**ARGUMENT**

Public Act 101-652 is a sprawling, 764-page piece of legislation with an unsurpassed breadth and scope that extends well beyond its espoused subject of "criminal law." Although titled the "Safety, Accountability, Fairness and Equity – Today" Act, it is all-encompassing and unbridled in scope, touching on everything from redistricting to collective bargaining. Hurriedly passed during a lame-duck legislative session in the middle of the night on January 13, 2021, the bill grew from 7 to 764 pages in a matter of just two days. The Act abolishes monetary bail and, through this and other provisions throughout, divests Illinois courts of their inherent authority to manage

their courtrooms and administer justice. The substance of Public Act 101-652 and the manner of its enactment are in violation of the Illinois Constitution for the following reasons:

*First,* because the Act is not limited in scope to the "criminal law" even under a generous reading, it violates the single-subject clause set forth in Article IV, Section 8(d) of the Illinois Constitution and is void in its entirety.

*Second,* in removing the discretionary authority of Illinois courts pertaining to integral facets of pretrial detention and release by eliminating monetary bail and by creating a myriad rules and strictures that severely undermine and restrict judicial authority, the General Assembly encroached upon the functions of the judiciary and violated the separation of powers clause of the Illinois Constitution in Article II, Section 1.

*Third,* the General Assembly violated the Illinois Constitution Article IV, Section 8(d)'s three-readings clause and was in such flagrant derogation of this constitutional requirement as to warrant revisiting the enrolled bill doctrine.

*Fourth*, in "abolishing monetary bail," the Act violates the bail provisions of Article 1, Sections 9 and 8.1 of the Illinois Constitution.

*Fifth*, the Act violates the rights of victims enshrined in the Illinois Constitution Article I, Section 8.1, by eliminating bail and severely constraining the ability of the judiciary to protect victims and their families.

*Finally*, the Act is replete with so many internal inconsistencies, undefined terms, and unclear standards that raise significant questions surrounding its enforcement and application as to render it unconstitutionally vague.

There being no genuine issues of material fact, this Court should enter summary judgment in favor of the Plaintiffs and declare Public Act 101-652 unconstitutional as a matter of law. Summary

judgment should be granted where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c). *Smithberg v. Illinois Mun. Ret. Fund*, 306 Ill. App.3d 1139 (3d Dist. 1999), *aff'd*, 192 Ill.2d 291 (2000). The party moving for summary judgment bears the initial burden of proof. *Neufairfield Homeowners Ass'n v. Wagner*, 2015 IL App (3d) 140775. When, as here, the parties file cross-motions for summary judgment, the parties agree that no material issue of fact exists and that only a question of law is involved. *Reece v. Board of Educ.*, 328 Ill.App.3d 773, 777 (1st Dist. 2002)

Although courts should begin any constitutional analysis with the presumption that the legislation is constitutional, *People v. Shephard*, 152 Ill.2d 489, 178 (1992), and it is the plaintiff's burden to clearly establish that the challenged provisions are unconstitutional, *Bernier v. Burris*, 113 Ill.2d 219 (1986), the Illinois Constitution is not a grant, but a limitation on legislative power. *Best v. Taylor Mach. Works*, 179 Ill.2d 367 (1997); *Taylorville Sanitary District v. Winslow*, 317 Ill. 25 (1925). It is the court's duty to interpret the law and to protect the rights of individuals against acts beyond the scope of the legislative power. *People ex rel. Huempfner v. Benson*, 294 Ill. 236 (1920). If a statute is unconstitutional, the court is obligated to declare it invalid. *Wilson v. Department of Revenue*, 169 Ill.2d 306 (1996). This duty cannot be evaded or neglected, no matter how desirable or beneficial the legislation may appear to be. *Best*, 179 Ill.2d at 378.

Because this motion involves an interpretation of Public Act 101-652, the rules of statutory construction apply. The construction of constitutional provisions is governed by the same general principles that apply to statutes. *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 136 Ill.2d 513, 526-27 (1990). The fundamental rule of statutory construction is to ascertain and give

effect to the intent of the legislature. *Carlasare v. Will Cnty. Officers Electoral Bd.*, 2012 IL App (3d) 120699, ¶18. The best indicator of that intent is the language of the statute itself. *People v. Araiza*, 2020 IL App (3d) 170735, ¶18. The words and phrases of a statute should not be construed in isolation and must be interpreted considering the other relevant provisions of the statute. *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill.2d 103, 117 (2007). That approach exemplifies attention to the text. *Id.* If the statutory language is clear and unambiguous, it must be applied as written without resorting to further aids of statutory construction. *Carlasare* at ¶18. A court may "not depart from the plain language of" a statute "by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." *Town & Country Utilities, Inc.,* 225 Ill.2d at 117.

## I. Public Act 101-652 is Void in Its Entirety Because It Violates the Single-Subject Clause of Article IV, Section 8(d) of the Illinois Constitution

Although the first line of Public Act 101-652 states it is "[a]n Act concerning criminal law," its plain language demonstrates that the Act addresses multitudes of subjects with no natural or logical connection to criminal law. *See* Plaintiffs' Ex. 6. By no stretch of the imagination does Public Act 101-652 cover only a single subject as required by Article IV, Section 8(d) of the Illinois Constitution.

The single-subject clause of the Illinois Constitution is clear: "Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject." Ill. Const., art. IV, §8(d). Its purpose is to prevent "[t]he practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits." *Fuehrmeyer v. City of Chicago,* 57 Ill.2d 193,

202 (1974). *See also Wirtz v. Quinn*, 2011 IL 111903. The single-subject requirement also facilitates "the enactment of bills through an orderly and informed legislative process," in that "by limiting each bill to a single subject, each legislator can better understand and more intelligently debate the issues presented by a bill." *People v. Cervantes,* 189 Ill.2d 80, 84 (1999).

In resolving a single-subject claim, the courts apply a two-tiered analysis. *People v. Burdunice,* 211 Ill.2d 264, 267 (2004). First, the court determines whether the Act, on its face, addresses a "legitimate single subject." *Id.* The analysis is "akin to statutory construction," beginning and ending with the plain language. *Id.* at 270. A legislative enactment must be found to violate the single subject requirement when the bill "on its face clearly embraces more than one subject." *Cervantes*, 189 Ill.2d at 94. Second, the court must "discern whether the various provisions within an act all relate to the proper subject at issue." *Burdunice*, 211 Ill.2d at 267, quoting *People v. Sypien*, 198 Ill.2d 334, 338 (2001). In other words, the court must decide whether the "individual provisions of the Act have a 'natural and logical' connection to that subject." *Id.* at 268.

In the words of the Illinois Supreme Court:

> The statute embraces but one subject or object where the matters included are such that, if traced back, they will lead the mind to the subject as the generic head. On the other hand, an act may not embrace unrelated or unconnected subjects or objects, but the various topics in the body of the act should and must be kindred in nature, and germane to the subject or object. It has been said that there can be no surer test of compliance with the constitutional requirement of singleness of subject than that none of the provisions of an act can be read as relating or germane to any other subject than the one named in the title. *Coordinated Transport, Inc. of Ill. v. Barrett,* 412 Ill. 321, 326-27 (1952).

When a public act violates the single subject rule, it is not severable, and the entire act is void. *People v. Reedy*, 295 Ill.App. 3d 34, 42 (1999). Because Public Act 101-652 Act violates Article IV, Section 8(d) of the Illinois Constitution, the court should award judgment as a matter of law in Plaintiffs' favor and declare the Act void in its entirety.

### A. Numerous Provisions Throughout Public Act 101-652 Violate the Single Subject Clause of the Illinois Constitution.

Below are a few of the myriad examples demonstrating how Public Act 101-652 fails to adhere to single-subject clause set forth in Article IV, Section 8 of the Illinois Constitution.

#### 1. New Section 4.1 of the Public Officer Prohibited Activities Act Does Not Relate to Criminal Law.

Public Act 101-652 adds to the Public Officer Prohibited Activities Act, a state law that regulates conduct that is primarily non-criminal in nature (whistleblowing) which applies to all 7,000 units of Illinois local government and its divisions (from Cook County Forest Preserve to the most obscure township or library board sub-committee) and all of its employees, officers, and agents (from the Cook County Board Chair to the summer intern at a park district). *See* Plaintiffs' Ex. 6 at art. 10, §10-135, creating 50 ILCS 105/4.1. New Section 4.1 mandates units of local government: (a) adopt written policies and procedures prohibiting retaliation against individuals who report "improper governmental action"; and (b) designate someone to serve as their "auditing official." *Id.* "Improper governmental action" mainly addresses non-criminal conduct (e.g., "abuse of authority," or conduct that "violates the public's trust;" poses a "risk to the public's health or safety," or is a "gross waste of public funds"). *Id.* at 4.1(i). The "auditing official" is not a law enforcement officer or generally considered part of the criminal justice system, and instead is charged with such tasks as receiving and investigating complaints about subjects such as inefficiencies and waste in government, and with promoting "economy, efficiency, effectiveness and integrity in the administration of the programs and operations of the municipality." *Id.* Additionally, a new penalty provision explicitly includes "civil penalties" and job-related ramifications such as "suspension, demotion, or discharge," Public Act 101-652, art. 10, §10-135;

50 ILCS 105/4.1(g), and the written protocols the auditing official must establish have nothing to do with criminal law. *Id*. at 4.1(c).

**2. The Act's Expansion of the Treatment Act to Apply to "Other First Responders" Does Not Relate to Criminal Law.**

Public Act 101-652 amends and expands the scope of the Community-Law Enforcement and Other First Responder Partnership for Deflection and Substance Use Disorder Treatment Act to include "other first responders" in addition to police officers. 5 ILCS 820/1 *et seq*.; Public Act 101-652, art. 10, §10-116.5. The new provision defines "other first responder" as "emergency medical services providers that are public units of government, fire departments and districts, and officials and responders representing and employed by these entities," and expands treatment options for such "other first responders." 5 ILCS 820/1 *et seq*.; Public Act 101-652, art. 10, §10-116.5. On its face, the subject of this provision is distinct from policing or criminal justice.

**3. The No Representation Without Population Act Does Not Pertain to Criminal Law.**

Public Act 101-652 creates the No Representation Without Population Act ("No Representation Act"), which sets forth, *inter alia*, rules and procedures the Illinois Department of Corrections and Illinois State Board of Elections must follow in counting prisoners for the purpose of determining representative districts. Public Act 101-652, art. 2. The new provision establishes a process of counting prisoners by using an inmate's most recent known address before incarceration for purposes of redistricting legislative districts. Merely because the provision involves IDOC and inmates, however, does not mean it relates to criminal law for purposes of the single-subject clause.

The Illinois Supreme Court addressed a similar issue in *Cervantes.* 189 Ill.2d at 80. There, petitioners challenged two provisions of a bill: an amendment to the WIC Vendor Management Act (WIC); and a provision creating the Secure Residential Youth Care Facility Licensing Act

(Licensing Act), which required IDOC to establish regulations for secure residential youth facilities. *Id.* at 89. On appeal, the State argued the provisions pertained to one subject because they related to "neighborhood safety." *Id.* at 93. The Supreme Court disagreed. *Id*. As to WIC, the Court noted that the amendments did not mention abuse of benefits, criminal fraud, criminal penalties, or forfeiture. *Id*. at 93. The court also found the Licensing Act extended beyond the bounds of "neighborhood safety":

> 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. *Id.* at 95-96

Similarly, the No Representation Act merely sets forth rules and procedures involved in the determination of representative districts. The mere fact that those being counted are inmates does not transform this into the subject of criminal law.

#### 4. The Provisions Granting the Attorney General Increased Powers to Pursue Civil Actions and Draft Award Determinations for The Court of Claims Does Not Relate to Criminal Law

Public Act 101-652 grants the Attorney General increased powers to pursue certain civil actions, some of which are newly created and do not pertain to criminal law. Public Act 101-652, art. 10, §10–116.7, creating 15 ILCS 205/10. Pursuant to the amendments, "[n]o governmental authority, or agent of a governmental authority, or person acting on behalf of a governmental authority, shall engage in a pattern or practice of conduct by 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." *Id*. This section authorizes the Attorney General to commence a civil action whenever the Attorney General has reasonable cause to believe that a violation of this subsection has occurred. *Id*. It also amends the Crime Victims Compensation Act

to empower the Attorney General to prepare and present an investigatory report and a draft award determination of each applicant's claim to the Court of Claims for a review period of 28 business days. *Id.* at art. 10, §10-307, modifying 740 ILCS 45/4.1. While this impacts crime victims, its function is to increase the powers given to the Illinois Attorney General in *civil* matter --a subject distinct from criminal law or the criminal justice system.

This Illinois Supreme Court's opinion in *Burdunice* is instructive here. The Court in *Burdunice* considered the constitutionality of a bill that primarily amended crime-related statutes. 211 Ill.2d at 267-271. At issue were the bill's amendments to the State Employee Indemnification Act (SEIA), which allowed the Illinois Attorney General to file counterclaims in civil suits where state employees are named defendants. *Id.* at 267-269. Pointing to the legislative history, the State argued that the SEIA was amended to authorize counterclaims by IDOC employees against inmates. *Id*. at 269. The court held that the amendments to the SEIA violated the single-subject rule because they could not be resolved under the subject "substantive criminal law and correction system administration." *Id.* at 271. In so holding, the court observed that "the act on its face encompasses two subject-matters relating to criminal law and matters relating to civil lawsuits against state employees." *Id.* In so holding, the court also rejected the State's reliance on legislative history and intent:

> Though the State maintains that the defendant ignores that "it is absolutely clear from the legislative history that [the amendment to 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." *Id.* at 271.

Similarly, in this case, this provision "on its face" encompasses not only criminal law but "matters relating to civil lawsuits" in violation of the single-subject clause.

### 5. The Constitutional Rights and Remedies Act Does Not Relate to Criminal Law

Public Act 101-652 creates a new Task Force on Constitutional Rights and Remedies Act (CRRA) whose express charge is to "develop and propose policies and procedures to review and reform constitutional rights and remedies, including qualified immunity for police officers." Public Act 101-652, art. 4, §4-5. Rights derived from the Illinois Constitution extend well beyond those encompassed by criminal law, including the rights to: life; liberty; property; religious freedom; freedom of speech; freedom of assembly; petition; justice; not be discriminated against in the sale of property; remedy and justice for injuries; individual dignity; not have soldiers quartered in one's home; bear arms; register to vote; vote; and a healthful environment. Ill. Const. art. I. Under the express language of the Illinois Constitution, CRRA necessarily encompasses constitutional rights and remedies that do even plausibly fall within the subject of criminal law.

### 6. The Amendments to the Public Labor Relations Act Do Not Relate to Criminal Law.

Pursuant to §2 of the Public Labor Relations Act (PLRA), its legislative purpose is as follows:

> It is the purpose of this Act to prescribe the legitimate rights of both *public employees and public employers*, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all. *To prevent labor strife* and to protect the public health and safety of the citizens of Illinois, *all collective bargaining disputes involving persons designated by the Board as performing essential services and those persons defined herein as security employees shall be submitted to impartial arbitrators*, who shall be authorized to issue awards in order to resolve such disputes. 5 ILCS 315/2 (emph. added).

Specifically, the PLRA amends section 14 to change the population requirements for peace officer arbitration disputes pertaining to wage, hours, and conditions of employment from municipalities under 1,000,000 to those under 100,000. Section 14 also amends the population requirements for a municipality's authority to impose residency requirements

on peace officers from 1,000,000 to those under 100,000. None of this relates in any way to criminal law.

### B. Public Act 101-652's Widespread Violations of the Single-Subject Rule Render It Void in Its Entirety.

The above examples, egregious enough in themselves, do not even come close to covering the breadth and scope of subject matters unrelated to criminal justice covered by the tentacles of Public Act 101-652. The synopsis of this massive piece of legislation demonstrates its expanse. (*See* Plaintiffs' Ex. 8, addressing subjects ranging from exemptions under the Illinois Open Meetings Act to the definition of "employee" under the State Employee Indemnification Act). Even within the general category of "policing," the subjects covered by the Act range from collective bargaining over residency requirements in specific Illinois cities with populations over 100,000, to personnel and indemnification matters concerning certain police oversight boards, to military surplus equipment and access to information about police officers. (*See* Plaintiffs' Exs. 6 and 9).

This unconstrained Act, if allowed to stand, would render meaningless the single-subject clause of the Illinois Constitution. The Illinois Supreme Court has previously admonished against exactly the sort of "sweeping and vague" categories to "unite unrelated measures" for this exact reason. *People v. Olender,* 222 Ill.2d 123, 139 (2005). The court observed "it is likely that any legislative action could fit within the broad category of governmental regulation." *Id.* The court previously "has cautioned that the use of such a sweeping and vague category to unite unrelated measures would render the single subject clause of our constitution meaningless." *Id.* After passage in the Senate, Public Act 88-669 experienced considerable growth in the House through a series of eight amendments; in addition to the three statutes amended in the version, the Public Act created two new statutes and amended provisions of 21 other statutes. *Id.* at 134-135; *see also Edgar*, 176 Ill.2d at 517-18. The court rejected the argument that the discordant provisions of

public act entitled "An Act in relation to public safety" were related "because of a tortured connection to a vague notion of public safety." *Reedy*, 186 Ill.2d 1, 10, 12 (1999) (finding single subject violation where public act entitled "An Act in relation to governmental matters, amending named Acts," encompassed at least two unrelated subjects, observing "that these topics might fit within the broad subject of 'governmental matters' is not compelling.").

Because "a single subject challenge goes to the very structure of the act, and the process by which it was enacted," legislation must be struck down in its entirety when the single-subject clause is violated. *Olender*, 222 Ill.2d at 146 (rejecting State's argument that provisions are severable under single subject clause, *citing* 1970 Illinois Constitution and observing that it removed severability provisions contained in 1870 Constitution). Public Act 101-652 is a massive legislative enactment which clearly violates the single subject clause of the Illinois Constitution and should be stricken as void in its entirety.

## II. The Bail Provisions of Public Act 101-652 Violate the Illinois Constitution's Separation of Powers Provision

Article II, Section 1 of the Illinois Constitution provides: "The legislative, executive, and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. art. II, § 1. *Lebron v. Gottlieb Mem'l Hosp.,* 237 Ill.2d 217, 239 (2010). Public Act 101-652 violates this bedrock principle underlying our system of governance by depriving the courts of their inherent authority to administer and control their courtrooms.

The Illinois Supreme Court has held that if "power is judicial in character, the legislature is expressly prohibited from exercising it." *People v. Jackson*, 69 Ill.2d 252, 256 (1977). The Court has long recognized that "[j]udicial power is that which adjudicates upon the rights of citizens and to that end construes and applies the law." *People v. Hawkinson*, 324 Ill. 285, 287 (1927). The courts have supplemented this "very general" definition by looking at the traditional role of courts

historically and at common law. *People v. Brumfield*, 51 Ill.App.3d 637, 643 (3d Dist. 1977). Legislative enactments undermining the "traditional and inherent" powers of the judicial branch, particularly, those restricting judicial discretion, violate the Separation of Powers Clause. *Best*, *supra.* (holding that statutory limit on compensatory damages for noneconomic injuries unconstitutionally interfered with "remitter," a court's discretionary power to reduce excessive damages).

The Supreme Court has also recognized that "matters concerning court administration" fall within the inherent power of the judiciary, and the legislature is "without power to specify how the judicial power shall be exercised under a given circumstance":

> At common law, it was recognized that the legislative branch was "without power to specify how the judicial power shall be exercised under a given circumstance. . .." The legislature was prohibited from limiting or handicapping a judge in the performance of his duties. Thus, the concept of "judicial power" included the inherent authority to prescribe and institute rules of procedure. Clearly, this common law prohibition would include matters of how the court was to function, that is, matters concerning court administration.
>
> The history of our judicial branch also indicates that court administration falls within the ambit of the courts' inherent "judicial power." The Constitution of 1870 (Ill. Const. 1870, art. VI, sec. 1 et seq.) granted to the courts all powers necessary for the complete performance of the judicial function. Our present constitution provides that the "[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised . . . in accordance with its rules." (Ill. Const. 1970, art. VI, sec. 16.) The words "and supervisory" were added in the 1970 provision to emphasize and strengthen the concept of central supervision of the judicial system. *People v. Joseph*, 113 Ill.2d 36, 42-43 (1986) (internal citations omitted).

The Illinois Supreme Court has specifically held that bail is "administrative" in nature, and that the court has independent, inherent authority to deny or revoke bail to "preserve the orderly process of criminal procedure." *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 79 (1975); *see also People v. Bailey*, 167 Ill.2d 210 (1995). In *Bailey*, a defendant appealed after having been denied bail pursuant to 725 ILCS 5/110-6.3, which allowed courts to

hold a defendant charged with stalking without bail. *Bailey*, 167 Ill.2d at 218. The Supreme Court, citing to Elrod, found that the court had inherent discretion to hold the defendant even though he was eligible for bail under the Illinois Constitution. *Id*. at 239-40.

In *Elrod,* the Supreme Court expressly recognized that the court has the ultimate authority in determining the appropriateness of bail. The defendant in *Elrod* was charged with non-capital murder and held without bail, even though the Illinois Constitution at the time imparted a right to bail to "all persons…except for capital offenses." *Elrod,* 60 Ill.2d. at 76. The Court began its analysis by stating:

> In our opinion, the constitutional right to bail must be qualified by the authority of the courts, as an incident of their power to manage the conduct of the proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure. *Elrod,* 60 Ill.2d. at 79.

The Court recognized that the denial of bail "must not be based on mere suspicion but must be supported by sufficient evidence to show that it is required," but went on to hold that "bail may properly be denied" when "keeping an accused in custody pending trial to prevent interference with witnesses or jurors or to prevent the fulfillment of threats," and "if a court is satisfied by the proof that an accused will not appear for trial regardless of the amount or conditions of bail." *Id*. at 79-80. According to the Supreme Court, in light of a court's inherent authority "to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction," the court likewise "has the authority to impose sanctions for the violation of conditions imposed upon a defendant's release and for the commission of a felony by a defendant while released on bail or recognizance, including the revocation of his release." *Id*. at 83-84.

The Illinois Supreme Court has ruled further that courts have inherent authority derived from the Illinois Constitution to set monetary bail. *People ex rel. Davis v. Vazquez*, 92 Ill.2d 132 (1982).

In *Davis*, the court consolidated the State's appeal denying the transfer of two juveniles to adult court. *Id*. at 137. Under the Juvenile Court Act (JCA), a juvenile defendant must be released unless there is an "immediate and urgent" necessity for detention. *Id*. Although there was no provision in the JCA for the setting of monetary bond, the court set a monetary bond in one of the cases but later reconsidered and vacated the order. *Id*. at 138-39. In a mandamus action regarding the transfer, the Illinois Supreme Court *sua sponte* vacated the juvenile offender's release and reinstated the previous order setting bail. *Id*. at 139. The court found that, although there was no statutory provision for bond, the defendants should have the same right to bail as adult offenders since "the Constitution does not draw a distinction based on the age of the accused." *Id*. at 147. Citing *Elrod*, the Court pronounced: "We hold that the minors in these cases were entitled to be admitted to bail and that the juvenile court therefore had authority to set bail in an appropriate amount, to release on recognizance, and/or to impose conditions on their release." *Id*. at 148.

Other states and at least one federal court have concluded that the power to fix bail and release from custody is a judicial power that exclusively belongs to the courts. *Gregory v. State*, 94 Ind. 384 (1884) (striking down statute permitting county clerks to fix bail because power to admit to bail demands discretion and is judicial that cannot be delegated); *State v. Smith*, 84 Wn.2d 498 (1974) (because bail is procedural in nature, power to fix bail and release from custody is a judicial power); *United States v. Crowell*, 2006 U.S. Dist. LEXIS 88489, 2006 WL 3541736 (06-M-1095 W. D. NY Dec. 7, 2006) (bail decisions, "the quintessential exercise of judicial power," must be "individualized"; legislature cannot prescribe "a rule of decision for courts" in these determinations "without permitting courts to exercise their judicial powers independently").

To date, only one trial court has ruled on whether the elimination of cash bail withstands a separation of powers inquiry. *People v. Johnston*, 67 Misc.3d. 267, 121 N.Y.S.3d 386 (N.Y. City

Ct. Cohoes 2020). The defendant in *Johnston* who was charged with minor traffic offenses, had a "long and incorrigible record of refusing to come back to court." *Id*. at 270. Unable to set monetary bail pursuant to a new state statute eliminating cash bail, the court concluded that the "least restrictive set of conditions" to assure the defendant's appearance was electronic monitoring. *Id*. at 271. Because placing the defendant on electronic monitoring for a misdemeanor offense "would be quite the intrusion on defendant's liberty," the court found the prohibition on cash bail unconstitutional. *Id*. at 271-77. In doing so, the court concluded that the "categorical" nature of the cash bail prohibition had eliminated court discretion. *Id*. at 274. Finding that "history counsels that bail is ultimately a judicial function," *id*. at 275, the court surmised that bail historically "broke the way of the courts" because it was not a punishment. *Id*. at 276. Rather, its purpose was "to ensure an orderly process for the courts and that defendants answer" on the charge. *Id*. While the legislature may "alter and regulate the proceedings in law," the court held, it may not wrest "from courts . . . final discretion" in determining "the least onerous conditions to ensure that a defendant answers the charges." *Id*. at 277.

Because, as the Illinois Supreme Court has determined, the administration of the justice system is an inherent power of the courts upon which the legislature may not infringe and the setting of bail falls within that administrative power, the appropriateness of bail rests with the authority of the court and may not be determined by legislative fiat.

### A. The Provisions of the Act Rescinding the Court's Authority to Detain Defendants and Deny or Revoke Bail Violate the Separation of Powers Clause

In abolishing monetary bail, Public Act 101-652 strikes at the court's ancient and inherent authority to render judgment on the first, most intrinsic question from which all other decisions stem–what is needed to vindicate the defendant's release from custody. Historically, all persons have been "bailable by sufficient sureties," not bailable in all cases. Ill. Const. art. I, § 9 (emph.

added). The mode of being on bail has, therefore, always been conditioned on collateral deemed "sufficient" (whether money, imposed conditions, or the good word of a defendant). If there is not collateral deemed sufficient, a defendant will not be released. As stated by the United States Supreme Court, "[t]he 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." *Stack v. Boyle,* 342 U.S. 1, 4 (1951). Public Act 101-652 eliminates the court's authority to detain pretrial, which has existed for centuries and can be traced uninterrupted back to medieval English common law, should those "sureties" not exist or not be secured.

By its express terms, Public Act 101-652 permits detention only for a small subset of crimes and under the limited circumstances set forth in 110-6.1.[1] In all other cases, the court is without authority to detain--even in exceptional cases involving heinous crimes and pathologically violent defendants--and must rely on a limited set of conditions to ensure compliance. Accordingly, a judge who finds that no combination of pretrial conditions is sufficient to ensure the defendant's presence in court and compliance with conditions of bond is left without recourse. The judge *must* release the defendant, regardless of how this impacts the administration of the court. In contrast, unlike conditions, monetary bail has no upper limit and can be increased in accordance with a defendant's recalcitrance such that it results in pretrial detention or, if paid, would radically change a defendant's current mind-set and incentives to appear. By relegating the court to a set of finite "conditions," the legislature has unconstitutionally capped "sureties" at a level that in many cases will not be "sufficient." This again impermissibly intrudes on the courts' inherent authority. As in

[1] Even in cases involving §110-6.1 charges, the court's broad and inherent discretion to deny bail is unduly circumscribed. For example, even though a court may find that a defendant will not consistently appear or violate conditions of bond, a defendant charged with murder must still be released unless the court also finds that the defendant is "a real and present threat to the safety of a specific, identifiable person, or persons." 725 ILCS 5/110-6.1(e)(2).

*United States v. Crowell,* the General Assembly here has imposed a specific rule that must be applied and has "commandeered the court into acting as its agent." 2006 U.S. Dist. LEXIS 88489, 2006 WL 3541736 (06-M-1095 W.D. NY Dec. 7, 2006).

Those sections of Public Act 101-652 mandating pretrial release in all cases not involving §110-6.1 charges and regardless of threat posed to the "orderly process of criminal procedure" or the safety of victims and potential witnesses, stands in stark contrast with the clear-cut ruling in *Elrod.* 60 Ill.2d at 80. These sections also intolerably reduce the court's inherent authority to revoke a defendant's pretrial release. As recognized in *Elrod*, the courts have inherent authority to "deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure." *Id.* at 79-80. However, under §110-6, "pretrial release may be revoked only" for violation of conditions of release in cases where the defendant is charged with a new felony or Class A misdemeanor offense. 725 ILCS 5/110-6.1. Irrespective of the severity of the violation of a condition, the brazenness of the violation, the magnitude of harm to public safety caused by a defendant's failure to abide by conditions of release or failure to appear, or the frequency by which the conditions are violated, the court is without authority to revoke bond in the vast majority of criminal cases.

Although Public Act 101-652 does grant very limited authority to the court to enforce its pretrial release orders through sanctions, this does not cure the legislative overreach into the inherent powers of the judiciary. 725 ILCS 5/110–6. The legislature is "without power to specify how the judicial power shall be exercised under a given circumstance." *Joseph,* 113 Ill.2d at 43-44. The court, not the General Assembly, is the branch charged with using its discretion to determine the appropriate remedy, such as revocation, for violations of its orders--especially involving matters primarily within its knowledge and expertise, such as court administration.

Lastly, §110-6.1(i) violates the separation of powers by summarily requiring a judge to release a defendant who has been detained if that individual is not brought to trial within 90 days. The provision expressly states: if a trial is not held within 90 days, the defendant "**shall not be denied pretrial release.**" 725 ILCS 110-6.1(i). Regardless of whether the judge finds that a defendant is an imminent and deadly threat to victims, witnesses, or the general community, intends to flee the jurisdiction, and will not comply with the conditions established by the court, the judge ***must*** release this defendant into the community. There is **no** provision allowing the offender to be placed back in detention.

This significant restriction severely inhibits the court's authority to control its calendar and the administration of its trial proceedings, by forcing the court to adhere to the 90-day period even in cases where reasonably and for any number of legitimate reasons a trial cannot commence within the 90-day period. This absolute rule divesting the court of all authority stands in stark contrast to the comprehensive criminal justice reform legislation enacted in New Jersey which does not encroach upon the powers of the judiciary. There, consistent with the separation of powers between the judicial and legislative branches, the law and accompanying New Jersey Supreme Court Rules allow for the court to assess the practical realities of trying complex criminal matters and to control its own docket and courtroom. *See, e.g.,* N.J. Stat. Ann. § 2A:162-22 (1)(a); N.J. Stat. Ann. § 2A:162-22 (2)(a); New Jersey Court Rule 325 (giving court discretion to grant delay based on numerous factors including, *e,g.*, complexity of the case, number of defendants, "voluminous or complicated evidence," difficulty in locating witnesses, and novel questions of law or fact).

Unlike the New Jersey legislation, which appropriately retained judicial discretion and control over the administration of its courtroom, the 90-day deadline in Illinois is absolute. The judge has no ability to exercise its discretion. Yet the Illinois Supreme Court repeatedly has held that it is the

court's prerogative, within the constitutional and statutory limits of a defendant's speedy trial rights, to administer its court calendar. The court cannot be hampered in this important exercise of its inherent discretion by another co-equal branch, which by its nature is less familiar with the court's administrative necessities. The Act also creates a perverse incentive for defendants to inject delay into proceedings at or near the 90-day deadline that will only undermine a court's ability to control proceedings within its courtroom. Thus, the Act creates an unconstitutional separation of powers violation, and those sections discussed above must be struck down.

### B. The Provision of the Act Rescinding the Court's Authority to Set Monetary Bail is a Separation of Powers Violation

Since its beginnings, the concept of bail has always involved money – whether cash, collateral, credit, or the conditional promise of payment by a surety. *See generally Stack v. Boyle*, 342 U.S. 1 (1951). New Section 110-1.5, however, removes a court's ability to require monetary bail in all cases other than those subject to certain interstate compacts. As stated by the Illinois Supreme Court, requiring 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." *People ex rel. Gendron v. Ingram,* 34 Ill.2d 623, 626 (1966). In *Gendron,* the Illinois Supreme Court found that a bail bond issued by a surety company was not a "surety" for purposes of the Illinois Constitution. *Id.* Rather, a surety must involve some threat of loss and, accordingly, bail bonds secured by cash deposit or stocks and bonds equal in value to the bail are constitutional. *Id.* at 625-26. Determining appropriate surety to compel the appearance of a defendant is a judicial, not legislative function. *Elrod*, *supra*. *Bailey*, *supra*. Public Act 101-625 unconstitutionally foists upon the court a limited number of alternatives that it may deem inadequate, interfering with the court's inherent authority to determine what constitutes a sufficient surety to secure pretrial release.

### C. The Provisions of the Act Rescinding the Court's Authority to Issue a Warrant or Revoke a Defendant's Pretrial Release Violate the Separation of Powers Clause

Section 110-3, as amended by Public Act 101-652, severely frustrates the court's authority to realize the orderly administration of justice by divesting the courts of the power to issue a warrant for the arrest of a defendant who fails to comply with a condition of pretrial release he previously swore to observe.[2] 725 ILCS 5/110-3. The system envisioned by §110-3 severely hamstrings the court's administration by undermining the court's inherent prerogative to effect compliance with its orders, procedure, and schedules on those inevitable defendants who are less than cooperative. Not only does the Act make it unduly onerous to merely arrange for the appearance of a nonconforming defendant, but it also dictates to the court how it should interpret and adjudge a defendant's failure to appear. Section 110-3(d) states:

> If the order as described in subsection (b) is issued, a failure to appear shall not be recorded until the defendant fails to appear at the hearing to show cause. For the purpose of any risk assessment or future evaluation of risk of willful flight or risk of failure to appear, a non-appearance in court cured by an appearance at the hearing to show cause shall not be considered as evidence of future likelihood of appearance in court. 725 ILCS 5/110-3(d).

The court order requiring the defendant's appearance and the defendant's promise to appear at all future court dates; the productivity of the court's multi-pronged and coordinated operations funded by taxpayers; the time spent by the judge, prosecutor, clerk, witnesses, defense attorney, and bailiff in preparing and being present for the defendant's appearance; the interest of the court, victims, and the public in having a defendant answer for a criminal offense(s) on anything other than his own timetable—all of these, mean nothing. Furthermore, in restricting the court's ability

[2] Upon a violation of a pretrial release condition, the court must first attempt to issue a rule to show cause, set a date for a hearing, and effectuate service 48-hours prior to the hearing. 725 ILCS 5/110-3. Should the summons not be served prior to 48-hours of the return date, the court must issue another rule and continue in this Sisyphean cycle until the summons is served.

to take judicial notice of facts occurring before them—namely, that a defendant has failed to appear—the Act drastically undermines the court's authority over the orderly administration of justice.

Section 110-3(d) also unconstitutionally interferes with the court's inherent power to "adjudicate." The absurdity of not being able to record a "failure to appear" when a "failure to appear" in fact occurs, or to use a prior failure to appear as even a factor in assessing future behavior, is a direct affront to a court's capacity to resolve matters before it. The idea that the court must ignore self-evidently relevant facts that occurred in its presence and distort the record in favor of a public policy argument advanced by another branch of government creates a problem for fact-based adjudication and independence of the courts. Inseparable from the court's power to revoke bail and effect the efficient administration of criminal procedure is a reasonable and competent means to ultimately compel the presence of non-compliant defendants. Public Act 101-652 is a direct assault on this inherent authority.

### D. The Provision Giving Police Officers the Power to Set Conditions of Pretrial Release Violates the Separation of Powers Clause

As the Illinois Supreme Court recognized in *Elrod,* "the constitutional right to bail must be qualified by the authority of the courts, as incident of their power to manage the conduct of proceedings before them." 60 Ill.2d at 79. The power to admit and fix bail or set conditions of pretrial release is a judicial function and cannot be delegated. *See Smith*, 84 Wn.2d 498, 501-2 and *Gregory,* 94 Ind. at 386. Despite these settled principles of judicial authority, the Act takes these powers away from the courts and gives them to law enforcement.

Amended Section 109-1 requires police officers to make impromptu rulings in their discretion on whether a defendant should be released without the benefit of a hearing, ability to impose conditions, an evaluation, other forms of due process, or any other type of formality. In cases

involving Class B or Class C misdemeanors, Public Act 101-652 amends Section 109-1 to compel police to release arrestees with a citation unless police officers in their discretion determine that the subject poses an "obvious" threat to the community or is suffering from an "obvious" medical or mental health issue that poses a risk to themselves. Moreover, and in arrests for all non-110-6.1 charges, amended Section 109-1 accords police officers unfettered discretion to release an arrestee on a summons. But in no case, can the arrestee be detained by the court. Clearly, the delegation of an act where judicial discretion is so obviously vital and so clearly within the province of the judiciary is an unconstitutional separation of powers violation.

**III. Public Act 101-652 Violates the Illinois Constitution's Bail Provisions**

Public Act 101-652 violates the Illinois Constitution's bail provisions set forth in Article 1 Section 9 and Section 8.1 on numerous fronts. *First*, it improperly replaces the offenses for which an individual is exempt from bail and thereby alters the standards set forth in the Constitution for detaining a defendant. *Second,* in explicitly abolishing monetary bail, the Act contravenes the language of Sections 9 and 8.1, both of which pertain to the imposition of monetary bail. *Third*, the elimination of monetary bail impinges upon and contravenes the Crime Victim Bill of Rights set forth in Section 8.1. Finally, in abolishing monetary bail, the General Assembly improperly amended the Illinois Constitution without adhering to the settled procedures for doing so set forth in Article XIV, Section 2.

**A. Public Act 101-652 Improperly Replaces the Standards for Detaining a Defendant.**

Article I, Section 9 of the Illinois Constitution expressly states that "[a]ll persons shall be bailable by sufficient sureties," subject to specific, delineated offenses:

> All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed

> by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender - would pose a real and present threat to the physical safety of any person. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it. Any costs accruing to a unit of local government as a result of the denial of bail pursuant to the 1986 Amendment to this Section shall be reimbursed by the State to the unit of local government. Ill. Const. art. I, §9.

In express contravention of the above constitutional provision, Public Act 101-652, in amended Section 110-6.1, limits the court's authority to hold defendants who have committed a felony offense for which a sentence of imprisonment must be imposed.

As the history of this provision demonstrates, judges are to be granted *more* authority, not less, in determining whether to detain a given individual. Article I, Section 9 has been amended twice by voters to *expand* the categories of offenders who may be denied bail based on a judge's determination of dangerousness. The provision was amended in 1982 to expand the bailable offense exceptions to include individuals who had committed crimes that carried a sentence of life imprisonment. It was again amended in 1986, this time to add a bailable offense exception for those facing certain felony charges. Miller, David R. *1970 Illinois Constitution Annotated for Legislators*, p. 10 (4th ed. Illinois Legislative Research Unit, Springfield, Ill. 2005). The purpose of these expanded categories of bailable exceptions was to protect the public and allow the court to detain in those cases where strictly complying with the court process is most important (*i.e.,* capital offenses and those where the defendant will be sentenced to the Illinois Department of Corrections upon conviction). *Bailey*, 167 Ill.2d at 240 (recognizing need "to achieve an appropriate balance between the right of an accused to be free on bail pending trial and the right of the public to be protected"). *See also Gendron*, 34 Ill.2d at 625 (purpose of constitutional provision is to give the accused liberty until proved guilty but have some assurance that he will appear for trial). By requiring the release of certain defendants even where the Illinois Constitution expressly provides otherwise, the General Assembly has essentially rewritten this section of the

Constitution. Indeed, as now written Section 110-6.1 is both overinclusive and underinclusive. It both divests the courts of the ability to detain individuals they would otherwise have the authority and discretion to retain under Article 9, while requiring detention of other individuals who would *not* otherwise be detainable under this provision–such as, for example, individuals charged with misdemeanor domestic battery. *See* 725 ILCS 5/110-6.1.

Further, in mandating how the courts must rule on pre-trial detention and release, Public Act 101-652 directly contradicts the plain language of the Illinois Constitution which provides that a person may be denied bail "when the court, after a hearing, 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. (emph. added). The Act replaces this standard, instead requiring the court to find the offender poses a "specific, imminent threat of serious physical harm to an ***identifiable person*** or persons" (emph. added). *See also* §110-6.1(a)(6) (threat to the physical safety of any ***specifically identifiable*** person or persons); 110-6.1(d)(1) (The State's petition must include the identity of the ***specific person*** or persons); 110-6.1(e)(2) (threat to the safety of a ***specific, identifiable*** person or persons) (emph. added); §110-2 (presumption that all arrestees are "entitled to release on personal recognizance" except, *inter alia*, when an arrestee "poses a ***specific***, real and present threat to a person") (emph. added); *see also* 725 ILCS 110-5(a)(4) (requiring **"*specific*"** real and present threat) (emph. added).

*People v. Bailey*, *supra,* demonstrates Public Act 101-652's unconstitutional changes to the bail system. In *Bailey*, the defendant challenged the constitutionally of 725 ILCS 5/110-6.3, which allowed a court to deny bail in stalking cases. 167 Ill. 2d at 237. In upholding the statute, the Supreme Court concluded that section 110-6.3 merely ***codified*** the inherent authority of courts to deny bail. *Id*. at 239. Because 110-6.3 did not conflict with Article I, Section 9 of the Illinois

Constitution, but rather codified the court's inherent authority, it survived the constitutional challenge. *Id*. at 240. Here, in contrast, Public Act 101-652 does not codify the powers the court possesses under the bail provision of the Illinois Constitution, but instead limits the court's inherent authority. Because those conditions added by the General Assembly usurp the courts' authority to set bail under the Illinois Constitution, they are invalid as a matter of law.

### B. Public Act 101-652's Abolition of Monetary Bail Violates Article 1, Section 9 and Article I, Section 8.1 of the Illinois Constitution

In abolishing monetary bail, Public Act 101-652 violates Sections 9 and 8.1 in Article I of the Illinois Constitution. *See* Public Act 101-652 §10–255 (creating 725 ILCS 5/110-1.5, *inter alia*, abolishing monetary bail). As noted, the Illinois Constitution provides that, "all persons are bailable by sufficient sureties." At the time the 1970 Constitution was adopted, Black's Law Dictionary defined a surety as: "[o]ne who undertakes to pay money or to do any other act in event that his principal fails therein." *Black's Law Dictionary*, p. 1611 (West Revised Fourth Edition 1968). This definition, contemporaneous with the adoption of the 1970 Illinois Constitution, demonstrates the understanding that a surety in the context of bail refers to a monetary amount, or at the very least, that the promise, obligation, or duty, must ultimately be backed or secured by a monetary amount. Another definition is "[o]ne bound with his principal for the payment of a sum of money or for the performance of some duty or promise and who is entitled to be indemnified by some one who ought to have paid or performed if payment or performance be enforced against him." *Id.*

This understanding of "surety" as involving a monetary sum is reinforced by the Victim's Bill of Rights provision in Section 8.1, which expressly refers to "[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(emph. added). The undeniable implication of these provisions is that the Illinois Constitution interprets bail, at its core, to include a monetary amount that, though it may take different forms, cannot be abolished altogether without running afoul of the Constitution. Because the Act expressly abolishes monetary bail, it contravenes the Illinois Constitution.

### C. In Abolishing Monetary Bail, Public Act 101-652 Violates the Illinois Constitution's Crime Victim's Bill of Rights in Article 1, Section 8.1

The Crime Victim's Bill of Rights as enshrined in Article I, Section 8.1 of the Illinois Constitution is an amendment that sets out the rights of victims of crime in Illinois. As the titles of the Amendment and the Act suggest, their drafters intended them to serve "as a shield to protect the rights of victims." *People v. Richardson*, 196 Ill.2d 225, 237 (2001), discussing Ill. Const. art. I, §8.1. By preventing the court from effectuating the constitutionally mandated safety of the victims and their families, Public Act 101-652 vitiates its provisions.

Section 8.1(a)(9) of the Illinois Constitution explicitly provides that "the safety of the victim and the victim's family" must be considered "in denying or fixing the amount of bail, determining whether to release the defendant, and setting conditions of release after arrest and conviction." In eliminating bail, Public Act 101-652 likewise eliminates the discretion provided to the courts under the Crime Victims Bill of Rights to protect victims and their families. Public Act 101-652 leaves courts with no "amount of bail" to fix and confines the court to legislatively enacted standards for detention. The constitutional requirement of bail is meant to help ensure victims' safety, the defendant's compliance with the terms of release, and the defendant's appearance in court.

Public Act 101-652 also deprives the court of its constitutional duty to ensure a victim is "free from harassment, intimidation, and abuse throughout the justice process in all cases" and to "be reasonably protected from the accused throughout the criminal justice process." Ill. Const. art. I, §8.1(a)(1) and (a)(8). In all cases that do not involve a §110-6.1 detention, the court ***must*** release

the defendant, regardless of whether it finds that no combination of conditions will be sufficient to protect the victim from "harassment or intimidation" or other danger. Under the current system, the court considers information provided by the State's Attorney's Office and pretrial services concerning the alleged crime and criminal history which may be used as basis for setting bail; the court assesses information from the State's Attorney's Office regarding the safety needs of victims and their families during pre-trial proceedings; often asks for recommendations on bail; has a significant role in seeking the modification of a defendant's bail; and conducts hearings on the source of money used to post defendant's bond. 725 ILCS 5/110-5; 725 ILCS 5/110-6 (2022). None of this will be considered under Public Act 101-652.

Under Public Act 101-652, a "defendant may be released on his or her own recognizance upon signature" and a court is prohibited from ordering monetary bail, except under certain interstate agreements. 725 ILCS 5/110-1.5; 725 ILCS 5/110-2 (effective Jan. 1, 2023). Moreover, as discussed *supra*, the court cannot issue a warrant when a defendant fails to appear or violates conditions of bond. *See* 725 ILCS 5/110-6, as amended by Public Act 101-652. Instead, the court must issue a rule to show cause along with a summons to be served upon the defendant to try and arrange for the defendant's appearance in court, and a defendant's "failure to appear shall not be recorded in the court file until the defendant fails to appear at the hearing to show cause." 725 ILCS 5/110-3 (effective Jan. 1, 2023). All of this impairs the court's ability to ensure the safety of the victim and victim's family between the time the defendant fails to appear in court and the rule to show cause hearing, in violation of the Crime Victim's Bill of Rights. The setting of an "amount of bail" and the accompanying discretion accorded the judge to ensure a defendant's appearance in court and for the protection of victims and their families has been stripped away in violation of the Illinois Constitution in violation of Article I, Section 8.1(a)(9).

### D. Public Act 101-652 Improperly Amends the Illinois Constitution in Contravention of the Procedures Set Forth in Article XIV, Section 2

Through the provisions discussed above, the General Assembly has illegitimately amended Article I, Sections 9 and 8.1 of the Illinois Constitution without adhering to the procedures for amending the Illinois Constitution expressly set forth in Article XIV, Section 2. For revisions through the General Assembly, amendments must be "approved by the vote of three-fifths of the members elected to each house" and "shall be submitted to the electors at the general election." *Id*. A proposed amendment only becomes effective "if approved by either three-fifths of those voting on the question or a majority of those voting in the election." *Id*.

None of this occurred. Instead, the General Assembly bypassed the procedures in the Constitution and passed Public Act 101-652 on January 13, 2021, with a rushed vote of 32-23 in the Senate and 60-50 in the House–not even satisfying the three-fifths majority vote required for submission of a proposed amendment to the electors. In contrast, the People of Illinois have twice amended the Bail provision of Ill. Const. art. I, §9 by way of referendum, demonstrating what can and should have been done here. The General Assembly has, even in the last few years proposed unrelated constitutional amendments that have been placed on statewide ballots. By abolishing that which has been explicitly set out in the Constitution, without following the procedures for amendment of the Constitution, the Illinois General Assembly violated the Constitution, and the resulting legislation which effectively amends the Illinois Constitution is invalid.

## 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)

The legislature, in enacting Public Act 101-652, violated the "three readings rule" of the Illinois Constitution. Article IV, section 8(d), of the Illinois Constitution of 1970 provides that "[a] bill shall be read by title on three different days in each house." Ill. Const. 1970, art. IV, § 8(d);

*see also Friends of Parks v. Chicago Park Dist.*, 203 Ill.2d 312, 328 (2003). On January 13, 2021, newly constituted HB 3653, which would become Public Act 101-652, received both a second and third reading on the same day in the Illinois Senate in direct contravention of the Constitution. *See generally,* Plaintiffs' Ex. 5. The 764-page Senate Floor Amendment No. 2, which would replace the contents of HB 3653 and become Public Act 101-652, was adopted in the Senate that very same day. *Id.*

In *Giebelhausen v. Daley*, 407 Ill. 25, 48 (1950), our Supreme Court held that the "complete substitution of a new bill under the original number, dealing with a subject which was not akin or closely allied to the original bill, and which was not read three times in each House, after it has been so altered" was a "clear violation of" a similar three-readings rule in the 1870 Constitution. *See* Ill. Const. 1870, art. IV, §13 ("Every bill shall be read at large on three different days, in each house…"). Although the Supreme Court has held that judicial challenges to legislation under the 1970 Constitution's three-readings rule are foreclosed by the enrolled-bill doctrine, *Geja's Cafe v. Metropolitan Pier & Exposition Auth.*, 153 Ill.2d 239, 258-60 (1992), Plaintiffs submit that the passage of Public Act 101-652 so clearly violates the three readings rule that it is time for the Supreme Court to revisit the doctrine.

The enrolled bill "doctrine flows out of the language in Article IV, § 8(d), which says '[t]he Speaker of the House of Representatives and the President of the Senate shall sign each bill that passes both houses to certify that the procedural requirements for passage have been met.'" *Id.* at 258-59 (*quoting* Ill. Const. 1970, art. IV, § 8(d)). Under this doctrine, once the Speaker of the House of Representatives and the President of the Senate certify that the procedural requirements for passing a bill have been met, a bill is conclusively presumed to have met all procedural requirements for passage. *Friends of Parks,* 203 Ill.2d at 328; *Doe,* 2020 IL App (1st) at ¶54.

Although the Supreme Court applied the doctrine in *Friends of Parks*, it pointed out that it has repeatedly noted "that the legislature had shown remarkably poor self-discipline in policing itself in regard to the three-readings requirement." *Id*. (citing *Geja's Cafe*, 153 Ill.2d at 260). The record below in that case was not "sufficiently developed" to demonstrate poor self-discipline, but the Supreme Court, "ever mindful of its duty to enforce the constitution of this state," took "the opportunity to urge the legislature to follow the three-readings rule." *Id*. The court admonished that "[w]hile separation of powers concerns militate in favor of the enrolled-bill doctrine," its "responsibility to ensure obedience to the constitution remains an equally important concern." *Id*. (citing *Cutinello v. Whitley*, 161 Ill.2d 409, 425 (1994)). For this reason, the Court "reserve[d] the right to revisit" the enrolled-bill doctrine if the legislature's noncompliance persists. *Geja's Café,* 153 Ill.2d at 260. Indeed, the Supreme Court has granted leave to appeal in a case raising this precise issue. *Doe v. Lyft, Inc*., 2020 IL App (1st) 191328, ¶53, app. allowed (No. 126605 1/27/21).

Like the plaintiff in *Doe*, Plaintiffs recognize that this Court is bound to reject a three-readings rule challenge under the enrolled-bill doctrine, but it is time to abandon the doctrine, and Plaintiffs here present the issue to preserve it for further review by the Supreme Court. *Doe,* 2020 IL App (1st) at ¶55. The record here clearly demonstrates a patent violation of the three readings rule. The shell bill that was HB 3653 as it was introduced in the House on February 15, 2019, amounting to seven pages, and affecting a single statute, was entirely replaced January 13, 2021, by Senate Floor Amendment No. 2, constituting 764 pages. *See* Plaintiffs' Exs. 1 & 8. The 7-page shell bill received three readings in the House and two readings in the Senate. *See* Plaintiffs' Exs. 2-4. On the date of the adoption of Senate Floor Amendment No. 2, the entirely new and expanded, 764-page HB 3653 was first returned for second reading status, Senate Floor Amendment No. 2 was passed by

voice vote, and then the bill was given a third reading—all in succession on the same day. *See* Plaintiffs' Exs. 5 & 8.

Senate Floor Amendment No. 2 encompassed multiple subjects that cannot be akin or closely allied to the 7-page original shell of HB 3653, which Senate Floor Amendment No. 2 replaced in its entirety. *See* Plaintiffs' Exs. 1 & 8. Therefore, the proceedings in the Senate violated Article IV, section 8(d), of the Illinois Constitution of 1970. *Giebelhausen,* 407 Ill. at 48. *See also Commentary, The Criminal Justice Bill Shows How Illinois Lawmakers Avoid Transparency to Pass Bad Policies*, DiVito, G., Chicago Tribune February 14, 2022 (retired Appellate Court Justice Gino DiVito explaining how Public Act 101-652 violated the Three-Readings and Single Subject requirements).

The General Assembly's "remarkably poor self-discipline in policing itself" with respect to the three readings rule in enacting Public Act 101-652 warrants revisiting the enrolled bill doctrine. The evidence presented here clearly shows that the certification filed is not supported by the record. This doctrine is no longer worthy of application and should be abandoned as set out in *Doe,* 2020 IL App (1st) at ¶ 54, and Public Act 101-652 should be stricken because its passage violated the Illinois Constitution's three-readings clause.

## V. Public Act 101-652 Is Unconstitutionally Vague

A well-established tenet of the constitutional guarantees of due process is the requirement that the proscriptions of a criminal statute be clearly defined. *People v. Haywood*, 118 Ill.2d 263, 269 (1987), citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The "void-for-vagueness" doctrine guarantees that ordinary people have "fair notice" of the conduct a statute proscribes. *Papachristou v Jacksonville*, 405 U.S. 156,162 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern

the actions of police officers, prosecutors, juries, and judges. *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). When the terms of a statute "are so indefinite that 'persons of common intelligence must necessarily guess at its meaning and differ as to its application,'" it is unconstitutionally vague. *People v. Maness*, 191 Ill.2d 478, 484 (2000), quoting *Polyvend, Inc. v. Puckorius*, 77 Ill.2d 287, 299-300 (1979). The innumerable unclear and ill-defined provisions, as demonstrated by continuing attempts to construe the interweaving and confusing language still under way by lawmakers and those charged with administering and applying this behemoth piece of legislation demonstrate the profound deficiencies that render Public Act 101-652 void for vagueness.

Public Act 101-652 also imposes new procedural requirements on the judiciary. 725 ILCS 5/109-1(f) states that at a hearing at which conditions of pretrial release are determined, the person charged shall be present in person rather than by video phone or any other form of electronic communication, unless the physical health and safety of the person would be endangered by appearing in court or the accused waives the right to be present in person. However, 725 ILCS 5/109-1(a) states in pertinent part: "Whenever a person arrested…is required to be taken before a judge… a charge may be filed… by way of a two-way closed circuit television system except that a hearing to deny pretrial release may not be conducted by way of closed-circuit television." Section 109-1(a) is clearly contradicting subsection 1(f). The Administrative Office of the Illinois Courts has been reviewing Public Act 101-652 for months to try and provide guidance for its implementation. Yet no guidance has been given on how the judiciary should reconcile these two conflicting sections. A statute lacking minimal standards to guide law enforcement officers is unconstitutionally vague. *Chicago v. Morales,* 527 US 41 (1999).

Public Act 101-652 also imposes new procedural requirements on peace officers, state's attorneys, and judges without articulating how they may be satisfied. For example, persons held

"in police custody" now have the to right make three phone calls and the right to communicate with family members or an attorney within three hours, but no later than three hours after arrival at the first place of detention. 725 ILCS 5/103-3.5. What if a person makes three phone calls but no one answers them; are they entitled to three more phone calls? If transferred to another place of detention, do they have the right to an additional three more phone calls? The Act offers no guidance.

Illustrating the legislation's profound internal inconsistencies and ambiguities, the Pretrial Practices Oversight Board has been unable to articulate uniform guidelines to comply with this Act despite meeting monthly since July 2021. Multiple committees, including the Pretrial Practices Oversight Board working with the Administrative Office of Illinois Courts, are currently working to address questions raised by the Act's provisions concerning pretrial release, speedy trials, and other procedural rules, and attempting to determine how they can be administered.

Tellingly, the materials provided by the Illinois Supreme Court Pretrial Implementation Task Force expressly refer to the many inconsistencies throughout the Act; each of its "Draft Flowcharts and Considerations" set forth a variety of "interpretation considerations" that identify inconsistencies in, and differing interpretations of, the Act's statutory language. *See https://www.illinoiscourts.gov/courts/additional-resources/pretrial-implementation-task-force.* For example, the chart discussing Release by Citation notes that there is a "question of interpretation whether this language excludes traffic offenses that are Class A misdemeanor offenses," and that "[[t]here are stakeholders who interpret this as excluding traffic offenses that are Class A Misdemeanors." That chart also identifies a "[q]uestion of interpretation whether the person must appear in court within 21 days, or the court date must be scheduled within 21 days of

arrest." The Detention Hearing chart, which is replete with "interpretation considerations," includes among them the following:

"Note that Section 110-6.1(g) lays out a long list of the non-inclusive factors the court may consider when deciding whether the dangerousness standard is met. Note also that the dangerousness standard and willful flight standard appear to be separate considerations in earlier subsections. But in this burden of proof standard, they appear conflated. As such, based on this subsection, it seems that the real and present threat must also be demonstrated when relying on the willful flight standard." *Id.*

Due process requires that the proscriptions of a criminal statute be clearly defined. *People v. Patterson*, 2018 Ill. App. (1st) 160610, ¶ 24. 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). Public Act 101-652, replete with inconsistent and conflicting provisions, undefined terms, ambiguous language, and amorphous standards rendering it impracticable, if not impossible, to construe let alone apply, is unconstitutionally vague.

## CONCLUSION

Because both the substance of Public Act 101-652 and the process through which it was enacted are in flagrant violation of the Illinois Constitution, this statute should be stricken as void in its entirety.

WHEREFORE, the Consolidated Plaintiffs, respectfully request that this Court: (a) Grant their Motion for Summary Judgment; (b) Declare that Public Act 101-652 is unconstitutional; (c) Enter an order restraining the enforcement of Public Act 101-652; and (d) Grant any additional relief as this Court deems just and appropriate.

By: *James Rowe*

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