Case No. 113676

IN THE
SUPREME COURT OF ILLINOIS

MICHAEL M. MCFATRIDGE and THE COUNTY OF EDGAR, Plaintiffs-Respondents, v. LISA M. MADIGAN, Attorney General, Defendant-Appellant.	Appeal from the Appellate Court, Fourth District, No. 4-10-0936 There on Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois, No. 10 MR 530 The Honorable Patrick Londrigan, Judge Presiding

BRIEF OF THE ILLINOIS CAMPAIGN FOR POLITICAL REFORM AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF INTEREST

The Illinois Campaign for Political Reform ("ICPR") is a non-profit and non-partisan public interest organization that conducts research and advocates reforms to promote public participation and to encourage integrity, accountability, and transparency in both government and the election process. Founded in 1997 by former U.S. Sen. Paul Simon (D-IL) and then-Lt. Gov. Bob Kustra (R-IL), ICPR facilitates bi-partisan dialogue around a range of reform issues in order to restore honest, open, and accountable government and re-invigorate public confidence and civic involvement. ICPR worked closely with the legislature to craft statutes in response to the corruption convictions of former governors George Ryan and Rod Blagojevich, and is in a unique position to assist this Court in understanding the effect of the government integrity and accountability issues at stake in this litigation.

SUMMARY OF ARGUMENT

If the lower court is correct in its interpretation of the State Employee Indemnification Act ("SEIA")—if indeed the Attorney General has no discretion to decline to pay for the defense of elected officials whom the Attorney General believes engaged in intentional, willful, or wanton misconduct—then SEIA is unconstitutional because it requires the expenditure of public funds for private purposes and is in tension with the constitutional role of the Attorney General to direct litigation involving public funds. ICPR respectfully submits that the only sensible reading of SEIA's text, and the only reading in concert with the structure and purpose of SEIA, rests significant discretion in the Office of the Attorney General.

ARGUMENT

This case is about protection of the public fisc and accountability to the taxpayers of Illinois. Simply put, under this State's constitution and under any theory of responsible civic government, the taxpayers cannot be required to pay the considerable costs of legal defense for civil servants who, after reasonable and diligent inquiry, are found by the Office of the Attorney General to have intentionally, willfully, or wantonly violated the law. SEIA provides an important check and balance to a system that would otherwise result in the automatic state-funded defense of civil servants who are accused of violating their duties and responsibilities to those very same taxpayers. The Attorney General has set forth the only textually honest reading of SEIA. Principles of constitutional avoidance mandate that this Court adopt the Attorney General's reading.

I. PUBLIC OFFICIALS HAVE AN ABSOLUTE DUTY TO SAFEGUARD THE PUBLIC FISC.

In Illinois, "[p]ublic funds, property or credit shall be used only for public purposes." Ill. Const. art. VIII, § 1(a). This constitutional provision reflects the decision of the people of Illinois—the principals in a constitutional democracy—that public funds belong to the public, not to the government officials—their agents—to whom such funds are entrusted. This principle is deeply-rooted in the American legal system. As this Court has recognized, "[i]t is a violation of the due process of law clause of the National and State constitutions to take a citizen's money from him under the guise of taxes for any other than a public purpose." *Chicago Motor Club v. Kinney*, 329 Ill. 120, 130 (1928). *See also Green v. Frazier*, 253 U.S. 233, 238 (1920) ("it has come to be settled that the authority of the States to tax does not include the right to impose taxes for merely private purposes"); Cal. Const. art. XVI § 6 ("nor shall [the legislature] have power to

make any gift or authorize the making of any gift, of any public money"); Neb. Const. art. XIII, § 3 ("[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation"); Wash. Const. art. VIII, § 7 ("[n]o county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation").

Because the contours of "public purpose" are often difficult to define, the Illinois General Assembly has wide latitude to determine what constitutes a public purpose. *See People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 355 (1972). However, in order to give effect to the Illinois Constitution—not its political branches—as the supreme law of the land, *see, e.g., Chicago Bar Ass'n v. Illinois State Bd. of Elections*, 161 Ill. 2d 502, 508 (1994), there must be meaningful limits to the General Assembly's discretion. If the lower court's interpretation of 5 ILCS 350/2(b) is correct—if indeed the State of Illinois must pay for the private legal defense of elected officials even if the Attorney General determines that the official has engaged in intentional, willful, or wanton misconduct—then the General Assembly has exceeded its constitutional authority by obligating public funds for the private benefit of elected officials.

The Fourth District postulated two possible legislative purposes: "to insulate partisan elected officials from potential withholding of representation or from arbitrary denial of payment for attorney fees when the opposite party is in control of those decisions" and to "provide special protection to elected State's Attorneys whose decisions to prosecute individuals must be able to be made without the threat of financial bankruptcy should they be sued." *McFatridge v. Madigan*, 962 N.E.2d 1113, 1121 (Ill. App. Ct. 4th Dist. 2011). The reasoning of the appellate court is flawed from the outset

because it rests on an overly broad and cynical premise—that partisan elected officials would withhold funds for the representation of a member of another party. Even if that cynical event were to come to pass, an interpretive doctrine that seeks to eliminate every conceivable evil would require all statutes to be read in the broadest possible way to eliminate all forms of potential evil. *See Chicago Nat. League Ball Club, Inc. v. Thompson*, 108 Ill. 2d 357, 367 (1985), *quoting Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 421-22 (1977) ("An entire remedial scheme will not be invalidated 'simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.'") And more specifically, neither of the purposes articulated by the Fourth District is a permissible "public purpose" under the Illinois Constitution for at least two reasons. First, defending against willful misconduct by politicians does not inure to the benefit of the people. Second, it is not in the public interest to minimize deterrence against unethical conduct by elected officials.

A. Defending against willful misconduct by elected officials does not inure to the benefit of the people.

Civil suits often follow political corruption. In such suits, the lower court's decision could require taxpayers to provide the necessary funds to defend elected officials removed from office *for the very acts that caused them to be removed from office*. *See McFatridge*, 962 N.E.2d at 1124-1125 (holding that the duty of the Attorney General to pay for the private defense of elected officials extends to officials *who no longer hold office*). Because the statute provides no mechanism to recoup funds if the factfinder determines that the elected official engaged in intentional, willful, or wanton misconduct, the lower court's decision effectively requires the taxpayers to fund the defense of the very acts that harmed the public in the first place.

Beyond the money expended without public benefit, defending elected officials against their own willful misconduct creates a moral hazard; that is, persons—in this case, elected officials—will be more likely to engage in misconduct because the costs of the misconduct will be borne by others. This is precisely why, as this Court has recognized "it is generally held that a contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as against public policy and courts will not enforce such a contract." *Dixon Distrib. Co. v. Hanover Ins. Co.*, 161 Ill. 2d 433, 446 (1994). While this Court has declined to follow the general consensus in the realm of private insurance contracts,[1] it is implausible to suggest that a regime creating moral hazards sufficient to render it unlawful in most jurisdictions can be said to benefit the citizens of Illinois. The Court has recognized this very concept in the context of criminal defense costs:

> Further, the purpose of indemnification, so as not to inhibit capable individuals from seeking public office, has no relevance in the context of the criminal conduct involved in this case. No official of public government should be encouraged to engage in criminal acts by the assurance that he will be able to pass defense costs on to the taxpayers of the community he was elected to serve. To the contrary, holding public officials personally liable for the expenses incurred in unsuccessfully defending charges of their criminal misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law.

Wright v. City of Danville, 174 Ill. 2d 391, 403 (1996) (internal citations omitted). The same logic applies in civil cases that involve intentional, willful, or wanton misconduct.

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[1] *Dixon*'s holding does not apply to statutory indemnification regimes. *See Wright v. City of Danville*, 174 Ill. 2d 391, 400 (1996). The *Wright* Court did not decide the public policy issue with respect to statutory indemnification regimes.

B. It is not in the public interest to minimize deterrence of unethical conduct by elected officials.

The court below hypothesized that the General Assembly intended to "provide special protection to elected State's Attorneys whose decisions to prosecute individuals must be able to be made without the threat of financial bankruptcy should they be sued." *McFatridge*, 962 N.E.2d at 1121. However, the court did not merely hold that State's Attorneys are entitled to attorney's fees as they are incurred. The court held that State's Attorneys *whom the Attorney General believes committed intentional, willful, or wanton misconduct* are entitled to attorney's fees as they are incurred. This Court has stated in the criminal context that "[t]he types of individuals who are drawn to [] corrupt practices should not be given any incentive to seek public office." *Wright*, 174 Ill. 2d at 403. In the same vein (and contrary to the Fourth District's reasoning), individuals who are drawn to corrupt practices should be subject to higher, not lower, levels of deterrence.

Public officials are appropriately held to high standards. In a liberal democratic government in which all of the people, not an oligarchic subset thereof, are the true principals, the public is entitled to expect that their elected officials are of the highest moral character—or, at the very least, law-abiding. Unethical behavior injures our democratic form of government and effectively converts public money and public authority to the private purposes of unscrupulous government officials. Accordingly, public officials are subject to moral and legal incentives to induce ethical behavior and are properly held to the duties equivalent to those of fiduciaries. *See, e.g., People ex rel. Daley v. Warren Motors, Inc.*, 114 Ill. 2d 305, 314-315 (1986) ("[i]f a fiduciary acquires title to property by virtue of that relation, equity will regard him as a trustee of the legal title and the fiduciary responsibility of a public official cannot be considered less than

that of a private person") (internal citations omitted); *Chicago Park Dist. v. Kenroy, Inc.*, 78 Ill. 2d 555, 562 (1980) ("There can be no doubt that, as an alderman, Wigoda occupied a fiduciary relationship to the City"); *People v. Savaiano*, 66 Ill. 2d 7, 15 (1976) ("[public] officials are held in public trust and owe a fiduciary duty to the people they represent.") It follows that it is not a proper "public purpose" within the meaning of the Illinois Constitution to encourage public officials who will fall short of this standard to hold public office by offering state-funded defenses against willful misconduct.

II. STRONG POLICY REASONS SUPPORT A BROADER INTERPRETATION OF THE ATTORNEY GENERAL'S POWERS UNDER SEIA

The Fourth District's construction of the SEIA leaves little discretion for the Attorney General to refuse to advance fees for civil servants who have engaged in willful misconduct while in office or even while executing their duties. *See McFatridge*, 962 N.E.2d at 1121 ("paragraph [2(b)] provides elected officials with the right to employ the counsel of their choosing and limits the Attorney General's discretion in this regard to whether the elected official's choice of counsel and the attorney fees are reasonable."). That narrow construction raises two significant policy issues. First, it is in tension with the Attorney General's constitutionally-prescribed role as the State's chief legal officer. See Ill. Const., art. V, § 15 ("The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.") Principal among the Attorney General's powers is the right to initiate and control litigation affecting public funds. *See Cnty. of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 478 (2005); *Lyons v. Ryan*, 201 Ill. 2d 529, 539 (2002).

Second, the Fourth District's limitation on the Attorney General's ability to exercise her discretion means in practice that there is no "gatekeeper"—or check—on

whether a private defense should be funded in the first instance. To be sure, the Fourth District would require the Attorney General to approve the selection of private counsel and the reasonableness of fees, but these are modest restrictions that offer the taxpayer absolutely no mechanism for refusal of a defense in cases where it is clear a public official's malfeasance in office is inimical to the public's interest. Such a fundamental precaution with respect to initiating funding in the first instance is present in every sensible budgetary scheme, public or private, and its elimination is cause for great concern.

Further, the Fourth District's primary reason for adopting its construction is plainly insufficient to warrant such policy risks. The Fourth District offers the cynical suggestion that the legislature *might* have feared that the Attorney General would withhold or arbitrarily deny payment for attorney fees if the Attorney General belongs to a different political party than does the elected official-defendant. *See McFatridge*, 962 N.E.2d at 1121. Yet this conclusion finds no support in the legislative history and, in any event, as explained above, represents an improper interpretive methodology. This purported fear—whether or not in has a factual basis—does not give the legislature authority *ex ante* to deprive the Attorney General of her constitutional right to direct litigation in which the state is an interested party. As this Court stated in *Rifkin*: "the legislature may add to [the Attorney General's] powers, but it cannot reduce the Attorney General's common law authority in directing the legal affairs of the state." 215 Ill. 2d at 478. If elected officials wish to retain absolute control over their litigation, they must pay for their own defenses and must pay the resulting judgments against them. If the

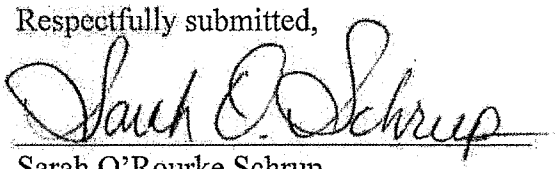
taxpayers of Illinois are footing the bill, then their chief legal officer must not be written out of the decision making-process entirely.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the appellate court and reinstate the trial court's order granting the Attorney General's motion to dismiss the *mandamus* complaint.

Dated: August 27, 2012

Respectfully submitted,



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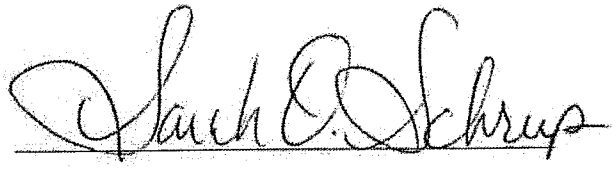
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 9 pages.



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I, Sarah Schrup, hereby certify that on August 27, 2012 a true and correct copy of the foregoing BRIEF OF THE ILLINOIS CAMPAIGN FOR POLITICAL REFORM AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER was served upon all counsel of record listed below by United States mail.

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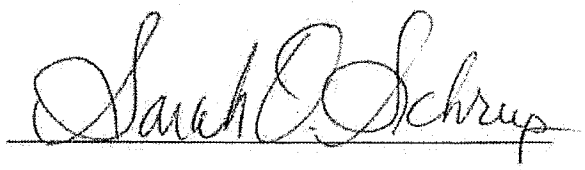

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