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CASE NOTE

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FOREWORD

It is my honor to present the 2025 Hiram H. Lesar Survey of Illinois law. The *Southern Illinois University School of Law Journal* has published the Survey edition annually since 1987 and has striven to provide legal professionals with recent developments, practical guidance, and thorough analyses of Illinois law.

I would like to thank all of those individuals who helped in the creation of this issue. First, I would like to thank our wonderful group of authors who contributed articles to this issue. Because of their time and effort, this issue contains a variety of unique and informative articles on a wide range of topics and practice areas. I also want to thank all of the journal staff and article editors for their tireless work in producing this issue. This year, our journal experienced exceptional growth and progress, and I am confident this growth will continue with the next board of editors. I would also like to give a special acknowledgment and thanks to my successor, Nicholas Stetler, who assisted me in the final steps of the production of this issue. I wish him the best as he steps into this position and works to produce the next Summer Survey, which will be an especially significant issue as it will be the 50th edition of the Hiram H. Lesar Survey of Illinois Law.

Thank you to the Illinois State Bar Association for their support of the SIU Law Journal and thank you to all those who read or otherwise support the issues we create. The Hiram H. Lesar Survey of Illinois Law is a great resource for the legal community and is made possible by your support.

Emily Buikema
Editor-in-Chief
Survey of Illinois Law
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In 2017, the Illinois Supreme Court mandated electronic filing (e-filing) in civil cases and adopted Illinois Supreme Court Rule 9 to implement the mandate, fifteen years after the court initially authorized e-filing. Since then, the court has made multiple amendments to Rule 9 and has made other efforts to implement e-filing across Illinois. Despite the court's efforts, the rule has fostered litigation and confusion over when a document is timely and how to seek relief when an e-filing error renders a document untimely. The goal of this Survey is to provide clarity for practitioners on e-filing by examining Rule 9's text, its history, case law interpreting and analyzing the timeliness of e-filed documents, and the solutions that have been proposed to address recurring issues.

Although every applicant for admission to the Illinois bar is required to demonstrate good moral character and general fitness to be licensed to practice law, few lawyers and would-be lawyers are familiar with what constitutes proof of character and fitness or the procedures by which such proof is to be made. This Article offers a general introduction to the procedural form and substantive elements of determinations of character and fitness under Illinois Supreme Court Rules. The subjects discussed are: the character and fitness process as a litigated proceeding; the relevant matters to be proved; the four levels of evidentiary review, and how the procedures at each level affect substance and the burden of proof; the formal Rule 9 hearing and the role of counsel appointed to present matters adverse to the applicant; post-hearing matters, including review by the Illinois Supreme Court; and the special problem of considering disability when determining character and fitness. The Article concludes with a discussion of the 2000 decision, *In re Krule*, the Supreme Court's last opinion on character and fitness.

Illinois' Interest Act provides for prejudgment interest on money due on an "instrument of writing" like an insurance policy. Although not in the statute's language, Illinois courts have long applied a common law rule that restricts awards of such interest to cases in which the amount owed is easily calculable. That easily calculable requirement has figured prominently in defeating interest awards in cases where insurers have breached their policy obligations to defend lawsuits against policyholders. In several such cases, courts have applied the

CASE NOTE

The ability of Illinois municipalities to enforce municipal ordinances is now clearer after the Illinois Supreme Court's decision in *City of Rock Falls v. Aims Industrial Services, LLC*. This case answers the question as to whether a trial court has discretion to balance the equities in deciding whether or not to grant a municipality's request for injunctive relief when expressly authorized by an ordinance. This Case Note summarizes the procedural history of *City of Rock Falls v. Aims Industrial Services, LLC*, discusses the competing cases representing a circuit split prior to the resolution of this case, analyzes the decision by the Illinois Supreme Court, and finally highlights the impact of this case and its remaining issues. *City of Rock Falls v. Aims Industrial Services, LLC* helps to ensure that municipalities are able to carry out their essential function of ordinance enforcement.

SURVEY OF ILLINOIS LAW: ELECTRONIC FILING AND ILLINOIS SUPREME COURT RULE 9

By: Emmet C. Fairfield*

INTRODUCTION

In September 2002, the Illinois Supreme Court authorized electronic filing (e-filing) on a pilot basis.[1] Fifteen years later, the court mandated e-filing in civil cases and adopted Illinois Supreme Court Rule 9 to implement the mandate.[2] This Survey will examine Rule 9's text, its history, case law interpreting and analyzing the timeliness of e-filed documents, and the solutions that have been proposed to address recurring issues.[3]

I. RULE 9'S TEXT: PAST TO PRESENT

A. Rule 9's Genesis

In September 2002, the supreme court entered an order authorizing e-filing on a pilot basis.[4] The e-filing pilot program was "intended to reduce by tens of thousands of pages the number of paper documents that are filed in [the Illinois] court system each year."[5] The end goal was "to make [the]

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1 ILL. S. CT. M.R. 18368 ¶ 2 (2016) (explaining that the Illinois Supreme Court authorized electronic filing on a pilot basis in September 2002).

2 *Id.*

3 After this article was ready for publication, the Illinois Supreme Court twice amended Rule 9. The first amendment overhauled Rule 9(d), which both eliminated the good-cause requirement that has caused much of the litigation concerning Rule 9 and seemingly resolved the jurisdictional issues that are discussed infra. ILL. S. CT. M.R. 3140 (May 21, 2025) (amending Illinois Supreme Court Rule 9(d)). The second amendment provides that no court can modify the Electronic Filing Rejection Standards made effective by Rule 9(f) without the Illinois Supreme Court's approval. ILL. S. CT. M.R. 3140 (June 3, 2025) (amending Illinois Supreme Court Rule 9(f)). This Survey therefore reflects the state of the law immediately before the 2025 amendments.

4 *Id.*

5 *VC & M v. Andrews*, 2013 IL 114445, ¶ 14.

courts more efficient and easier to use" and "to save costs both for litigants and the court system."[6]

The majority of courts, however, were slow to adopt e-filing, prompting the Illinois Supreme Court to step in.[7] It approved e-filing standards, ended the pilot status of civil case e-filing, and authorized permanent e-filing upon request by a circuit court and approval by the Illinois Supreme Court.[8] In 2014, the court further amended the e-filing standards to include criminal cases and traffic citations,[9] with the goal of achieving statewide, standardized e-filing.[10]

Because of the slow progress, the Illinois Supreme Court tasked two committees with studying the reasons for the delays and making recommendations for improving e-filing implementation.[11] Specifically, in June 2013, the technology committee of the Conference of Chief Circuit Judges reported "that statewide e-filing efforts [would] develop if courts [were] mandated to e-file and follow a common set of standards for data packaging and organization."[12]

In December 2015, the Illinois Supreme Court's e-Business Policy Advisory Board and Technical Committee (e-Business Policy Board) (which was created in 2014) recommended that e-filing in civil cases be mandated statewide.[13] Specifically, it advised the court to:

> (1) set a date certain for the implementation of mandatory e-filing of civil cases for all counties in the state; (2) require a single e-filing manager (EFM) to integrate e-filed documents into the case management systems of all counties not presently approved to conduct e-filing; and, (3) allow counties currently approved for e-filing to continue with their current e-filing systems, including EFMs, until one year after the centralized EFM has been operational for all other counties in the state . . . .[14]

In spite of the court's efforts, by 2016, only 15 out of Illinois's 102 counties had received approval for e-filing.[15] Thus, the court made e-filing in civil cases mandatory and set deadlines for implementation: e-filing was to be required in the supreme and appellate courts by July 1, 2017, and in the

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6 *Id.*

7 ILL. S. CT. M.R. 18368 ¶¶ 2–3 ("[A]fter several years, only five counties were operating under the pilot program") (citing the *Electronic Filing Standards and Principles* document).

8 *Id.*

9 *Id.* at ¶ 3.

10 *Id.* at ¶ 8 (stating the "desired goal" was "statewide e-filing on civil matters").

11 *Id*. at ¶¶ 5–6 (tasking the Technology Committee of the Conference of Chief Circuit Judges and the newly created e-Business Policy Advisory Board with providing recommendations).

12 *Id.* at ¶ 5.

13 *Id.* at ¶¶ 6–7.

14 *Id.* at ¶ 7.

15 *Id.* at ¶ 3.

circuit courts by January 1, 2018.[16] In addition, the court mandated that all courts "provide designated space, necessary equipment, and technical support for self-represented litigants seeking to e-file documents during regular court hours."[17] It also directed trial courts to standardize records on appeal and transmit them to the respective reviewing court via the central EFM.[18]

B. History of Rule 9's Text

The Illinois Supreme Court adopted Rule 9, effective on July 1, 2017, to implement its directive of statewide mandatory e-filing in civil cases.[19] The court has amended the rule seven times in the past eight years.[20]

1. The Rule's Original Text

At its adoption, the rule stated as follows:

> (a) Electronic Filing Required. Unless exempt as provided in paragraph (c), all documents in civil cases shall be electronically filed with the clerk of court using an electronic filing system approved by the Supreme Court of Illinois.
> (b) Personal Identity Information. If filing a document that contains Social Security numbers as provided in Rule 15 or personal identity information as defined in Rules 138 or 364, the filer shall adhere to the procedures outlined in Rules 15, 138, and 364.
> (c) Exemptions. The following types of documents in civil cases are exempt from electronic filing:
>
> (1) Documents filed by a self-represented litigant incarcerated in a local jail or correctional facility at the time of filing;
> (2) Wills;
> (3) Documents filed under the Juvenile Court Act of 1987; and

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16 *Id.* at ¶ 9. Note that counties could seek an extension of the implementation date by petitioning the supreme court and showing good cause. Three counties, Cook, Greene, and Winnebago obtained extensions. *See* ILL. S. CT. M.R. 18368 (2017) (amending ILL. SUP. CT. M.R. 18368 (2016)) (three separate orders).

17 ILL. S. CT. M.R. 18368 ¶ 9 (2016).

18 *Id.*

19 ILL. S. CT. R. 9 (July 1, 2017).

20 ILL. S. CT. R. 9 (West 2024) (showing in version history amended Dec. 13, 2017, Dec. 12, 2018, Dec.19, 2019, Aug. 14, 2020, Feb. 4, 2022, Jan. 31, 2024, and June 12, 2024).

> (4) Documents in a specific case by court order, upon good cause shown.
>
> (d) Timely Filing. Unless a statute, rule, or court order requires that a document be filed by a certain time of day, a document is considered timely if submitted before midnight (in the court's time zone) on or before the date on which the document is due. A document submitted on a day when the clerk's office is not open for business will, unless rejected, be file stamped as filed on the next day the clerk's office is open for business. The filed documents shall be endorsed with the clerk's electronic file mark setting forth, at a minimum, the identification of the court, the clerk, the date, and the time of filing.
>
> (1) If a document is untimely due to any court approved electronic filing system technical failure, the filing party may seek appropriate relief from the court, upon good cause shown.
>
> (2) If a document is rejected by the clerk and is therefore untimely, the filing party may seek appropriate relief from the court, upon good cause shown.
>
> (e) Effective Date. This rule is effective July 1, 2017[,] for proceedings in the Supreme Court and the Appellate Court. For proceedings in the circuit court, this rule is effective January 1, 2018.[21]

2. Rule 9's Evolution

Within six months, the Illinois Supreme Court amended Rule 9(c).[22] Under this amendment, certain documents in specific cases could now be exempted from e-filing "upon good cause shown *by certification*" under section 1-109 of the Code of Civil Procedure (Code),[23] and the filer did not need prior court approval, although the court retained discretion to review

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21 ILL. S. CT. R. 9 (July 1, 2017).

22 ILL. S. CT. R. 9 (West 2024) (stating in Historical Notes that the Dec. 13, 2017, amendment rewrote 9(c)(4)).

23 ILL. S. CT. R. 9(c)(4) (Dec. 13, 2017) (emphasis added) (amending ILL. S. CT. R. 9 (July 1, 2017)); *see* 735 ILL. COMP. STAT. 5/1-109 (2016).

the certification and determine whether good cause was shown.[24] Further, the amendment refined the standard for good-cause exemptions:

> Good cause exists where a self-represented litigant is not able to e-file documents for the following reasons: no computer or Internet access in the home and travel represents a hardship; a disability, as defined by the Americans with Disabilities Act of 1990, that prevents e-filing; or a language barrier or low literacy (difficulty reading, writing, or speaking in English). Good cause also exists if the pleading is of a sensitive nature, such as a petition for an order of protection or civil no contact/stalking order.

A Certification for Exemption from E-filing shall be filed with the court—in person or by mail—and include a certification under section 1-109 of the Code . . .. The court shall provide, and parties shall be required to use, a standardized form expressly titled 'Certificate for Exemption From E-Filing' adopted by the Illinois Supreme Court Commission on Access to Justice. Judges retain discretion to determine whether good cause is shown. If the court determines that good cause is not shown, the court shall enter an order to that effect stating the specific reasons for the determination and ordering the litigant to e-file thereafter.

> Judges retain discretion to determine whether, under particular circumstances, good cause exists without the filing of a certificate, and the court shall enter an order to that effect.[25]

About a year later, the rule was amended again to reorganize the stated exemptions.[26] Specifically, a disability, as defined by the Americans with Disabilities Act of 1990,[27] that prevents e-filing was made a separate exemption and was no longer a basis for a good-cause exemption.

The rule was amended yet again, effective January 1, 2020, to restructure and renumber its provisions, inserting paragraph (e) as a separate section:

> The filer is responsible for the accuracy of data entered in an approved electronic filing system and the accuracy of the content of any document

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24 *Compare* ILL. S. CT. R. 9(c)(4) (Dec. 13, 2017), *with* ILL. S. CT. R. 9(c)(4) (July 1, 2017) (emphasis added) (exempting "[d]ocuments in a specific case *by court order* upon good cause shown"); *see* 5/1-109.

25 ILL. S. CT. R. 9(c)(4) (Dec. 13, 2017).

26 ILL. S. CT. R. 9 (2018) (amending ILL. S. CT. R. 9 (Dec. 13, 2017)).

27 ILL. S. CT. R. 9(c) (2018).

> submitted for electronic filing. The court and the clerk of court are not required to ensure the accuracy of such data and content.[28]

In August 2020, the Illinois Supreme Court reorganized and further modified Rule 9(c)'s good-cause exemption.[29] Under the revised rule, self-represented litigants could establish a good-cause exemption if they "trie[d] to e-file documents but [were] unable to complete the process and the necessary equipment and technical support for e-filing assistance is not available to the self-represented litigant."[30] Additionally, the amendment permitted self-represented litigants to submit Certificates for Exemption from E-Filing and accompanying documents by email if permitted by the local court, though the rule's preference remained with filing the certificate in person or by mail.[31]

The Illinois Supreme Court amended Rule 9 again in February 2022, [32] clarifying that "any person," including attorneys, were exempt from e-filing if the person has a disability that prevents e-filing.[33]

In January 2024, the court amended the rule once more, removing the preference for filing a Certification for Exemption in person or by mail.[34] Under the new rule, "A Certification for Exemption . . . shall be filed with the court—in person, by e-mail or by mail, or by third-party commercial carrier."[35]

3. The Rule's Latest Amendment and Its Current Text

In June 2024, the court adopted Rule 9's latest amendment.[36] It governs the clerks' rejection of documents submitted for e-filing, which was the result of a years' long effort to alleviate frustration and, more importantly, serious timeliness issues caused by the clerks' rejection of documents.[37] This amendment will be discussed in more detail later in this Survey.

In its current form, Rule 9 reads as follows:

> (a) Electronic Filing Required. Unless exempt as provided in paragraph (c), all documents in civil cases shall be electronically filed with the clerk of the court using an

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28 ILL. S. CT. R. 9(e) (Jan. 1, 2020) (amending ILL. S. CT. R. 9 (2018)).
29 ILL. S. CT. R. 9(c)(5) (Aug. 14, 2020) (amending ILL. S. CT. R. 9 (Jan. 1, 2020)).
30 ILL. S. CT. R. 9(c)(5)(iv) (Aug. 14, 2020).
31 ILL. S. CT. R. 9(c)(5) (Aug. 14, 2020).
32 ILL. S. CT. R. 9(c) (2022) (amending ILL. S. CT. R. 9 (Aug. 14, 2020)).
33 ILL. S. CT. R. 9(c)(4) (2022).
34 ILL. S. CT. R. 9(c) (Feb. 1, 2024) (amending ILL. S. CT. R. 9 (2022)).
35 *Id.*
36 ILL. S. CT. R. 9(f) (Sept. 1, 2024) (amending ILL. S. CT. R. 9 (Feb. 1, 2024)).
37 *Id.*

electronic filing system approved by the Supreme Court of Illinois.

(b) Personal Identity Information. If filing a document that contains Social Security numbers as provided in Rule 15 or personal identity information as defined in Rule 138 or 364, the filer shall adhere to the procedures outlined in Rules 15, 138, and 364.

(c) Exemptions. The following types of documents in civil cases are exempt from electronic filing:

(1) Documents filed by a self-represented litigant incarcerated in a local jail or correctional facility at the time of filing;

(2) Wills;

(3) Documents filed under the Juvenile Court Act of 1987

(4) Documents filed by any person, including an attorney or a self-represented litigant, with a disability as defined by the Americans with Disabilities Act of 1990, whose disability prevents e-filing; and

(5) Documents in a specific case upon good cause shown by certification.

(A) Good cause exists where a self-represented litigant is not able to e-file documents for the following reasons:

(i) no computer or Internet access in the home and travel presents a hardship;

(ii) a language barrier or low literacy (difficulty reading, writing, or speaking in English); or

(iii) a self-represented litigant tries but is unable to complete the process and the necessary equipment and technical support for e-filing assistance is not available to the self-represented litigant.

(B) Good cause also exists where any person, including an attorney or self-represented litigant, is filing a pleading of a sensitive

> nature, such as a petition for an order of protection or a civil no-contact/stalking order.

A Certification for Exemption from E-filing, which includes a certification under section 1-109 of the Code . . . and any accompanying documents shall be filed with the court—in person, by e-mail or by mail, or by third-party commercial carrier. The court shall provide, and parties shall be required to use, a standardized form expressly titled 'Certificate for Exemption From E-filing" adopted by the Illinois Supreme Court Commission on Access to Justice. Judges retain discretion to determine whether good cause is shown. If the court determines that good cause is not shown, the court shall enter an order to that effect stating the specific reasons for the determination and ordering the litigant to e-file thereafter.

Judges retain discretion to determine whether, under particular circumstances, good cause exists without the filing of a certificate, and the court shall enter an order to that effect.

(d) Timely Filing. Unless a statute, rule, or court order requires that a document be filed by a certain time of day, a document is considered timely if submitted before midnight (in the court's time zone) on or before the date on which the document is due. A document submitted on a day when the clerk's office is not open for business will, unless rejected, be file stamped as filed on the next day the clerk's office is open for business. The filed documents shall be endorsed with the clerk's electronic file mark setting forth, at a minimum, the identification of the court, the clerk, the date, and the time of filing.

> (1) If a document is untimely due to any court-approved electronic filing system technical failure, the filing party may seek appropriate relief from the court, upon good cause shown.
> (2) If a document is rejected by the clerk and is therefore untimely, the filing party may seek

> appropriate relief from the court, upon good cause shown.
>
> (e) Filer Responsible for Electronic Submissions. The filer is responsible for the accuracy of data entered in approved electronic filing system and the accuracy of the content of any documents submitted for electronic filing. The court and the clerk of court are not required to ensure the accuracy of such data and content.
>
> (f) Rejections. Documents filed electronically may be rejected by the clerk as authorized by the Electronic Filing Rejection Standards for circuit courts[38] and courts of review[39], as published on the illinoiscourts.gov website.
>
> (g) Effective Date. This rule is effective July 1, 2017[,] for proceedings in the Supreme Court and the Appellate Court. For proceedings in the circuit court, this rule is effective January 1, 2018.[40]

II. E-FILING AND RULE 9(D)'S TIMELINESS PROVISION

Rule 9(d) has generated a majority of the Rule 9 case law. It governs a document's timeliness and how to obtain relief if a filing error causes a document to be untimely.[41] Despite the recurring litigation under Rule 9(d)[42] and a willingness to amend other provisions in the rule, Rule 9(d) has remained unchanged since 2017.

A. When is a document timely?

E-filing has provided litigants with round-the-clock access to the courts. Litigants may now give late-hour attention to preparing routine documents and refining pleadings, motions, or briefs, because a document may be filed

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38 ILL. SUP. CT., ELECTRONIC FILING REJECTION STANDARDS CIRCUIT COURTS 1–6 (2024), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/44154505-ae47-43f5-ad2c-542ef24d39fc/Circuit_Court_eFiling_Rejection_Standards.pdf [hereinafter CIRCUIT COURT E-FILING REJECTION STANDARDS].

39 ILL. SUP. CT., ELECTRONIC FILING REJECTION STANDARDS COURTS OF REVIEW 1–9 (2024), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/825c991c-551c-46d5-8b3d-d04120dd9407/Reviewing_Courts_eFiling_Rejection_Standards.pdf [hereinafter REVIEWING COURT E-FILING REJECTION STANDARDS].

40 *See* ILL. S. CT. R. 9 (Sept. 1, 2024).

41 ILL. S. CT. R. 9(d) (Sept. 1, 2024).

42 Emmet Fairfield, *The Clerk Rejected Your Electronic Filing. Fear Not?*, J. DUPAGE CNTY. BAR ASS'N, Jan.–Feb. 2023, at 12, 12–13.

well after the clerk's office closes for the day.[43] However, case law, discussed below, shows that last-minute work may breed disaster.

Rule 9(d) is essential because the practice of law is deadline-driven. The rule states "a document is considered timely if it submitted before midnight . . . on . . . the date on which the document is due."[44] If the document is submitted on a day when the clerk's office is closed, the document will be deemed filed on the next business day, unless rejected.[45] Critically, the mere submission of a document for e-filing does not render it timely, because a document is filed only when it is *accepted* by the clerk.[46]

Once a document is submitted, the clerk reviews it against various standards—including the Electronic Filing Procedures and User Manual (User Manual),[47] the eFileIL Electronic Document Standards,[48] and the e-Filing Rejection Standards[49]—along with the court rules, before accepting it for e-filing. This review process naturally involves a delay, especially for documents submitted after business hours. Case law demonstrates that, in some instances, a significant delay can occur between a party's submission and the clerk's review and the acceptance or rejection determination.[50]

Once the clerk accepts the document for e-filing, the document will be marked as filed on the date it was submitted, meaning no problem arises if a document is submitted close to a filing deadline. If the document does not meet e-filing standards or court rules, however, the clerk will reject the filing, sending it back to the e-filer with instructions to correct it. "A document is untimely if it is rejected by the clerk and not timely resubmitted and accepted."[51] That is, the earlier submission has no effect if the document is later rejected by the clerk.[52] Instead, the document is deemed filed on the date the correction is made and the document is resubmitted.[53]

Of course, a clerk's rejection of a document may spawn litigation when the rejection renders a document untimely.[54] And any delay in the clerk's

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43 *See generally* JAMES E. MCMILLAN, J. DOUGLAS WALKER & LAWRENCE P. WEBSTER, A GUIDEBOOK FOR ELECTRONIC COURT FILING 81 (1998).

44 ILL. S. CT. R. 9(d) (Sept. 1, 2024).

45 *Id.*

46 *Kilpatrick v. Baxter Healthcare Corp.,* 2023 IL App (2d) 230088, ¶ 24.

47 ILL. SUP. CT., ELECTRONIC FILING PROCEDURES AND USER MANUAL 3 (2021), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/05df0957-c20a-441d-9f79-fd16e65dc7d2/SCt_efiling_user_manual.pdf.

48 ILL. SUP. CT., EFILEIL ELECTRONIC DOCUMENT STANDARDS (2022), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/2de31a65-a2d9-4295-aa51-476ee6d58c0e/eFileIL_Digital-Media-Standards.pdf.

49 *See* REVIEWING COURT E-FILING REJECTION STANDARDS, *supra* note 39.

50 *See, e.g.*, *Davis v. Vill. of Maywood*, 2020 IL App (1st) 191011, ¶ 19 (explaining delay of almost two full business days).

51 *Waukegan Hospitality Group, LLC v. Stretch's Sports Bar & Grill Corp.*, 2024 IL 129277, ¶ 15.

52 *Davis*, 2020 IL App (1st) 191011, ¶ 19.

53 *Waukegan Hosp. Grp., LLC*, 2024 IL 129277, ¶ 15.

54 *See id.*

review, if the document is ultimately rejected, can have serious consequences.

B. Excusing Late Filings for Good Cause

Rule 9(d) recognizes that both system errors and user errors may cause a party to miss a filing deadline, and it provides a means for relief.[55] When a party cannot file a document on time due to system error, that is, a technical failure of the e-filing system, Rule 9(d)(1) states the party may obtain relief from the court upon good cause shown.[56] When a user error results in a rejection and the document is therefore untimely, a party may likewise obtain relief upon good cause shown under Rule 9(d)(2).[57]

1. The Case Law Discussing Good Cause Under Rule 9

Rule 9(d)'s good-cause provisions are addressed to a court's discretion.[58] Several cases have addressed Rule 9(d)'s good-cause provisions.

The first reported decision addressing Rule 9(d)'s good-cause provision was *Askew Insurance Group, LLC v. AZM Group, Inc.*[59] In that case, the circuit court denied the defendant's petition to vacate a default judgment under section 2-1401 of the Code.[60] The notice of appeal was due on January 11, 2019, but was filed on January 25, 2019.[61] In its appellant brief, the defendant claimed for the first time that it had submitted the notice of appeal on January 11, but the clerk rejected it "because it [was] submitted in the same envelope as a motion to stay and the system was unable to process it."[62] The defendant claimed it refiled its notice of appeal on January 25.[63]

However, the record contained no evidence—such as the clerk's rejection notice, an error message on a computer printout, or an affidavit from the defendant's attorney—to support the claim that the defendant had attempted to file the notice of appeal on January 11.[64] Thus, on November 21, 2019, the appellate court, on its own motion, allowed the defendant to submit a motion for leave to file a late notice of appeal.[65] The appellate court

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55 ILL. S. CT. R. 9(d) (Sept. 1, 2024).
56 ILL. S. CT. R. 9(d)(1) (Sept. 1, 2024).
57 ILL. S. CT. R. 9(d)(2) (Sept. 1, 2024).
58 *Davis v. Vill. of Maywood*, 2020 IL App (1st) 191011, ¶ 13.
59 *See Askew Ins. Grp., LLC v. AZM Grp., Inc.*, 2020 IL App (1st) 190179.
60 *Id.* ¶ 13.
61 *Id.* ¶ 14*; see* ILL. S. CT. R. 303(a)(1) (2017).
62 *Askew Ins. Grp., LLC*, 2020 IL App (1st) 190179, ¶ 16.
63 *Id.* ¶ 17.
64 *Id.* ¶ 18.
65 *Id.*

directed the defendant to include "proof of good cause" under Rule 9(d)(1) for its failure to file a timely notice of appeal.[66]

In response to the appellate court's order, the defendant filed a verified (sworn) motion for relief.[67] The defendant alleged that its notice of appeal was rejected on January 11 and that it did not learn of the rejection until January 25.[68] Though apparently preferring better evidence, the court accepted counsel's verified motion as a sworn statement under oath.[69] And because the defendant's attorney had "now sworn, under oath, that [the defendant] filed a notice of appeal on January 11, 2019, and that it was rejected by the circuit court for technical reasons," the court concluded the defendant had "now established proof of good cause for its failure to file a timely notice of appeal, pursuant to Rule 9(d)(1)."[70] Accordingly, the court granted the motion and considered the appeal's merits.[71]

Under *Askew*, it appeared Rule 9(d) relief could be granted based solely on an attorney's sworn statement that a document was timely submitted but rejected for technical reasons.[72] However, later cases took a more nuanced approach and refined Rule 9(d)'s good-cause standard.

In *Davis*, the plaintiffs submitted a complaint in Cook County at 10:32 a.m. on the last day of the statute of limitations period.[73] The county's mandated e-filing system had been implemented less than two weeks earlier.[74] Two business days later, in the early afternoon, the clerk rejected the submission because counsel had omitted the Cook County Attorney Code (attorney code) from the "Case Cross Reference Number" field in the e-filing envelope.[75] By the end of the day, the plaintiffs resubmitted the complaint in a corrected envelope, and the clerk filed the document at 4:21 p.m.[76]

The defendant moved to dismiss, in part arguing the complaint should be dismissed because it was filed two days after the statute of limitations expired.[77] The plaintiffs filed a written response to the motion and also a separate motion for relief under Rule 9(d)(2), arguing there existed good

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66 *Id.* The reader should note two things about *Askew*'s analysis. First, the appellate court asked for proof of good cause under Rule 9(d)(1) without discussion of whether a system error or user error caused the filing to be late. The rejection was based on a user error—the filer submitted the notice of appeal in the same envelope as a motion to stay—meaning Rule 9(d)(2) would have applied. Second, the appellate court excused the deadline for filing a motion for leave to file a late notice of appeal, which was 30 days after January 11, 2019. *See* ILL. S. CT. R. 303(d) (2017).

67 *Askew Ins. Grp., LLC*, 2020 IL App (1st) 190179, ¶ 18.

68 *Id.* ¶ 19.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Davis v. Vill. of Maywood*, 2020 IL App (1st) 191011, ¶¶ 4–5.

74 *Id.*¶ 4.

75 *Id.* ¶ 6.

76 *Id.*

77 *Id.* ¶8.

cause to excuse the late filing.[78] The circuit court denied the plaintiffs' motion and dismissed the plaintiffs' complaint as untimely.[79] The court reasoned the plaintiffs could have sought relief under Rule 9(d)(2) sooner and instead waited until after the defendant's moved to dismiss, rendering their request for relief untimely.[80]

The appellate court reversed,[81] noting that the rule's use of "appropriate relief" and a good-cause standard made the determination of good cause a fact-dependent inquiry.[82] The court emphasized the rule:

> [D]oes not limit "good cause" to particular grounds for the clerk's rejection of a document, does not suggest that requests for relief are disfavored, does not list factors that the trial court should take into consideration, and does not specify the type of relief that may be granted by the court.[83]

The court first determined the document was not filed until it was resubmitted and accepted after the clerk's initial rejection, making the complaint untimely.[84] It clarified that submission does not equate to filing:

> Applying Rule 9(d) as a whole, if the document the [plaintiffs] successfully submitted . . . had been accepted by the court clerk, its filing date and time would have coincided with the [plaintiffs'] transmission date and time, which was within the limitations period . . . . The rule next indicates that the clerk's rejection of the document [two business days later], meant that [the plaintiff's] electronic transmission . . . had no effect, unless the trial court subsequently granted "appropriate relief." [85]

Nevertheless, the court found the plaintiffs had "demonstrated good cause for the trial court to correct the date that was stamped by the clerk so that the pleading was considered filed as of the date it was first submitted to the clerk."[86] The appellate court first noted it would give the plaintiffs' attorney "the benefit of any doubt about the accuracy and completeness of his electronic submission[,]" given the problem occurred in the first two weeks of Cook County's implementation of mandatory e-filing, when the procedures were unfamiliar and "had not been fully tested through experience."[87]

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78 *Id.*
79 *Id.* ¶ 9.
80 *Id.*
81 *Id.* ¶ 18.
82 *Id.*
83 *Id.*
84 *Id.* ¶ 19.
85 *Id.*
86 *Id.* ¶ 20.
87 *Id.* ¶ 21.

The court also considered the defect's nature. It noted the resubmitted complaint was identical to the original, except for a minor change to the e-filing envelope.[88] In other words, the defect was not in the complaint itself, but in something unrelated to the complaint and not required by statute or rule.[89]

Next, the court noted the first e-filing envelope was largely complete and correct in that it correctly identified the attorney by name, law firm name, and ARDC number, and included the attorney code in one of the two required locations.[90] Further, the attorney code was omitted from a field labeled "Case Cross Reference Number," which one would not expect to be filled with an attorney code.[91]

The court then considered the two submissions' timing.[92] The court explained "[c]ounsel's midmorning attention to his [e-filing] task[,]" though not reason alone to grant relief, "weigh[ed], slightly, in favor of granting the motion."[93] Additionally, the plaintiffs resubmitted their complaint within hours of the clerk's rejection, and their "timely correction suggest[ed] that the omission . . . was not caused by counsel's inattentiveness to e-filing procedures, but was instead caused by the e-filing procedure itself."[94] This too weighed slightly in favor of granting the plaintiffs' motion.[95]

Finally, the appellate court addressed the trial court's finding that the plaintiff's Rule 9(d)(2) motion was untimely.[96] The court held the timing of the motion did not have any relevance and instead focused on the circumstances that caused the complaint's late filing.[97] Accordingly, the court found the plaintiffs had established good cause and the trial court abused its discretion by denying their motion.[98]

In *O'Gara v. O'Gara*, the appellate court considered whether the trial court abused its discretion when it denied the plaintiff's Rule 9(d)(2) motion to have her postjudgment motion to reconsider deemed timely.[99] The circuit court granted the respondent's motion to dismiss the petitioner's petition for issuance of a recovery citation on November 10, 2020, making a postjudgment motion due on December 10.[100] The record showed the plaintiff's attorney attempted to file a motion to reconsider that day, and the

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88 *Id.* ¶ 22.
89 *Id.*
90 *Id.* ¶ 27.
91 *Id.* ¶ 28.
92 *Id.*
93 *Id.* ¶ 32.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* ¶ 34.
98 *Id.* ¶35.
99 *O'Gara v. O'Gara*, 2022 IL App (1st) 210013, ¶ 35.
100 *Id.* ¶¶ 18, 20; *see* 755 ILL. COMP. STAT 5/16–1 (West 2016).

filing was rejected due to the attorney's failure to select the correct filing type and pay the accompanying fee.[101] The filing was not accepted until December 11.[102] On December 16, the plaintiff "filed a *nunc pro tunc* motion under . . . Rule 9(d)(2) [citation] . . . to backdate the filing date from December 11, 2020, to December 10, 2020."[103]

At the January 7, 2021, hearing on the motion, the circuit court found its jurisdiction had lapsed on December 10, but it nevertheless addressed the motion's substance and found the plaintiff had not shown good cause.[104] The next day, the plaintiff filed a motion in the appellate court, asking for leave to file a late notice of appeal, challenging the court's November 10, 2020, and January 7, 2021, orders.[105] On January 21, the appellate court granted the plaintiff's motion, and she filed her notice of appeal the next day.[106]

The appellate court addressed the circuit court's finding that the plaintiff had not shown good cause under Rule 9(d)(2), noting that the record showed the plaintiff's attorney attempted to file the motion to reconsider at 11:52 p.m. on the due date, but due to the apparent confusion, the attorney filed it on December 11, one day late.[107] The appellate court rejected the plaintiff's argument that the late filing should be excused because of her attorney's unfamiliarity with the e-filing system, because the e-filing system had been functional since 2018.[108] According to the attorney's affidavit that was attached to the Rule 9(d)(2) motion, the attorney "knew that it would be his first time e-filing" and "could have taken steps during the 29 days prior to the deadline to familiarize himself with the e-filing system."[109] Not only did the attorney wait to the last day, he made his first attempt at 11:52 p.m.[110] Moreover, the rejection was caused by "an entirely avoidable attorney error."[111] Thus, the court found *Davis* to be distinguishable.[112] In closing, the court stated it "may have arrived at a different conclusion" had the plaintiff's attorney "exercised prudence and familiarized himself with the e-filing system in the 29 days before the due date, or at the very least attempted to file before 11:52 p.m. on the due date."[113]

In *Leff, Klein and Kalfen, Ltd. v. Wiczer & Associates, LLC*, the appellate court found the trial court abused its discretion in finding good

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101 *O'Gara*, 2022 IL App (1st) 210013, ¶ 21.
102 *Id.*
103 *Id.* ¶ 22.
104 *Id.* ¶ 23.
105 *Id.* ¶ 24.
106 *Id.*
107 *Id.* ¶ 37.
108 *Id.*
109 *Id.*
110 *Id.* ¶ 38.
111 *Id.* ¶ 41.
112 *Id.* ¶ 42.
113 *Id.*

cause, under Rule 9(d)(2), to excuse a late filing and therefore *reversed* the court's order granting relief under Rule 9(d).[114] There, the citation respondent filed a motion to reconsider a judgment entered against it.[115] The judgment was entered on July 12, 2019, making the deadline for filing a motion to reconsider August 12, 2019.[116]

The respondent filed the motion to reconsider on August 16, 2019.[117] In its response to the motion, the plaintiff in part asserted the motion was untimely, and in reply, the respondent contested this assertion.[118] The respondent's attorney attached an affidavit in which the attorney explained that, out of caution, he attempted to e-file the motion on August 9.[119] The attorney received notice of a rejection on August 13.[120] He resubmitted the motion the same day, which was accepted a week later, on August 20.[121] Attached to the affidavit was a group exhibit consisting of emails and other documents generated by the e-filing system.[122] The group exhibit established the attorney submitted the motion via the e-filing system at 3:56 p.m. on August 9.[123] The clerk sent notice of rejection at 10:39 a.m. on August 13, stating the e-filing system rejected the filing because the attorney had submitted multiple filings in one transaction, and the system allowed only one document per filing.[124] The resubmitted motion was rejected again on August 15 at 3:52 p.m. because no appearance had been filed on the respondent's behalf.[125] Counsel submitted an appearance for e-filing, but the system rejected the document because the attorney did not include the correct filing fee.[126] An email dated August 20 confirmed the court accepted the motion to reconsider for e-filing at 10:28 a.m. and considered the motion submitted on August 16.[127]

At the hearing on the motion to reconsider, the trial court asked the respondent's attorney if he had good cause to excuse the late filing per Rule 9(d)(2), and the attorney responded that the court need not make this determination because the motion became filed when the attorney submitted it.[128] Alternatively, the respondent's attorney argued there was good cause

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114 *Leff, Klein & Kalfen, Ltd. v. Wiczer & Assocs.,* 2022 IL App (2d) 220089-U, ¶¶ 33, 36.
115 *Id.* ¶¶ 6–7; *see* 735 ILL. COMP. STAT. 5/2-1402 (West 2018).
116 *Leff, Klein & Kaflen, Ltd*., 2022 IL App (2d) ¶ 23.
117 *Id.* ¶ 7.
118 *Id.*
119 *Id.* ¶ 8.
120 *Id.*
121 *Id.*
122 *Id.* ¶ 9.
123 *Id.*
124 *Id.*
125 *Id.* ¶ 10.
126 *Id.*
127 *Id.*
128 *Id.* ¶ 11.

because the motion was submitted several days before the deadline.[129] The court found the motion was timely and granted it, vacating the July 12, 2019, judgment.[130]

On appeal, the plaintiff argued the trial court lacked jurisdiction to consider the untimely motion to reconsider because it was filed 4 days after the 30-day deadline.[131] The appellate court first rejected the respondent's argument that the motion to reconsider was timely because the respondent submitted it to the clerk within 30 days of the judgment.[132] The court reasoned that "[t]he mere submission of a motion to the clerk for filing does not render it filed[,]" and the motion was rejected due to multiple deficiencies that the respondent had the responsibility to ensure were accurate.[133]

Addressing the trial court's good-cause finding, the appellate court found "the record . . . [did] not show any basis, beyond the clerk's mere failure to accept the submission, that would constitute good cause within the meaning of Rule 9(d)(2)."[134] The court rejected the respondent's assertion, which was based on *Davis*, that he showed good cause because he made no substantive changes to the original document when he resubmitted it.[135] The court explained that, unlike *Davis*, the e-filing system was not in its infancy when the respondent first attempted its e-filing.[136] The e-filing error "was not as 'minor' as the mere failure to insert an attorney code in one section of an e-filing when that same code had been provided in another section."[137]

Moreover, the clerk rejected the filing for additional reasons—counsel had not filed an appearance and did not pay the filing fee.[138] "Thus, counsel's failure to comply with the e-filing requirements was more egregious than merely failing to submit the motion individually."[139] Finally, the court disagreed with *Davis* "to the extent it held that good cause existed because the noncompliance there did not affect the substance of the document filed[,]" reasoning that "[s]uch a rule would undermine the gatekeeping role of submission requirements."[140] Accordingly, the appellate court held the trial court erred by finding the motion to reconsider was timely, and as a result, the court lacked jurisdiction to rule on the motion to reconsider and vacate the July 12 judgment.[141]

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129 *Id.*
130 *Id.* ¶ 12.
131 *Id.* ¶ 24.
132 *Id.* ¶ 25.
133 *Id.*
134 *Id.* ¶ 27.
135 *Id.* ¶ 28.
136 *Id.* ¶ 30.
137 *Id.* ¶ 31.
138 *Id.*
139 *Id.*
140 *Id.* ¶ 32.
141 *Id.* ¶ 33.

At issue in *Bean v. Board of Election Commissioners for City of Chicago Electoral Board* was the timeliness of a petition for judicial review of an electoral board decision.[142] A statute provides that such petitions must be filed within five days after service of the electoral board's decision.[143] The electoral board sustained the objector's ballot contest and removed the petitioner from the ballot on January 6, 2023, meaning a petition for judicial review was to be filed no later than January 11.[144] On that date, the petitioner, a self-represented litigant, made several unsuccessful attempts to e-file his petition and sought help via phone calls to both the circuit clerk and the e-filing service provider.[145] The petition was ultimately filed the next day, outside the five-day statutory deadline.[146]

The circuit court granted the objector's motion to dismiss the petition, finding the petition was untimely, and the petitioner appealed.[147]

Relying on *Davis*, the petitioner asked the appellate court to excuse his late filing under Rule 9(d)(2).[148] The court declined, finding the petitioner had not established good cause.[149] The court distinguished *Davis*, noting the court there excused the late filing largely because of the confusion surrounding the new e-filing system.[150] And even though the petitioner, as a self-represented litigant, was not personally familiar with the e-filing system, the system had been in use for several years.[151] Additionally, the court noted the petitioner waited until the last day to attempt "to file his relatively straightforward petition."[152]

In *Kilpatrick v. Baxter Healthcare Corporation*, the appellate court affirmed the circuit court's denial of relief under Rule 9(d)(2).[153] There, the plaintiff e-filed her complaint on September 15, 2022, two days after the statute of limitations expired.[154] The defendant moved to dismiss, arguing the complaint was untimely.[155] In her response, the plaintiff asserted she submitted the complaint on September 13, 2022, at 1:06 p.m. and received notice of rejection stating the filing was rejected because the attorney, in contravention of a local court rule, "included his law firm's attorney number"

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142 *Bean v. Bd. of Election Comm'r for City of Chi. Electoral Bd.,* 2023 IL App (1st) 230239-U, ¶ 2.
143 *Id.* ¶ 15 (quoting 10 ILL. COMP. STAT. 5/10-10.1(a) (West 2022)).
144 *Id.* ¶ 8.
145 *Id.* ¶ 9.
146 *Id.*
147 *Id.* ¶ 11.
148 *Id.* ¶ 17.
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Kilpatrick v. Baxter Healthcare Corp.*, 2023 IL App (2d) 230088.
154 *Id.* ¶ 3.
155 *Id.*

instead of the attorney's individual ARDC number.[156] The attorney fixed the error and resubmitted the complaint on September 15, and the complaint was accepted and filed.[157] The plaintiff invoked Rule 9(d)(2), "arguing that there was good cause for the untimely submission because she had *attempted* to file the complaint within the applicable limitations period and the rejection was due to a 'minute' error tantamount to a scrivener's error."[158] The plaintiff asserted "the complaint should be corrected *nunc pro tunc* to show that it was filed on September 13, 2022."[159] In support, the plaintiff submitted printouts of emails from the e-filing provider confirming the September 13 submission and stating the reason the complaint was rejected.[160] The circuit court granted the defendant's motion to dismiss, in part finding the plaintiff had not shown good cause under Rule 9(d)(2).[161]

On appeal, the plaintiff argued the court erred by finding she had not established good cause and by failing to assess the totality of the circumstances in denying her relief.[162] The appellate court discussed *Davis*, *O'Gara*, and *Leff*, noting the case resembled *O'Gara* in that the e-filing system had been functional for "well over four years."[163] Further, "as far as [the court could] tell from the scant record before [it,]" the user error was not like the one at issue in *Davis*.[164] Specifically, the error was not "an understandable error not entirely attributable to an attorney dealing with a new system . . . ." but rather "was an entirely avoidable attorney error."[165] The court found the record did "not establish any mitigating reason for the inability to enter the proper attorney registration number."[166] Finally, the court noted the plaintiff attempted to file the complaint on the last day of the statute of limitations, which weighed against a finding of good cause.[167] The court summed up as follows:

> [P]laintiff failed to timely file her complaint, and in requesting relief under Rule 9(d)(2), she provided little, if any, substantive evidence to the circuit court that would demonstrate good cause. Accordingly, we do not believe

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156 *Id.* ¶ 4.
157 *Id.*
158 *Id.* ¶ 5.
159 *Id.*
160 *Id.* ¶ 6.
161 *Id.* ¶ 7.
162 *Id.* ¶ 13.
163 *Id.* ¶ 22.
164 *Id.* ¶ 23.
165 *Id.* (internal quotation marks omitted).
166 *Id.*
167 *Id.* ¶ 24.

> that the circuit court abused its discretion in finding that plaintiff was unable to demonstrate good cause.[168]

In *Saucedo-Diaz v. Illinois Workers' Compensation Commission*,[169] the trial court dismissed the petitioner's complaint for judicial review under sections 2-619(a)(1) and 2-619(a)(5) of the Code.[170] The circuit court determined the petitioner had initiated judicial review 11 days too late.[171]

On appeal, the petitioner relied in part on Illinois Supreme Court Rule 9(d)(2).[172] Before the circuit court, the petitioner's attorney submitted an unsworn explanation of why its filing was late—the clerk informed the attorney of an omitted signature and an unpaid fee on September 12, 2022, 14 days after the deadline.[173] The attorney corrected the filing as soon as the attorney was able.[174] However, the petitioner did not raise Rule 9 in the circuit court.[175] In any event, the appellate court explained that even if the unsworn explanation was admissible, it was unclear whether the petitioner's attorney's explanation would merit relief under Rule 9(d)(2).[176] More importantly, the court explained, it could not conclude a no-good-cause finding would have been unreasonable, because, for example, the petitioner had not claimed the e-filing software was new and the petitioner had waited until the final day to initiate the proceedings for judicial review.[177]

The issue in *Bhutani v. Barrington Bank & Trust Company, N.A.*, was the timeliness of a third-party defendant's motion to vacate or reconsider a judgment awarding damages.[178] Judgment was entered against the third-party defendant on October 26, 2022, making any postjudgment motion due on November 28, 2022.[179] The third-party defendant submitted its motion within the deadline, but it was rejected and not accepted until after the deadline, in part due to noncompliance with e-filing procedures.[180] Specifically, the clerk

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168 *Id.* ¶ 25.

169 Saucedo-Diaz v. Ill. Workers' Comp. Comm'n, 2024 IL App (3d) 230263WC-U.

170 *Id.* ¶ 9; see 735 ILL. COMP. STAT. 5/2-619(a)(1) (2022); 735 ILL. COMP. STAT. 5/2-619(a)(5) (2022).

171 *Saucedo-Diaz*, 2024 IL App (3d) ¶ 9.

172 *Id.* ¶ 20.

173 *Id.* ¶ 18.

174 *Id.*

175 *Id.* ¶ 20.

176 *Id.*

177 *Id.*

178 Bhutani v. Barrington Bank & Trust Co., 2024 IL App (2d) 230162, ¶ 4. A discussion of *Bhutani*'s unique, complex procedural situation is not necessary to this article.

179 *Id*; *See* 735 ILL. COMP. STAT. 5/2-1203 (2022) (postjudgment motion after a bench trial must be filed within 30 days of the judgment); ILL. S. CT. R. 303(a)(1) (2017) (notice of appeal must be filed within 30 days of the judgment or within 30 days of the order disposing of the last proper motion directed against the judgment); see also 5 ILL. COMP. STAT. 70/1.11 (2022) (weekends and holidays should be excluded when computing the date upon which an act must be done). Here, the 30th day after the judgment was Friday, November 25, 2022, a court holiday. ILL. S. CT. M.R. 5272 (2021).

180 *Bhutani*, 2024 IL App (2d) 230162, ¶ 4.

rejected the first submission, in part because it was missing a certification mandated by local rule.[181] Three days later, after the 30-day period expired, the third-party defendant resubmitted its motion but failed to place the motion and its attachments as separate PDF files, in violation of another local rule.[182] Two days later, the third-party defendant again submitted its motion, and the clerk accepted it.[183] At the time, other postjudgment matters were pending, and the trial court gave the third-party defendant leave to file a brief as to whether to excuse the late filing under Rule 9.[184]

On March 3, 2023, the trial court determined it lacked jurisdiction to consider the third-party defendant's motion, explaining the third-party defendant had not established good cause to excuse the late filing.[185] On April 3, the third-party moved to reconsider the March 3 order, and on May 4, the court orally ruled that it lacked jurisdiction to rule on the motion.[186] On May 9, however, the court reversed course, determining the third-party defendant's first postjudgment motion was not untimely.[187] The court ultimately vacated the judgment against the third-party defendant.[188]

In a cross-appeal, the plaintiff argued the trial court erred by granting the third-party defendant's April 3, 2023, motion to reconsider, which relied on the erroneous determination that the October 26, 2022, order was not final.[189] Because the October 26 order was final, the third-party defendant's motion—which was submitted but rejected by the clerk within the 30-day period—was not timely filed.[190] And because the trial court determined, on March 3, 2023, that the third-party defendant had not shown good cause under Rule 9, it lacked jurisdiction to consider the third-party defendant's first postjudgment motion and its April 3, 2023, motion to reconsider to the extent it sought to challenge the October 26 judgment.[191]

The appellate court noted that a portion of the third-party defendant's April 3 motion to reconsider did not challenge the October 26, 2022, judgment.[192] Specifically, the third-party defendant's April 3 motion asked the court to reconsider its March 3, 2023, determination that it had not established good cause under Rule 9.[193] Thus, the appellate court considered

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181 *Id.* ¶ 32.
182 *Id.*; see 19TH JUD. CIR. CT. R. 1-2.08(E) (Dec. 31, 2017).
183 *Bhutani*, 2024 IL App (2d) 230162, ¶ 32.
184 *Id.* ¶ 4; *see* ILL. S. CT. R. 9(d)(2) (2022).
185 *Bhutani*, 2024 IL App (2d) 230162, ¶ 32.
186 *Id.* ¶ 4.
187 *Id.* ¶ 32.
188 *Id.* ¶ 9.
189 *Id.*
190 *Id.* ¶ 28.
191 *Id.* ¶ 29.
192 *Id.*
193 *Id.* ¶ 30.

whether the third-party defendant had established a jurisdictional basis for the trial court's consideration of the initial postjudgment motion.[194]

The appellate court concluded there was no jurisdictional basis to enter the May 9, 2023, order.[195] After noting the trial court's discretion in determining whether a party has shown good cause under Rule 9, the appellate court explained the court had entered a "well-reasoned" order denying third-party's good cause motion.[196] The trial court reasoned that the third-party defendant's filing failed to comply with local e-filing rules on two separate occasions and that the defendant's attorney should have become familiar with those rules during the five years they had been effective.[197] In its April 3 motion, the third-party defendant did not attack the court's findings of no good cause based on those two rule violations.[198] Thus, the third-party defendant had not provided a basis on which to affirm the trial court's May 9, 2023, determination that it could address the initial postjudgment motion.[199]

2. The Case Law Summarized

To summarize, the case law has established guideposts for a court's discretion under Rule 9(d)'s good-cause provisions: (1) the failure to present actual evidence, such as affidavits or other sworn statements and documentation from the e-filing provider is likely fatal to a Rule 9(d) motion; (2) the type of e-filing error at issue matters (is the error minor like in *Davis* or more significant like in *Leff*?); (3) whether the filer made any substantive changes made to the original document before resubmitting it; (4) whether the filer made corrections and refiled the document promptly after a rejection; and (5) whether the party was diligent both in attempting to timely file the document and in seeking relief under Rule 9(d).[200] The case law also suggests that a clerk's erroneous application of the e-filing standards and local court rules in rejecting a document would establish good cause.[201] Finally, the courts have admonished litigants that waiting until the last day (and in some cases, the last minute) to file a document is risky business and have little sympathy for rejections that come after a deadline.

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194 *Id.*
195 *Id.* ¶ 34.
196 *Id.* ¶ 33.
197 *Id.*
198 *Id.* ¶ 34.
199 *Id.*
200 *See* Fairfield, *supra* note 42, at 12, 16.
201 *Waukegan Hosp. Grp., LLC, v. Stretch's Sports Bar & Grill Corp.,* 2024 IL 129277, ¶ 24.

C. The Circuit Court's Jurisdiction to Grant Relief in the Postjudgment Context

1. Non-jurisdictional and Jurisdictional deadlines

Statutes, supreme or local court rules, and court orders set filing deadlines in Illinois. Not all deadlines are jurisdictional, meaning a court can still hear the matter if the party does not meet a deadline. For instance, an ordinary statute of limitations is not jurisdictional but rather an affirmative defense that a party can waive.[202] Some deadlines—such as filing complaints for judicial review of administrative proceedings,[203] postjudgment motions,[204] notices of appeal,[205] and petitions for rehearing in the appellate court[206]—have jurisdictional consequences. In other words, the failure to timely file a jurisdictional document may eliminate a party's statutory right (in the case of postjudgment and judicial review proceedings) or constitutional right (in the case of appeal from the circuit to appellate court) to have the decision of a tribunal reviewed by the same or a different tribunal.

2. The Circuit Court's Jurisdiction After Final Judgment

The applicability of Rule 9(d)'s good-cause provisions is not clear when the document is a postjudgment motion or notice of appeal, that is, one that has jurisdictional implications.[207] The question arises out of the operation of sections 2-1202(c) and 2-1203(a) of the Code and Illinois Supreme Court Rules 301 and 303. Sections 2-1202(c) and 2-1203(a) of the Code provide that postjudgment motions in cases tried to a jury (section 2-1202(c)) and cases disposed of by the court (section 2-1203(a)) must be filed within 30 days of the judgment.[208] Rule 303(a)(1) provides that a party must file a notice of appeal in the circuit court within 30 days of the final judgment, "or, if a timely posttrial motion directed against the judgment is filed, whether in a jury or nonjury case, within 30 days after the entry of the order disposing

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202 *See*, *e.g.*, People v. Adams, 2024 IL App (1st) 221474, ¶ 42.

203 *See* Nudell v. Forest Preserve Dist. of Cook Cnty., 799 N.E.2d 260, 267 (Ill. 2003).

204 *Mo v. Hergan,* 2012 IL App (1st) 113179, ¶ 31.

205 *Waukegan Hosp. Grp., LLC*, 2024 IL 129277, ¶ 8.

206 Woodson v. Chi. Bd. of Educ., 609 N.E.2d 318, 321 (Ill. 1993); *accord* People v. Lyles, 840 N.E.2d 1187, 1191 (Ill. 2005).

207 *Compare Waukegan Hosp. Grp., LLC, v. Stretch's Sports Bar & Grill Corp.,* 2024 IL 129277, ¶ 15 (questioning whether the circuit court can grant relief under Rule 9(d) after its jurisdiction has lapsed), *with O'Gara v. O'Gara*, 2022 IL App (1st) 210013, ¶ 46 (rejecting an argument that the circuit court lacked jurisdiction to consider a Rule 9(d)(2) motion); *see* Fairfield, *supra* note 42, at 14–16.

208 735 ILL. COMP. STAT. 5/2-1202(c), 2-1203(a) (West 2025).

of the last pending postjudgment motion directed against that judgment or order . . . ."[209]

These rules have functioned together to create a well-settled rule: a circuit court's jurisdiction lapses 30 days after final judgment except in two circumstances: (1) the party timely files a notice of appeal within 30 days, per Rule 303(a)(1), thus vesting the appellate court with jurisdiction, and (2) the party files a motion directed against the judgment or obtains an extension to do so within 30 days.[210]

Peraino v. County of Winnebago illustrates this issue in the age of e-filing. The circuit court entered summary judgment in the defendant's favor on December 2, 2016.[211] Therefore, a motion to reconsider was due on January 3, 2017,[212] and the plaintiff filed it on January 4.[213]

On January 5, the plaintiff moved for leave to file his motion to reconsider *nunc pro tunc* to January 3, 2017.[214] The plaintiff alleged his attorney was not able to complete the motion to reconsider until 11:55 p.m. on January 3.[215] The attorney's paralegal began the e-filing process at 11:58 p.m.[216] During the e-filing process, the e-filing service provider "would not upload the motion, and the motion was not considered accepted or filed by the system until 12:03 a.m. on January 4, 2017."[217] In the motion, the plaintiff relied on a local court rule that permitted the court to backdate a late filing because of "technical problems experienced by the filer" and Illinois Supreme Court Rule 183.[218]

The circuit court denied the plaintiff's motion on April 20, 2017.[219] It concluded the filing was late because of a user error by the plaintiff's attorney, not a technical defect in the e-filing system.[220] While the local rule did not define "technical problems," the local rule was modeled after the User Manual.[221] The User Manual's definition of a "technical failure" did not include a failure of the user's equipment.[222] The court ultimately ruled that there was no reason under the local rule to backdate the filing and Rule 183

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209 ILL. S. CT. R. 303(a)(1) (2017).

210 *See Peraino v. Winnebago*, 2018 IL App (2d) 170368, ¶ 13; 5/2-1202(c), 2-1203; ILL. S. CT. R. 301 (1994); ILL. S. CT. R. 303 (2017).

211 *Peraino,* 2018 IL App (2d) 170368, ¶ 4.

212 *Id.* ¶ 5. (citing 735 ILL. COMP. STAT. ANN. 5/12-1203(a) (West 2016); 5 ILL. COMP. STAT. ANN. 70/1.11 (West 2016)).

213 *Id.* ¶ 6.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id*; *see* 17TH JUD. CIR. CT. R. 22.01(N) (Jul. 25, 2016); ILL. S. CT. R. 183 (2011).

219 *Peraino*, 2018 IL App (2d) 170368, ¶ 8.

220 *Id.*

221 *Id*; *see* ILL. S. CT. M.R. 18368 (2014)).

222 *Peraino*, 2018 IL App (2d) 170368, ¶ 8.

did not apply, as it pertained to deadlines set by supreme court rule and not statute.[223]

The appellate court concluded it lacked jurisdiction over the appeal.[224] The appellate court explained that the circuit court loses jurisdiction 30 days after it enters a final judgment, except in two circumstances: (1) if the party timely files a notice of appeal within 30 days, per Rule 303(a)(1), and (2) if the party files a motion directed against the judgment or obtains an extension to do so within 30 days, per section 2-1203 of the Code.[225] The plaintiff did not file a notice of appeal within 30 days; instead, he filed a motion to reconsider, which was one day late and did not toll the time for filing a notice of appeal.[226] The appellate court further found the circuit court, in fact, lacked jurisdiction to rule on the plaintiff's motion to reconsider, rendering the ruling void.[227] Per *People v. Bailey*, the appellate court vacated the circuit court's ruling and dismissed the motion.[228] And because the plaintiff had not filed a notice of appeal within 30 days of the circuit court's judgment, the appellate court lacked jurisdiction to consider the appeal.[229]

In reaching its conclusion, the court explained the plaintiff's motion was not the proper use of *nunc pro tunc* relief because the plaintiff's motion did not seek to correct a clerical error *in the judgment*, and the evidence relied upon came from outside the court record.[230] Further, the court discussed section 10(b) of the Illinois Supreme Court's then-effective e-filing standards—which provided that the court could, upon good cause, backdate the document to the date of the attempted first filing[231]—and Rule 9(d)(1), which was not in effect when plaintiff filed his motion to reconsider.[232] Though neither section 10 nor Rule 9 limited the time in which a court could backdate a document, those general provisions could not control "the specific jurisdictional deadlines in section 2-1203(a) and Rule 303(a)(1)."[233] Regarding Rule 9(d)(1), the appellate court explained that it could not apply

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223 *Id.*

224 *Id.* ¶ 11.

225 *Id.* ¶ 13; *see* ILL. S. CT. R. 303(a)(1) (2015); 735 ILL COMP. STAT. ANN. 5/2-1203 (West 2016).

226 *Peraino*, 2018 IL App (2d) 170368, ¶ 14.

227 *Id.* ¶ 15 (citing *People v. Bailey*, 2014 IL 115459, ¶¶ 28-29).

228 *Id.*

229 *Id.*

230 *Id* ¶ 16.; *see Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 29 (a *nunc pro tunc* order may be used to correct a clerical error, provided the correction is based on a note, memorandum, or paper in the record).

231 *See* ILL. SUP. CT., ELECTRONIC FILING STANDARDS AND PRINCIPLES § 10(b) (amend. Sept. 16, 2014), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/a723f4cd-cf43-406a-a282-64d00ee3d15f/Standards%20and%20Principles%20eFiling.pdf.

232 *Peraino*, 2018 IL App (2d) 170368, ¶ 18.

233 *Id.* ¶ 19.

to the circumstances present, because Rule 9(d)(1) applies to technical errors on the e-filing service providers' end, not user error.[234]

Finally, the appellate court noted the plaintiff was not without recourse when the circuit court's jurisdiction lapsed as a result of his late filing.[235] The court explained that the plaintiff could have sought leave in the appellate court to file a late notice of appeal under Rule 303(d), and he failed to do so, but he could still seek relief in the Illinois Supreme Court via a supervisory order.[236]

About a month later, the appellate court issued *In re Marriage of Bordyn*.[237] In that case, the final judgment was entered on December 5, 2017, making the notice of appeal due on January 4, 2018. At 2:37 p.m. that day, the petitioner submitted a notice of appeal and notice of filing through the court's e-filing system.[238] The next day, at 9:40 a.m., the petitioner received notice that the system rejected his submission because he had sent the notice of appeal and notice of filing as one document.[239] According to the petitioner, he immediately corrected the filing and resubmitted it.[240] The resubmission was accepted, and he filed the notice on January 5.[241]

The appellate court granted the respondent's motion to dismiss the appeal.[242] The petitioner moved to vacate the dismissal.[243] He also asked the court to extend the time to seek relief under Rule 303(d).[244] The petitioner argued he submitted his notice of appeal before the deadline and that the court should have accepted the appeal even if he had to resubmit the notice of filing.[245] He also argued that the one-day delay of the rejection notice was unreasonable and caused him to be unable to file the notice of appeal timely.[246]

The appellate court denied the motion to vacate the dismissal.[247] The court explained that under the Illinois Supreme Court's e-filing standards, the circuit clerk must accept a document before the court regards it as filed.[248] Additionally, the standards provided that multiple documents combined into

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234 *Id.* ¶ 22.
235 *Id.* ¶ 25.
236 *Id.*
237 *See generally In re* Marriage of Bordyn, 2018 IL App (2d) 180017-U.
238 *Id.* ¶ 3.
239 *Id.* ¶ 4.
240 *Id.*
241 *Id.*
242 *Id.* ¶ 5.
243 *Id.* ¶ 6.
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.* ¶ 10.
248 *Id.* ¶ 7.

one PDF document should not be accepted.[249] In reaching its conclusion, the court recognized the result, dismissal of the appeal, was harsh, especially since the petitioner submitted his documents in the afternoon on the 30th day but did not receive the rejection notice for 18 hours, which made him unable to correct the filing timely.[250] The court emphasized the jurisdictional implications of the clerk's delayed rejection notice, noting "[o]ne might imagine scenarios wherein a litigant submits his or her documents even *earlier* than day 30, but a combination of weekends, court holidays, or even a busy or short-staffed clerk's office nevertheless operate to delay a rejection notice . . . until after the jurisdictional period has expired."[251] The court explained "[i]t is simply not for this court to make exceptions to jurisdictional requirements, re-write supreme court rules, or create new rules in this situation."[252] The court emphasized the petitioner could have but never sought relief under Rule 303(d), and "encourage[d] all litigants [in these circumstances] to pay heed to [the rule]."[253]

Justice Hudson specially concurred, explaining his decision to concur was based primarily on the petitioner's failure to seek relief under Rule 303(d).[254] He also gave a premonition:

> Like most technological innovations, e-filing was supposed to make things easier and more efficient. Yet in this case the opposite seems to have occurred. Before e-filing, had petitioner submitted two documents that were improperly stapled together, the clerk would likely have simply removed the staple and filed the documents.
>
> It might be advisable to clarify the scope of the clerk's power of rejection. Perhaps, the filing date of a document that is rejected under the circumstances that exist in this case and then correctly resubmitted should automatically relate back to the date of its original submission.[255]

But one way or another, what happened here is likely to happen again.[256]

And it did.

In *Waukegan*, the appellate court pointed out this apparent gap in Rule 9(d)'s good-cause provisions.[257] In that case, the court entered the final judgment on March 2, 2021, making a notice of appeal or postjudgment

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249 *Id.*
250 *Id.* ¶ 8.
251 *Id.*
252 *Id.*
253 *Id.* ¶ 9.
254 *Id.* ¶ 13.
255 *Id.* ¶¶ 14–15.
256 *Id.* ¶¶ 14–16.
257 *Waukegan Hosp. Grp., LLC v. Stretch's Sports Bar & Grill Corp.*, 2022 IL App (2d) 210179.

motion due on April 1.[258] The plaintiff filed a notice of appeal, which was file stamped on April 6, 2021.[259] In the notice of appeal, the plaintiff certified that it served the notice on the defendant on April 1, 2021.[260]

The appellate court dismissed the appeal for lack of jurisdiction.[261] In its brief, the plaintiff asserted the appellate court had jurisdiction because "it 'timely filed and served its Notice of Appeal on April 1, 2021[,] pursuant to Illinois Supreme Court Rule 303; however, on April 6, 2021, the [circuit clerk] returned the filing with instructions to resubmit, to which Plaintiff promptly complied.'"[262] For its analysis, the appellate court accepted this representation even though it found no support in the record.[263] Ultimately, the court explained, consistent with *Davis*, the plaintiff's timely submission of the document had no effect once the clerk rejected it, and the plaintiff filed the notice of appeal when he resubmitted it, and the clerk accepted it and stamped it "filed."[264]

In reaching its conclusion, the court identified an issue which needed clarity. The appellate court noted Rule 9(d)(2) does not "specify from which court a party must seek relief" under Rule 9(d)(2).[265] But, the court wrote, "In the context of a notice of appeal . . . the appropriate court from which to seek relief would be the trial court because that is the only court, up to that point, that ever had jurisdiction over the parties and subject matter."[266] Thus, the apparent recourse after the clerk rejected the notice of appeal, rendering it untimely, was to ask the trial court for relief under Rule 9(d)(2).[267] The clerk's rejection occurred after the 30-day period in which to file a notice of appeal, however, and the trial court had therefore lost its jurisdiction over the matter.[268] "Thus," the court explained, "it appears the procedure to seek relief under Rule 9(d)(2) may not apply to a notice of appeal because (1) a trial court loses its jurisdiction 30 days after final judgment, and (2) the rule does not state that a trial court retains jurisdiction to grant such relief."[269]

Like the court in *Peraino*, the court noted a party in this situation could still seek relief from the appellate court under Illinois Supreme Court Rule 303(d), which permits the appellate court to allow a late notice of appeal.[270] The party must seek relief from the appellate court within 30 days after the

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258 *Id.* ¶ 4.
259 *Id.* ¶ 5.
260 *Id.*
261 *Id.* ¶ 17.
262 *Id.* ¶ 11.
263 *Id.* ¶ 12.
264 *Id.* ¶ 16.
265 *Id.* ¶ 13.
266 *Id.*
267 *Id.* ¶ 14.
268 *Id.*
269 *Id.* ¶ 15.
270 *Id.*

time for filing a notice of appeal expires and must demonstrate a "reasonable excuse" for missing the deadline for filing a notice of appeal.[271]

The appellate court did "not decide whether Rule 9(d)(2) or Rule 303(d) is the proper vehicle to excuse a late electronic filing of a notice of appeal, however, because the plaintiff did not seek relief under either."[272] And the court could not determine whether there was good cause under Rule 9(d) or a reasonable excuse under Rule 303(d) under such circumstances.[273]

The supreme court affirmed but declined to address the appellate court's apparent question: Where should the party turn when a clerk's rejection renders a notice of appeal untimely?[274] The court gave two reasons for affirming the appellate court's judgment: (1) the record was incomplete and there was no basis to find the notice of appeal was timely, and (2) the plaintiff failed to follow the Supreme Court Rules when it did not seek relief under either Rule 9(d)(2) or Rule 303(d).[275]

In discussing the record, the supreme court noted that the plaintiff had submitted documents in its appendix, which showed "the April 1 filing was the notice of appeal with the trial court's order included as an attachment[,]" the clerk's reason for rejecting the filing "was that there 'should not be any attachments[,]'" and "[t]he clerk directed plaintiff to 'resubmit with all pages as one lead document.'"[276] According to the plaintiff, the rejection contradicted a local court rule.[277] The problem was that the documents upon which the plaintiff relied were not made part of the record or presented to the appellate court, because the plaintiff did not file a motion to excuse the late filing.[278] Thus, the record did not support a finding that the filing was timely.[279]

Discussing the plaintiff's failure to seek relief under either rule, the court wrote the following:

> Because plaintiff's notice of appeal was untimely, plaintiff was required to seek relief. Plaintiff did not do so. That fact is fatal to plaintiff's claim that the appellate court had jurisdiction. Plaintiff's reliance on due process concerns is misplaced because plaintiff did not utilize the remedies available. [Citation]. As discussed above, two of our rules provide potential recourse for a litigant who has an initial submission rejected by the clerk. Taking plaintiff's premise as true, that the clerk erroneously applied local

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271 *Id.*
272 *Id.*
273 *Id.*
274 *Id.* ¶ 16.
275 *Waukegan Hosp. Grp., LLC v. Stretch's Sports Bar & Grill Corp.*, 2024 IL 129277, ¶ 18.
276 *Id.* ¶ 21.
277 *Id.*
278 *Id.* ¶ 22.
279 *Id.*

> rules in rejecting his initial submission, one would be hard-pressed to find a more compelling case of "good cause" or "reasonable excuse" to allow plaintiff's appeal to proceed. However, plaintiff never sought to establish that premise in either the circuit or appellate court. Because plaintiff did not seek to excuse its untimely filing, it is left with the fact that its notice of appeal was filed five days after the due date. The legal effect of that fact is that the appellate court did not have jurisdiction to hear plaintiff's appeal.[280]

In *Dailey v. Amirante*, the appellate court adhered to *Peraino* and affirmed the trial court's order denying the plaintiff's "motion seeking leave to file [a] motion to reconsider *nunc pro tunc* to [the date of submission]."[281] After noting the plaintiff's motion did not seek to correct a clerical error in the court's judgment but rather reconsideration of the substantive decision, the appellate court stated, "[T]he trial court correctly held it lacked jurisdiction to grant a reconsideration motion, or a *nunc pro tunc* motion not aimed at a clerical error, once the 30th day from the judgment has ended."[282] The court also noted that the plaintiff's "unverified claim that his technical issues were caused by [e-filing] system flaws [was] hindered by an insufficient record."[283] Because the record did not contain a report of the proceedings or an acceptable substitute, the appellate court presumed the trial court's order had a sufficient factual basis and was grounded in the law.[284]

The appellate court's decision in *Waukegan* demonstrates the court's skepticism about Rule 9's application to notices of appeal. Its reasoning applies equally to the jurisdictional implications of untimely postjudgment motions in the circuit court and untimely petitions for rehearing in the appellate court.[285] In *Waukegan*, the appellate court's skepticism about Rule 9(d)(2)'s application stemmed in part from Rule 9(d)'s failure to specify from which court relief must be sought. The supreme court did not provide guidance on this portion of the rule.[286]

In *Miller v. Thom*, the appellate court answered that question. There, the plaintiff filed a complaint in Madison County and voluntarily dismissed it on August 17, 2018.[287] Under section 13-217 of the Code, the plaintiff had one year, that is, until August 19, 2019, to refile the complaint.[288] On August 14, 2019, the plaintiff attempted to e-file the refiled complaint in St. Clair

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280 *Id.* ¶ 24.
281 Dailey v. Amirante, 2023 IL App (1st) 211609-U, ¶ 20.
282 *Id.* ¶ 18.
283 *Id.*
284 *Id.* ¶ 19.
285 *Waukegan Hosp. Grp., LLC v. Stretch's Sports Bar & Grill Corp.,* 2024 IL 129277, ¶ 13.
286 *Id.*
287 *Miller v. Thom*, 2023 IL App (4th) 220429.
288 735 ILL. COMP. STAT. 5/13-217 (2018). Note August 17, 2019 was a Saturday, meaning the refiled complaint was due the next Monday, August 19.

County.[289] The filing was rejected eight days later, on August 22, because the plaintiff did not pay the fees for a new case filing and jury demand or attach a fee waiver.[290] The next day, the plaintiff filed the complaint in Sangamon County by mistakenly selecting that county in the e-filing system.[291] The court later granted the plaintiff's forum *non conveniens* motion and transferred the matter to St. Clair County.[292] The defendant petitioned the appellate court for leave to appeal.[293] The appellate court denied the defendant's petition for leave to appeal but was later directed to vacate the judgment and consider the appeal.[294] The appellate court reversed the circuit court's order granting the transfer to St. Clair County, finding the plaintiff did not state a claim for relief under the doctrine of forum *non conveniens*.[295]

On remand, the plaintiff did not mention Rule 9(d)(2) until filing a supplemental brief on the defendants' earlier motion to dismiss.[296] The defendant noted the plaintiff never filed a motion under Rule 9(d) and the e-filing error was the failure to pay the required fees, not a clerical error.[297] The circuit court dismissed the complaint with prejudice.[298]

The defendants argued on appeal that the plaintiff requested Rule 9 relief in the wrong court, and the appellate court agreed.[299] Relying on the appellate court's decision in *Waukegan*, the plaintiff argued a request for relief under Rule 9(d)(2) was to be made to the court that had jurisdiction of the case.[300] The appellate court did not find the appellate court's decision in *Waukegan* relevant because it did not actually make that finding and ultimately never addressed Rule 9(d)(2)'s applicability because the appellant never made a request under the rule.[301] Turning to Rule 9(d)(2)'s text, the court wrote the following:

> Rule 9(d)(2) first refers to a rejection by the "clerk" and then allows the filer of the rejected document to seek relief from the "court." A circuit clerk is "an officer of the court who has charge of the clerical part of its business." [Citation]. It is logical the circuit court whose officer took clerical action and rejected a document should be the court to determine if relief should be

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289 *Miller*, 2023 IL App (4th) 220429, ¶ 4.
290 *Id.*
291 *Id.* ¶ 5.
292 *Id.* ¶ 8.
293 *See* ILL. SUP. CT. R. 306(a)(2) (2019) (allowing an immediate appeal from an order granting or denying a forum *non conveniens* motion).
294 *Miller*, 2023 IL App (4th) 220429, ¶ 4.
295 *Id.* (citing *Miller v. Thom*, 2021 IL App (4th) 200410).
296 *Id.* ¶¶ 9–10.
297 *Id.* ¶ 10.
298 *Id.*
299 *Id.* ¶ 23.
300 *Id.*
301 *Id.* ¶ 24.

> granted for a collateral consequence of the clerk's rejection. Moreover, the circuit court of the same county as the circuit clerk would be familiar with local rules governing e-filing and filing fees . . . Thus, we find Rule 9(d)(2) is referring to the clerk and court of the same county."[302]

Because the St. Clair County court rejected the plaintiff's complaint, she had to seek relief under Rule 9(d)(2) from the St. Clair County circuit court.[303] In the case before it, however, the plaintiff filed the motion in the Sangamon County circuit court.[304] "Thus, the denial of plaintiff's request for relief under Rule 9(d)(2) was proper on the basis it was filed in the wrong court."[305]

The court also addressed the defendants' argument that the plaintiff's Rule 9(d)(2) request was untimely. The court noted the rule does not contain a time limit for seeking relief, but "the timing of the request for relief is clearly a circumstance the court can consider in addressing whether plaintiff has shown good cause."[306] The plaintiff received notice in early 2020 that the defendants challenged her complaint on untimeliness grounds, but she did not seek relief under Rule 9(d)(2) until March 2022, and the delay became a proper consideration.[307]

Finally, the court rejected the defendants' argument that the motion was properly denied because the plaintiff did not seek relief in a standalone motion, because Rule 9(d)(2) contained no such requirement.[308] In any event, the appellate court declined to address whether the plaintiff established good cause because the circuit court's denial of her request could be affirmed on the basis that it was filed in the wrong court.[309]

Miller should be taken with caution when it comes to the jurisdictional implications of untimely postjudgment documents identified by *Waukegan*. The document at issue in *Miller* did not have jurisdiction deadlines; it was a complaint filed outside the applicable statute of limitations, that is, the one-year refiling period under section 13-217 of the Code.[310]

Not all courts, however, have ascribed to *Peraino* and *Waukegan*. Recall *O'Gara*, where the rejected filing was a postjudgment motion to reconsider.[311] The appellate court rejected the defendant's argument that the circuit court lacked jurisdiction to consider the plaintiff's Rule 9(d)(2)

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302 *Id.* ¶ 25 (citation omitted).
303 *Id.*
304 *Id.*
305 *Id.* ¶ 26.
306 *Id.* ¶ 27.
307 *Id.* ¶ 28.
308 *Id.* ¶ 29.
309 *Id.*
310 *See id*.
311 *O'Gara v. O'Gara*, 2022 IL App (1st) 210013, ¶ 21.

motion, because the circuit court's jurisdiction had lapsed by passage of 30 days.[312] The court reasoned that "[s]uch a narrow reading of [sic] would effectively disallow any *nunc pro tunc* motion to be filed to cure an untimely postjudgment motion[,]" which "defies common sense and stands contrary to settled case law."[313] *O'Gara* did not squarely address what *Peraino* said about the proper use of *nunc pro tunc* relief—it is used to correct clerical errors in a *judgment*, as opposed to a clerk's purported error in rejecting a document.[314] And in *Leff*, the appellate court did not address the circuit court's jurisdiction to consider the Rule 9(d)(2) request—a point not argued by the parties—and reviewed the merits of that decision.[315]

After the supreme court's decision in *Waukegan*, practitioners still lack clear guidance as to where they should seek relief when a document is rejected by the clerk and, therefore untimely. However, practitioners at least know they must seek relief somewhere, or else they may lose their right to have a decision of one tribunal reviewed by the same or a different tribunal.

III. STATEWIDE REJECTION STANDARDS: WILL THEY SOLVE THE PROBLEM?

As the case law demonstrates, a clerk's delay in reviewing and determining whether to accept or reject a document can have serious consequences. Practitioners have long wished for solutions to the problems created by a clerk's rejection after a document's due date. Among the solutions offered were two amendments to Rule 9 proposed by the e-Business Policy Board.[316]

A. The First Proposal—a "Grace Period"—Was Not Adopted

In 2020, the Appellate Lawyers Association of Illinois's (ALA) Special Committee on E-Filing prepared a report on e-filing issues to the ALA, which it later presented to the Administrative Office of the Illinois Courts and the clerks of the Illinois Supreme Court and each of the five appellate districts.[317] The committee stated its membership was concerned primarily the "clerks' nonuniform acceptance and rejection of filings[,]" and also cited concerns with the lack of uniformity in e-filing rules among the circuit courts and

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312 *Id.* ¶ 46.

313 *Id.*

314 *See id.*

315 *See Leff, Klein, & Kalfen, Ltd. v. Wiczer & Assoc.,* 2022 IL App (2d) 220089-U.

316 *See* APP. LAW. ASS'N. SPECIAL COMM. ON E-FILING, REPORT ON E-FILING ISSUES 6 (2020), https://applawyers.org/blog/10504726#:~:text=%C2%A0issued%20a-,report,-proposing%20some%20recommended.

317 *See id.*

appellate districts.[318] The committee recommended that the Illinois Supreme Court "issue uniform standards governing e-filing . . . across all courts at all levels."[319] The committee noted some but not all courts had published standards, which contained only general information and, in any event, were not uniform.[320]

As to the clerks' acceptance and rejection of filings, the committee wrote, "[t]he problem with the current e-filing system [was] not the clerks' discretion per se, but rather the consequences of delayed rejections and the inability to backdate filings to ensure that minor technical deficiencies do not render otherwise acceptable filings untimely."[321] The committee suggested that "published standards should state the exact circumstances under which rejections will happen" and parties should have a defined timeframe to correct a rejected e-filing and still have the document be deemed timely.[322]

The director of the Administrative Office of the Illinois Courts and the clerks of the Illinois Supreme Court and each appellate district responded to the ALA in May 2021.[323] In response to the ALA's concerns about uniform e-filing rules, they wrote that the Illinois Supreme Court and the Fourth District had modified their existing e-filing manuals to be more consistent and had published them on the Illinois Courts Website, and the remaining districts had either already or were intending to adopt the supreme court's manual.[324]

In response to the ALA's concern about the clerks' nonuniform acceptance and rejection of filings, the director and clerks wrote that "[s]tatewide rejections typically ranged from 8-10% of total filings for all Illinois courts," and the supreme court and the director were aware of the issues arising from the clerks' rejection of documents.[325] They noted that even though the current system had the functionality, the current Supreme Court Rules did not authorize the clerks to backdate documents.[326] However, the Administrative Office of the Illinois Courts and the e-Business Policy Board were pursuing that avenue.[327]

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318 *See id.*

319 *See id.* at 10.

320 *See id.*

321 *See id.* at 11.

322 *See id.*

323 Letter from Marcia Meis, Dir. of the Admin. Off. of Ill. Cts. et al., to App. Law. Ass'n (May 10, 2021), https://applawyers.org/blog/10504726.

324 *Id; see* ELECTRONIC FILING PROCEDURES AND USER MANUAL, *supra* note 47.

325 Letter from Marcia Meis et al. to App. Law. Ass'n., *supra* note 323; *see* ELECTRONIC FILING PROCEDURES AND USER MANUAL, *supra* note 47.

326 Letter from Marcia Meis et al. to App. Law. Ass'n., *supra* note 323; *see* ELECTRONIC FILING PROCEDURES AND USER MANUAL, *supra* note 47.

327 Letter from Marcia Meis et al. to App. Law. Ass'n., *supra* note 323; *see* ELECTRONIC FILING PROCEDURES AND USER MANUAL, *supra* note 47.

In 2022, the e-Business Policy Board proposed an amendment to Rule 9(d) aimed at remedying the effects of delayed rejections and was consistent with the ALA's recommendations.[328] The proposal, which was not adopted, would have amended Rule 9(d) to read as follows (additions appear in underscored text; deletions appear in strikethrough text):

> (d) Timely Filing. Unless a statute, rule, or court order requires that a document be filed by a certain time of day, a document is considered timely if submitted before midnight (in the court's time zone) on or before the date on which the document is due. A document submitted on a day when the clerk's office is not open for business will, unless rejected, be file stamped as filed on the next day the clerk's office is open for business. The filed document shall be endorsed with the clerk's electronic file mark setting forth, at a minimum, the identification of the court, the clerk, the date, and the time of filing.
>
> (1) If a document is untimely due to any court-approved electronic filing system technical failure, the filing party may seek appropriate relief from the court, upon good cause shown.
>
> (2) If the clerk does not accept the document(s), the clerk shall notify the submitting party via the electronic filing service provider of the reason(s) for not accepting the document(s). Upon such notification, the status of the document(s) will be designated as "pending correction" for the next 48 hours.
>
> (A) If properly resubmitted with all deficiencies corrected by the submitting party within those 48 hours, the document(s) shall be accepted by the clerk and the file mark shall be the date and time of the original submission. In order for the filing to relate back to the original submission date, the filing party may only make changes to cure the

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328 *Supreme Court Rules Committee Proposal Public Hearing Before the Supreme Court Rules Committee Public Hearing*, Ill. Sup. Ct. Board/Comm'n/Comm./Task Force 4 (Oct. 5, 2020) [hereinafter *Hearing*] (statement of Hon. Eugene Doherty, Chair, Ill. Sup. Ct. e-Bus. Pol'y Advisory Bd.), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/4e65d57c-5c9a-4f98-a71d-ebd16e18bdd4/Public%20Hearing%20Transcript.pdf.

> reason(s) for the rejection. The originally submitted document(s) shall be available to the other parties in the case upon order of court;
> (B) If the corrected document(s) is not properly submitted within said time or if all deficiencies are not cured, the document(s) may be rejected by the clerk.
>
> (3) ~~(2)~~ If a document is rejected by the clerk and is therefore untimely, the filing party may seek appropriate relief from the court, upon good cause shown.[329]

The proposal also would have added a committee comment stating that Rule 9(d) "allows the relation back of documents after specified technical defects are cured and does not allow relation back if substantive changes are made."[330] "Documents rejected and later accepted for filing will be marked to reflect this."[331]

Prior to the October 5, 2022, hearing at which the proposal was considered, the Illinois Supreme Court Rules Committee received public comments from the Illinois State Bar Association's (ISBA) general counsel Charles J. Northrup and the Illinois Defense Counsel (IDC) president Terry Fox.[332] Northrup expressed the ISBA's support for the proposal, which "were seen as important improvements to ensure that minor technical deficiencies associated with document filing do not result in the loss of client rights."[333] The ISBA, however, identified two concerns. First, it suggested the proposal's 48-hour correction period "be changed to 'two (or three) business days.'"[334] Second, some in the ISBA thought "greater clarification was necessary on the distinction between a 'technical' defect (subject to

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329 Ill. Sup. Ct. e-Bus. Pol'y Advisory Bd., Proposal 22-02 Amends Supreme Court Rule 9 (Electronic Filing of Documents) (Feb. 4, 2022), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/59bf4604-d2e3-4618-a0c7-811474ba4da8/Proposal%202202%20Amends%20Supreme%20Court%20Rule%209%20(Electronic%20Filing%20of%20Documents)%20Offered%20by%20the%20Illinois%20Supreme%20Court%20eBusiness%20Policy%20Advisory%20Board.pdf.

330 *Id.*

331 *Hearing*, *supra* note 328, at 4.

332 Letter from Charles J. Northrup, Gen. Couns., Ill. St. Bar Ass'n, to Sec'y of the Sup. Ct. Rules Comm. (Sept. 28, 2022), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/85b66fc9-e7bf-4722-96cc-ebf9b9fcfd3a/Charles%20Northrup%20written%20comments%20on%20all%20Proposals.pdf.

333 *Id.*

334 *Id.*

correction) and a 'substantive' change (not subject to correction)."[335] Fox expressed the IDC's support for the proposal, explaining clerk rejection was "not an uncommon occurrence" and such rejections can have "disastrous" consequences for parties who attempt to file a document on the date a deadline expires.[336] IDC believed the proposal's enumerated steps for seeking appropriate relief after a rejection supported the proposal's adoption.[337]

At the hearing, the e-Business Policy Board's chair, Justice Eugene Doherty (then a circuit judge), spoke in the proposal's favor.[338] He explained the proposal's intent was "to guard against fatal errors of untimeliness that might occur when an e-file[d] document is rejected for technical, but curable reasons."[339] The e-Business Policy Board proposed "a middle ground between acceptance and rejection of a document, a grace period[,]" during which a clerk would review a document, flag it for error, give notice of the error, and a limited time to correct it.[340] If the party corrected the error within the specified time, the court would deem it filed of the original submission date.[341] In the event the Rules Committee was inclined to recommend the amendment be adopted, Justice Doherty asked that they be given some lead time, because the courts' e-filing provider needed time to build the grace period into its software.[342] Justice Doherty also asked for flexibility with the proposal's 48-hour grace period, which the committee had arbitrarily selected, and emphasized that further coordination with the courts' e-filing provider was necessary.[343]

Seth Horvath of the ALA also spoke in support of the proposal. He stated the proposal was "a much needed rule change" that addresses delayed rejection notices in the e-filing system.[344] He believed the proposal's adoption would provide a sense of relief to the ALA's membership, given the serious jurisdictional consequences a rejection can pose.[345] Horvath proposed a minor modification to the proposal, clarifying the 48-hour grace

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335 *Id.*

336 Letter from Terry Fox, Pres., Ill. Def. Couns., to Comm. Sec'y, Ill. Sup. Ct. Rules Comm. (Sept. 27, 2022) https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/549cd7a5-cf96-4799-8768-3f0d54fb2d9c/Terry%20Fox%20written%20comment%20on%20Proposal%2022-02.pdf (last visited Apr. 19, 2025).

337 *Id.*

338 *Hearing*, *supra* note 328, at 5.

339 *Id.*

340 *Id.*

341 *Id.*

342 *Id.* at 5–6.

343 *Id.* at 14 (statement of Seth Horvath, App. Laws. Ass'n. of Ill.).

344 *Id.*

345 *Id.*

period.[346] Specifically, he suggested a period of "48 business hours or two business days[,]" if not longer.[347]

While the Illinois Supreme Court did not adopt this proposed amendment, the ALA's report made some progress in bringing relief to appellate practitioners, in that the reviewing courts' e-filing standards were modified and made public.

B. The Second Proposal—Rejection Standards—Was Adopted

After the Illinois Supreme Court declined to adopt the first proposed amendment, the e-Business Policy Board took a different approach.[348] It proposed an amendment to Rule 9 that did not focus on providing relief to aggrieved litigants. Instead, the proposal aimed to address the problem's roots. The proposal would enact statewide rejection standards that were published on the Illinois Supreme Court's website, leaving the onus on litigants to ensure their filings are fileable upon submission.[349] The Illinois Supreme Court adopted the proposal in a new paragraph (f), effective September 1, 2024. which, again, states that "[d]ocuments filed electronically may be rejected by the clerk as authorized by the Electronic Filing Rejection Standards for circuit courts and courts of review, as published on the illinoiscourts.gov website."[350]

The Illinois Supreme Court adopted separate rejection standards for the circuit courts and courts of review. The circuit court standards list twenty-two reasons that may cause a document's rejection.[351] The courts of review standards list twenty-nine reasons applicable to both the appellate and Illinois Supreme Court and an additional eight reasons applicable only to the Illinois Supreme Court.[352] Each set of standards provides suggested comments for clerks to use when notifying filers of a rejection, references existing rules and standards that support the rejection standards, and in some cases, examples, helpful links, and notes.[353]

That said, the rejections standards leave some wiggle room for variance among the courts. Indeed, both sets of standards provide a document may be rejected because of a local rule requirement.[354] In addition, both sets of standards allow rejections for issues not otherwise identified, permit a "rejection by clerk," and direct the clerk to specify a reason for the rejection

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346 *Id.*
347 *Id.* at 14–15.
348 ILL. S. CT. R. 9(f) (Sept. 1, 2024).
349 *Id.*
350 *Id.*
351 *See* CIRCUIT COURT E-FILING REJECTION STANDARDS*, supra* note 38.
352 *See* REVIEWING COURT E-FILING REJECTION STANDARDS, *supra* note 39.
353 *See* CIRCUIT COURT E-FILING REJECTION STANDARDS, *supra* note 38.
354 *See id.* at 5; *see* REVIEWING COURT E-FILING REJECTION STANDARDS, *supra* note 39, at 5.

and how to correct it.[355] The Circuit Court Rejection Standards state "This reason should be used in rare circumstances only when none of the [other] specified reasons are applicable" and it directs the clerk provide a "detailed" explanation of the issue and how it can be corrected.[356]

In a press release announcing the amendment, the Illinois Supreme Court stated the adoption of rejection standards was "intended to ensure statewide uniformity" and "will provide filers with guidance on correcting their filings for resubmission."[357] The new rejection standards have met some skepticism.[358] One practitioner has commented that the rejection standards did not provide uniformity, fostered confusion, and left in place the status quo.[359] Specifically, the practitioner took issue with the standards' inclusion of a rejection based on a local rule requirement, which necessarily is not uniform and contradictory to the Illinois Supreme Court's goal of achieving statewide standardization.[360] She also commented that the amendments did not provide different treatment for errors that do not affect a document's integrity.[361]

Criticisms aside, this amendment aligns with Rule 9's existing text. Indeed, for five years, Rule 9(e) has placed the responsibility of ensuring the accuracy of data and content on the litigants, not the court or the clerk.[362]

Perhaps the new rejection standards will kill the problem at its roots. Litigants, however, continue to shoulder the load, ensuring their documents comply with the applicable rules and standards so that they are not rejected. At least now, they have a centralized source listing the reasons their documents may be rejected. Savvy litigants will familiarize themselves with those standards and the rules and standards referenced in them to save themselves the headache of remedying a late filing caused by a delayed clerk rejection. In any event, only time will tell if these standards will have their intended effect.

C. Will Anything Come from the Grace Period Proposal?

As noted, the e-Business Policy Board's grace period proposal received support from the ISBA, the IDC, and ALA, but was ultimately not adopted

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355 *See* CIRCUIT COURT E-FILING REJECTION STANDARDS, *supra* note 38, at 6.

356 *See id.*

357 *Illinois Supreme Court Amends Rejections Standard for Circuit and Reviewing Courts*, ILL. CTS., https://www.illinoiscourts.gov/News/1390/Illinois-Supreme-Court-amends-rejection-standards-for-circuit-and-reviewing-courts/news-detail/ (last visited Apr. 19, 2025) [hereinafter *Rejections Standard Amended*].

358 Pete Sherman, *Rejected E-Filings*, 112 ILL. B.J. 16, 18 (August 2024).

359 *Id.*

360 *Id.*

361 *Id.*

362 ILL. S. CT. R. 9(e) (2020).

by the Illinois Supreme Court.[363] One could speculate why the Illinois Supreme Court chose the alternative approach of the e-Filing Rejection Standards. For instance, one could argue that under the grace period proposal, rejections due to user errors would receive more favorable treatment than documents not filed due to system errors. Filers who make a mistake would not need to show good cause in the event of the rejection; rather, they could just make the required corrections (but not change the document's substance) within 48 hours and have their document deemed timely. However, filers whose documents are rendered untimely because of a system error—something they have no control over—would not have a similar means of relief. This, and the Illinois Supreme Court's longstanding policy of placing the burden of accuracy on filers, may explain the court's reluctance to adopt the grace period proposal.

That said, the Illinois Supreme Court could always reconsider the proposal or some analog if the rejection standards prove to be fruitless in curbing the consequences of a clerk's rejection. The preference is always to hear disputes on their merits rather than decide them on procedural technicalities.[364] Clerk rejections, though caused by usually avoidable user error, do not promote that policy.

In addition, the grace period proposal may not be a complete fix in circumstances like those in *Waukegan*, where the circuit court's jurisdiction has lapsed. As this author has previously written, the proposed amendment would still require parties whose filings are rejected (and not timely corrected) to show good cause.[365] And as this author has suggested, the Illinois Supreme Court could solve the jurisdictional issue illustrated by *Waukegan* by amending Rule 9(d) to state that for documents to be filed in the circuit court, the circuit court retains jurisdiction to entertain motions under the Rule notwithstanding the lapse of the circuit court's jurisdiction after passage of thirty days.[366]

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363 *Rejections Standard Amended*, *supra* note 357.

364 *Dupree v. Hardy*, 2011 IL App (4th) 100351, ¶ 59 (citing *Midwest Builder Distrib., Inc. v. Lord & Essex, Inc.*, 891 N.E.2d 1, 22 (Ill. App. Ct. 2007)).

365 Fairfield, *supra* note 42, at 12, 16; *see* Ill. Sup. Ct. e-Bus. Pol'y Advisory Bd., Proposal 22-02 Amends Supreme Court Rule 9 (Electronic Filing of Documents) (Feb. 4, 2022), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/59bf4604-d2e3-4618-a0c7-81147 4ba4da8/Proposal%2022-02%20Amends%20Supreme%20Court%20Rule%209%20(Electronic %20Filing%20of%20Documents)%20Offered%20by%20the%20Illinois%20Supreme%20Court% 20e-Business%20 Policy%20Advisory%20Board.pdf.

366 Fairfield, *supra* note 42, at 12, 16; *see* Ill. Sup. Ct. e-Bus. Pol'y Advisory Bd., Proposal 22-02.

CONCLUSION

In the seven years since being mandated statewide via Rule 9, e-filing has solved some problems while creating others, and the courts have provided answers about Rule 9 while creating some questions. The history of Rule 9's text and the body of law that has developed around the rule demonstrates that the courts of this state place responsibility on litigants to understand and follow court rules and procedures, demand attention to detail, and contemn procrastination. In the end, litigants should know that there is some means of relief when the clerk rejects a document, rendering it untimely.

PROVING CHARACTER AND FITNESS IN ILLINOIS BAR ADMISSIONS: AN INTRODUCTION TO THE SUBSTANTIVE REQUIREMENTS AND THE APPLICABLE PROCEDURES

Stephen Fedo*

INTRODUCTION

All lawyers have direct experience with one particular evidentiary proceeding, even those whose practice never takes them anywhere near a courtroom. Nevertheless, few lawyers are actually familiar with that proceeding, and far fewer acquire real expertise with it. The proceeding arises from the requirement, under Illinois Supreme Court Rule 708(b), that there must be a formal determination "whether each applicant presently possesses good moral character and general fitness for admission to the practice of law" in Illinois.[367]

Although a determination of good moral character and general fitness is integral to bar admissions,[368] bar applicants typically do not think of it as a "proceeding" such as those they have learned about in law school or have otherwise encountered in civic life, and only a relatively small fraction of bar applicants will ever experience the character and fitness "process" as any kind of formal "proceeding." For most, the process consists of providing personal background details, including employment and education history in response to an extensive but by no means exhaustive

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367 ILL. SUP. CT. R. 708(b).

368 ILL. SUP. CT. R. 701(a).

questionnaire;[369] beyond that, most applicants are not required to furnish further proof of good character and general fitness.

For some, however, the questionnaire marks the beginning of a process that may continue for weeks or months and may require an applicant to come forward with "clear and convincing" proof of good character,[370] which will be closely scrutinized and assessed by members of the bar serving as commissioners of the Illinois Supreme Court. Applicants obliged to present proof beyond their questionnaire responses are often clueless about the process, its objectives, and what may be expected of them as they go forward.[371] Uninformed assumptions may guide them, and thus, they may unwittingly complicate their own cause.

An applicant may retain counsel to help in the process.[372] Still, even seasoned lawyers may fail to perceive the anomalies within the character and fitness process or may incorrectly assume similarity with proceedings before the Attorney Registration and Disciplinary Commission, when the differences are fundamental. Even lawyers appointed by the Illinois Supreme Court to serve on Committees on Character and Fitness may come to the job with little substantive experience in bar admissions matters and may face a learning curve like those found when they undertake matters in new areas of the law.

The problem at the outset of the Character and Fitness process—for applicants and lawyers alike—is that the process is both *like* and *materially different from* other kinds of proceedings. Therefore, it may be helpful for anyone who must work within that process, be they applicants, the lawyers who represent them, the educators and mentors who may advise them, or the commissioners who will assess the evidence, to consider the fundamentals of character and fitness in general as they begin the specific tasks before them. And even those lawyers whose own experience with character and fitness was in the remote past and was so fleeting as to be barely noticeable by them, and who, though perhaps never having reason to engage further with the character and fitness process, may be interested in how the legal profession self-regulates, may profitably consider how the character and fitness process serves as a gateway to the profession.

This Article is an introduction to the procedural form and fundamental substance of determinations of good character and fitness. The following topics are discussed:

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369 *Character & Fitness Questionnaire*, ILL. BD. OF ADMISSIONS TO THE BAR, https://www.ilbaradmissions.org/browseform.action?applicationId=1&formId=2&startNew=true (last visited Mar. 2, 2025).

370 RULES OF PROC. 6.1 (ILL. BD. OF ADMISSIONS TO THE BAR 2018).

371 James E. Spence, Jr., *From My Perspective: Advising Applicants on the Character and Fitness Process*, THE BAR EXAMINER (Spring 2022), https://thebarexaminer.ncbex.org/article/spring-2022/from-my-perspective-3/.

372 RULES OF PROC. 9.4.4.

(1) The basic nature of the character and fitness process as a legal proceeding;
(2) The matter to be proved;
(3) The four principal levels of evidentiary review, and how the procedures at each level affect substantive considerations, including the burden of proof;
(4) The conduct of the Rule 9 hearing and the role of counsel appointed to present matters adverse to the applicant;
(5) Post-hearing matters, including new hearings and Supreme Court review; and
(6) The special problem of considering disability when determining character and fitness.

The Article concludes with a discussion of *In re Krule*,[373] issued a quarter-century ago but still the most recent opinion on character and fitness published by the Supreme Court. Each of the three differing opinions in *Krule* deals in its own way with what is *fair*—procedurally, or to the public at large, or to an individual whose case is at issue.[374] The *Krule* perspectives on fairness, taken together, cast light on the fundamental objectives of the character and fitness process and, when understood by all participants in the process, may contribute to greater transparency and just outcomes.

I. CHARACTER AND FITNESS AS ADJUDICATION

A bar applicant's good moral character and general fitness are established through a process that is largely *sui generis,*[375] but in many ways, it resembles or is analogous to civil litigation. Each applicant is essentially a movant or petitioner seeking judicial relief. Here, the "petition" is the character and fitness application, which implicitly prays both for preliminary relief (the application must be satisfactory on its face for the applicant to be admitted to the bar examination)[376] and ultimate relief, *i.e.*, the certification

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373 *In re* Krule, 741 N.E.2d 259 (2000).

374 *See generally id.* (majority opinion); *id.* (Miller, J., concurring); *id.* (McMorrow, J., concurring in part and dissenting in part).

375 *Sui Generis*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sui%20generis (last visited May 23, 2025).

376 ILL. SUP. CT. R. 704(b) (describing that admission to the bar examination will not be granted to applicants who have been convicted of felonies; are subject to pending indictments, criminal informations, or felony complaints; have been denied bar admission in another jurisdiction on character and fitness grounds, or are the subject of proceedings regarding same; or have been subject to professional discipline or are the subject of disciplinary proceedings in another jurisdiction where admission previously was granted. For such applicants, full certification of good moral character and general fitness is a prerequisite for taking the bar examination.).

of the Committee on Character and Fitness that the applicant "presently possesses good moral character and general fitness for admission to the practice of law."[377]

The trier of fact on the issue of an applicant's character and fitness is the Committee on Character and Fitness ("the Committee").[378] Both it and the Board of Admissions to the Bar (the Board) are "respectively constituted bodies of commissioners of [the supreme court], who are . . . empowered and charged to receive and entertain complaints, to make inquiries and investigations, and to take proof from time to time as may be necessary, concerning applications for admission to the bar . . . ."[379] As a commission of the supreme court, the functions of the Committee are judicial (or quasi-judicial), not ministerial or administrative, and the determination of character and fitness by the Committee is deemed to be a "court" proceeding.[380] But, as will be discussed in greater detail, *infra*, the proceeding seems more clearly adjudicatory at some stages than others. The *de novo* hearing that may be convened before a panel of the Committee at the last stage of character and fitness review has many attributes of a formal civil trial.[381] However, at the outset of the process, the applicant's "petition"—the character and fitness application—is submitted not to the Committee but to the Board of Admissions, and the "initial review" is conducted by the Board's Director of Administration with the assistance of Board staff.[382] If the Director's review "raise[s] no character and fitness concerns . . . the Director may recommend . . . the certification of the applicant . . . ."[383]

Notably, a decision by the Committee (or the Director) that an applicant possesses the requisite character and fitness for admission is not final and conclusive.[384] The supreme court has reserved to itself the power to determine whether every applicant is qualified for admission and may review and even reverse the Committee's certification.[385] The supreme court also may review, upon the applicant's petition, the Committee's decision not to certify.[386] In character and fitness matters, the supreme court's functions extend somewhat beyond customary appellate jurisdiction; the court plays a fundamental role in the oversight of the legal profession, and by reserving to

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377 ILL. SUP. CT. R. 708(b); *see* ILL. SUP. CT. R. 704(a); ILL. SUP. CT. R. 704(b).

378 ILL. SUP. CT. R. 708(b).

379 ILL. SUP. CT. R. 709(b). One Committee is appointed in each of Illinois' six Judicial Districts. ILL. SUP. CT. R. 708(a).

380 *See*, *e.g.,* Edwards v. Ill. Bd. of Admissions to the Bar, 261 F.3d 723, 729 (7th Cir. 2001).

381 RULES OF PROC. 9 (ILL. BD. OF ADMISSIONS TO THE BAR 2018).

382 RULES OF PROC. 4; RULES OF PROC. 5; RULES OF PROC. 8.1.

383 RULES OF PROC. 8.1.

384 *Id.*

385 *In re* Loss**,** 518 N.E.2d 981, 983 (Ill. 1987); *see also In re* Krule, 741 N.E.2d 259, 260 (Ill. 2000) ("[A] determination by the Committee . . . concerning the character and fitness of an applicant neither binds this court nor limits our authority to take action."); *see also* RULES OF PROC. 9.12.

386 ILL. SUP. CT. R. 708(h); RULES OF PROC. 12.

itself the final decision as to each bar applicant, the court confirms the judicial nature of character and fitness proceedings.

II. CHARACTER AND FITNESS: WHAT IS THE MATTER TO BE PROVED?

Outside the context of bar admissions, "good moral character and general fitness" is rarely a subject of litigation, much less the ultimate fact to be established in a case. Indeed, only in exceptional circumstances is evidence of character ever admissible.[387] As individuals, we frequently make subjective judgments about someone's character or fitness for a particular task or responsibility, and our experience with subjective assessments may lead us to assume we understand the meaning of "character" and "fitness." But do we? And is a subjective understanding adequate in a proceeding where those qualities must be proved by "clear and convincing evidence[?]"[388]

"Character" may be defined as "one of the attributes or features that make up and distinguish an individual (*syn.* personality); moral excellence and firmness (*syn.* reputation)."[389] "Fitness" may be defined as "how suitable someone or something is (*syn.* able)."[390] A broad distinction might be that character/personality suggests an intrinsic quality, while fitness/ability suggests qualities that can be learned or acquired. Stated even more broadly, the determination of character asks: What *are* you? The determination of fitness asks: What can you *do*?

While dictionary definitions provide a rudimentary structure for proof of character and fitness in bar admissions, more is needed. The supreme court has provided greater particularity to the definitions in its promulgation of ten "Essential Eligibility Requirements" under Illinois Supreme Court Rule 708(c) and IBAB Rule 6.3.[391] These Rules do not, on their face, expressly define "character" or "fitness," but do so implicitly by setting forth the "essential" matters that will constitute proof of good moral character and general fitness. The ten requirements are as follows:[392]

> (1) The ability to learn, to recall what has been learned, to reason, and to analyze;

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387 *See* ILL. R. EVID. 404–05.

388 *See* RULES OF PROC. 6.1.

389 *1 Character*, Merriam-Webster, https://www.merriam-webster.com/dictionary/character (last visited Mar. 3, 2025).

390 *1 Fitness*, *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/fitness (last visited Mar. 3, 2025).

391 ILL. SUP. CT. R. 708(c); RULES OF PROC. 6.3.

392 ILL. SUP. CT. R. 708(c); RULES OF PROC. 6.3.

> (2) The ability to communicate clearly and logically with clients, attorneys, courts, and others;
> (3) The ability to exercise good judgment in conducting one's professional business;
> (4) The ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
> (5) The ability to conduct oneself with respect for and in accordance with the law and the Illinois Rules of Professional Conduct;
> (6) The ability to avoid acts that exhibit disregard for the health, safety, and welfare of others;
> (7) The ability to conduct oneself diligently and reliably in fulfilling all obligations to clients, attorneys, courts, creditors, and others;
> (8) The ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others;
> (9) The ability to comply with deadlines and time constraints; and
> (10) The ability to conduct oneself properly and in a manner that engenders respect for the law and the profession.[393]

Notably, each of the ten requirements is expressly referred to as an "ability,"[394] which may suggest that all of them are fitness criteria. Still, in essence, the majority of the requirements—those focusing on qualities of honesty, trustworthiness, judgment, diligence, etc.—bear on an applicant's character. The evidence needed to satisfy the few requirements that appear most directly to implicate fitness and ability is fairly straightforward: the ability to learn and to communicate will generally be proved by objective evidence*, e.g.*, satisfactory completion of law school and passing the bar examination.[395] On the other hand, proof of character is not straightforward,

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393 Strictly speaking, the ten Essential Eligibility Requirements are not exclusive; proving good moral character and general fitness means not only meeting each of the listed criteria, but also presenting a "record of conduct" that "justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them." *See* ILL. SUP. CT. R. 708(b); RULES OF PROC. 6.2, As a practical matter, the "record of conduct" criterion might best be viewed not as additional to the Essential Eligibility Requirements, but as cumulative of all of them.

394 *See* ILL. SUP. CT. R. 708(b); RULES OF PROC. 6.2.

395 *See* Nat'l Conf. of Bar Exam'rs, *The Testing Column*, THE BAR EXAM'RS (Fall 2023), https://thebarexaminer.ncbex.org/article/fall-2023/the-testing-column-fall23.

for while an applicant's history may disclose objective evidence relevant to the inquiry, character is not susceptible to objective measurement.[396]

How, then, does an applicant prove good moral character? Under the rules, the applicant "has the burden to prove by clear and convincing evidence that he or she has the requisite character and fitness for admission to the practice of law."[397] Note, too, that the applicant's burden of proof continues throughout the process, from submission of an application through the point of actual admission.[398] The applicant must meet the burden with "clear and convincing evidence," an especially rigorous standard described as the "quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question."[399] Clear and convincing evidence is "free from doubt,"[400] or is "highly probably true."[401] However described, the evidence must be of a very high level of certainty to be "clear and convincing;" the standard is much higher than the ordinary standards of civil litigation.[402]

In the abstract, having to prove affirmatively and by clear and convincing evidence the rather subjective qualities of one's character might seem an insurmountable barrier to admission to the legal profession. The proof, however, is not made in the abstract but within a series of procedural steps that effectively narrow the scope of relevant evidence and provide important context for applying the burden of proof and presenting and evaluating the evidence.

III. THE FOUR LEVELS OF EVIDENTIARY REVIEW AND THE BURDEN OF PROOF AS A REBUTTABLE PRESUMPTION

There are four separate levels in the character and fitness process where evidence of an applicant's background and conduct may be reviewed: an "initial review" by the Board's Director of Administration and the Board's staff of the character and fitness application and any supplemental materials and investigations,[403] evaluation of the application and materials and an interview by a single member of the Committee on Character and Fitness,[404]

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396 *See* Am. Bar Ass'n, *A Higher Bar? Character and Fitness and the New Title VII*, HARV. L. SCH. CTR. ON THE LEGAL PRO. (2023), https://clp.law.harvard.edu/article/a-higher-bar (discussing the variability and subjectivity in character and fitness evaluations for bar admission).

397 RULES OF PROC. 6.1; *see also In re* DeBartolo, 488 N.E.2d 947, 948 (Ill. 1986).

398 RULES OF PROC. 3.4; *see also* RULES OF PROC. 3.3.

399 Bazydlo v. Volant, 647 N.E.2d 273, 276 (Ill. 1995).

400 *In re* Hansen, 172 N.E.2d 772, 773 (Ill. 1961).

401 *Estate of* Ragen, 398 N.E.2d 198, 202–03 (Ill. App. Ct. 1979).

402 *Clear and Convincing Evidence*, CORNELL L. SCH. LEGAL INFO. INST. (July 2022), https://www.law.cornell.edu/wex/clear_and_convincing_evidence (explaining that clear and convincing evidence is a greater burden than preponderance of the evidence).

403 RULES OF PROC. 8.1; *see also* RULES OF PROC. 3.1, 3.2, 5.

404 RULES OF PROC. 8.1(b), 8.2; *see also* ILL. SUP. CT. R. 708–709.

a similar evaluation of written material and an interview by a three-person Inquiry Panel of the Committee,[405] and a full evidentiary hearing before five members of the Committee, sitting as a Hearing Panel.[406] The process at each level differs significantly from the other levels. The degree of procedural formality increases at each step from the initial review through the five-member hearing, but each step stands on its own, and a succeeding step is not the equivalent of an appellate review of a preceding step, nor will a determination of an applicant's character and fitness necessarily involve all four steps—indeed, most determinations are reached at the initial stage of review.

A. Initial Review: IBAB Rule 8.1

Each bar applicant must "register his or her character and fitness by submitting a completed Character & Fitness Questionnaire together with such additional proofs and documentation as the Board may require . . . ." and that questionnaire must be supplemented and updated from time to time, as required by the rules.[407] In addition, applicants have "a continuing obligation to report promptly . . . any change or addition to the information provided" in the initial questionnaire.[408] The questionnaire is lengthy and requires that applicants report extensively about their personal, professional, and educational backgrounds, including past matters that may have been problematic, such as criminal charges and disciplinary issues at school or in employment.[409]

What the questionnaire does *not* require—at least not explicitly—is any direct statement by applicants that they have met the ten Essential Eligibility Requirements, nor does it directly call upon them to adduce "clear and convincing evidence" of good character and moral fitness.[410] Although applicants bear the burden of proof throughout the entire character and fitness process, at this initial stage, most applicants will be unaware of the need to "prove" anything—more likely, they will regard their "burden" as one of disclosure, not proof.

Applicants' disclosures are reviewed by the Director, with the assistance of Board staff, who also conduct a character investigation of each applicant by gathering pertinent information from employers, educational institutions, courts and law enforcement agencies, and other persons and

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405 RULES OF PROCEDURE 8.3.
406 RULES OF PROC. 9; *see also* RULES OF PROC. 8.3(c).
407 RULES OF PROC. 3.2–3.3.
408 RULES OF PROC. 3.4.
409 *Character & Fitness Questionnaire*, *supra* note 3.
410 *See generally id.*

entities.[411] Upon reviewing all of the disclosed and compiled information, the Director's conclusion is *not* whether an applicant has met the burden of proving that they have satisfied the Essential Eligibility Requirements, but whether the reviewed materials "raise character and fitness concerns."[412] If there are no concerns, "the Director may recommend to the Board the certification of the applicant;" if there are concerns, the Director must refer the applicant's file for further evaluation.[413] In other words, where the Board grants certification at this stage, there is no affirmative finding of good character and fitness, but only a determination that no evidence of "concern" (*i.e.,* information suggesting *bad* character or *un*fitness) has been revealed.

Thus, the burden of proof at this stage of character and fitness proceedings functions not at all as it does in litigation. Here, there is not so much a question of whether the "petitioner" has established the elements necessary to prevail, but whether adverse evidence precludes that result. It may be more accurate to think of the character and fitness burden of proof as, *de facto*, a rebuttable presumption. If in satisfactory form, an applicant's character and fitness application will be presumed sufficient "proof" of good moral character and general fitness and of the applicant's meeting the Essential Eligibility Requirements.

That presumption may be rebutted, however, by any evidence raising "character and fitness concerns."[414] IBAB Rule 6.4 provides that "[t]he revelation or discovery of any of the following should be treated as cause for further detailed inquiry . . . :"[415]

> (a) unlawful conduct;
> (b) academic misconduct;
> (c) making false statements, including omissions;
> (d) misconduct in employment;
> (e) acts involving dishonesty, fraud, deceit or misrepresentation;
> (f) abuse of legal process;
> (g) neglect of financial responsibilities;
> (h) neglect of professional obligations;
> (i) violation of an order of a court;
> (j) evidence of conduct indicating instability or impaired judgment;

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411 RULES OF PROC. 5, 8.1.
412 RULES OF PROC. 8.1.
413 *Id.*
414 *Id.*
415 RULES OF PROC. 6.4.

> (k) denial of admission to the bar in another jurisdiction on character and fitness grounds;
> (l) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction;
> (m) acts constituting the unauthorized practice of law; and
> (n) failure to comply with the continuing duty of full disclosure to the Board and the Committee subsequent to the date of application.

Although IBAB Rule 6.4 refers to the fourteen listed areas of "misconduct" as "cause for further inquiry[,]" the practical effect of the discovery of any such "cause" will be, in most cases, that the Director is precluded from making a positive determination of an applicant's character and fitness, and is required to forward the application to the Committee.[416] That is to say, evidence of a Rule 6.4 concern rebuts the presumption in favor of certification, and in the "further inquiry" that ensues, a presumption *against* certification will become controlling—a negative presumption rebuttable only by clear and convincing evidence.[417]

B. Review by Committee Member: IBAB Rule 8.2

The process following the Director's determination that an applicant's materials "raise character and fitness concerns" is often misunderstood by those applicants who become subject to it. Misunderstandings may arise from various elements of the process. When the Director refers an applicant's file to the Committee, pursuant to IBAB Rule 8.1b, further review will be assigned, in most cases,[418] to a single Committee member. Thereafter, "the applicant shall be required to appear in

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[416] A Rule 6.4 "cause" need not be established by evidence meeting any standard of proof; facially credible information may be sufficient. *Id.* The purpose of IBAB Rule 8.1 is to invest the Director with discretion to recommend certification only where the character and fitness appears free from doubt, and to require referral to the Committee where matter of concern has been flagged. RULES OF PROC. 8.1; In some cases, however, a potential Rule 6.4 "cause" may be resolved and disposed of by the Director and Board staff where the investigation reveals that information about possible misconduct is obviously erroneous (*e.g.*, the wrong name on a police report; a satisfied debt appearing as past-due on a credit report, etc.). RULES OF PROC. 6.4.

[417] *See* RULES OF PROC. 6.4.

[418] *But see* RULES OF PROC. 8.1 ("[A] character and fitness registration falling within the purview of Supreme Court Rule 704(b) [pertaining to applicants who have been convicted of felonies, are subject to pending indictments or criminal complaints charging felonies, have been rejected on character and fitness grounds or are subject to pending proceedings in another jurisdiction, or have been admitted in another jurisdiction but have been disciplined or are subject to pending disciplinary proceedings in that jurisdiction] or otherwise containing matters of significant character and fitness concern shall instead be referred directly to an Inquiry Panel . . . for evaluation and review as provided in Rule 8.3 *et seq."*).

person before the member to discuss the character and fitness matter(s) of concern raised by the materials submitted and/or gathered in connection with the applicant's character and fitness registration."[419]

The seeming informality of this level of review—an interview with a single Committee member to "discuss" identified matters of concern and "provide . . . any further information or documentation requested . . . ."[420]—may, for some applicants, obscure the fact that they must now overcome the negative presumption that has arisen from the discovery of matters constituting "misconduct" under IBAB Rule 6.4.[421] Applicants may perceive the interview as no more than an occasion to supplement the record they already have provided, and they may fail to appreciate that their subjective assessments of prior conduct may be evaluated differently by the interviewer. For example, an applicant whose employment record discloses discipline for alleged on-the-job misconduct may be dismissive of the matter because "my supervisor didn't like me." However, while personal animosity could have been the motive for wrongful discipline, the mere assertion of such motive, without additional evidence, may not convince the interviewer.

The interviewer may also conduct investigations beyond those of the Director and Board staff and, to return to the example given above, may possess more than superficial knowledge of the employment discipline that becomes a subject of discussion at the interview. Moreover, the Committee member functions at this stage as interviewer, investigator, and judge.[422] The conclusion of the work is either to "recommend to the Board the certification of the applicant" or indicate to the Committee that he or she "is not prepared to recommend" certification.[423] The interviewer's conclusion under IBAB Rule 8.2 mirrors that of the Director under IBAB Rule 8.1. Both are authorized to recommend applicants for certification, and the rules do not provide for review by the Board or the Committee of such recommendations. Where an applicant is not recommended, whether by the Director or the interviewing Committee member, the rules call for escalation to another level of review.[424] But review by a Committee member under IBAB Rule 8.2 is distinguishable from the Director's review under IBAB Rule 8.1; and may be seen as more adjudicatory in nature because of the formal requirement that the applicant "appear" before the Committee member for an in-person interview where they will be confronted with evidence of matters of concern

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419 RULES OF PROC. 8.2.
420 *Id.*
421 RULES OF PROC. 6.2.
422 *See generally* RULES OF PROC. 8.2(a)–8.2(b).
423 *Id.*
424 RULES OF PROC. 8.2(b).

and will be allowed to respond directly and, in effect, "make the case" for certification.[425]

Applicants engaged in the process need to be aware of and responsive to the range of functions of the Committee member who interviews them. Cooperating with the investigation and providing additional information as requested are obvious responses and are expressly stated in IBAB Rule 8.2,[426] but how should an applicant "make a case" to the interviewer/judge? For some applicants, the case is made, and the adverse presumption raised by evidence of prior misconduct is rebutted by the investigation alone, *i.e.*, further facts clearly and convincingly refute reports of prior misconduct.[427] More commonly, however, the Committee member must weigh evidence that may not be so clearly one-sided.

IBAB Rule 6.5 lists the "factors" that must be considered "in assigning weight and significance to prior misconduct."[428] The Rule 6.5 factors are:

> (a) age at the time of the conduct;
> (b) recency of the conduct;
> (c) reliability of the information concerning the conduct;
> (d) seriousness of the conduct;
> (e) factors underlying the conduct;
> (f) cumulative effect of the conduct;
> (g) ability and willingness to accept responsibility for the conduct;
> (h) candor in the admissions process;
> (i) materiality of any omissions or misrepresentations;
> (j) evidence of rehabilitation; and
> (k) positive social contribution since the conduct.[429]

Where an applicant's record, after investigation, provides a reasonable basis for concluding that misconduct occurred, the Committee member must consider the Rule 6.5 factors when deciding whether to certify the applicant or decline to do so.[430] Depending on the circumstances in an applicant's case, each factor may mitigate or exacerbate the gravity of prior misconduct.[431] An applicant would be well-advised to address directly any of those factors

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425 *See* RULES OF PROC. 8.1–8.2.
426 *See* RULES OF PROC. 8.2.
427 *See* RULES OF PROC. 6.5.
428 *See id.*
429 *See id.*
430 *See id.*
431 *See id.*

pertinent to evidence of misconduct and to present facts in mitigation, if possible.

C. Review by Inquiry Panel: IBAB Rule 8.3

Where the applicant fails to present clear and convincing evidence under IBAB Rule 6.5 to rebut the adverse presumption raised by evidence of misconduct within IBAB Rule 6.4, and the interviewing Committee member "is not prepared to recommend" certification, the Committee's Chairperson must "assign the applicant's file to an Inquiry Panel for further review and examination."[432] Review by an Inquiry Panel is, in some respects, effectively a continuation of the review undertaken by the single Committee member; indeed, that single Committee member chairs the Inquiry Panel, joined by two additional Committee members.[433] Moreover, the review undertaken by the Inquiry Panel, including the requirement that the applicant appear in person, is described in the Rules in terms substantially identical to the description of the single member's review.[434]

Similarities notwithstanding, proceedings before the Inquiry Panel are likely to appear much more formal and adjudicatory to applicants than the preceding levels of review. The presence of three interrogators may tend to distinguish this level from a somewhat informal interview, but a greater distinction is that the record will have been more fully developed at this stage—and, of course, the Panel Chairperson, who previously conducted the single-member review, may come to this level with formed opinions on what the evidence presented to date does or does not show.[435] Questioning by Panel members is apt to be more pointed than what the applicant experienced previously, delving less into the details of particular acts of misconduct than the applicant's reasons for and explanations of that misconduct, and especially any efforts at remediation and rehabilitation.

It is not uncommon for applicants to be caught off-guard when appearing before an Inquiry Panel. They may respond defensively or worse, with impatience or aggravation. Such applicants likely have failed to apprise themselves of the burden of proof they bear, and they may not recognize that

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[432] *See* RULES OF PROC. 8.2(b).

[433] RULES OF PROC. 8.3.

[434] *Compare* RULES OF PROC. 8.2, *with* RULES OF PROC. 8.3.

[435] It is not uncommon for individual members of the Inquiry Panel to conduct their own investigations where matters in the file presented to them raise questions or need clarification or supplementation. As is the case with independent investigations conducted by a single member of the Committee, the rules do not expressly provide for such independent investigations. However, references in the rules to information "gathered in connection with the applicant's character and fitness registration," recognize the utility of investigation beyond the "materials submitted" by the applicant. The designation of the reviewing Panel as an *Inquiry* Panel implicitly authorizes Panel members to gather further information. RULES OF PROC. 8.3.

the record of misconduct, whether major or minor, that has accumulated to this point will not simply be overlooked but will have to be rebutted or otherwise ameliorated with the factors listed in IBAB Rule 6.5.[436]

A decision by the Inquiry Panel requires the concurrence of a majority of its members.[437] If the Panel declines to certify, the Chairperson submits to the Director a written report detailing the matters of concern, and the Panel's decision and the basis therefor.[438] The character and fitness process may end at that point, subject to the applicant's right to seek a full evidentiary hearing under IBAB Rule 9.[439]

The finality of an Inquiry Panel's decision not to certify contrasts with the interlocutory nature of a single member's decision not to certify. An equally notable contrast is that while a single member's decision in favor of certification is submitted directly to the Board without further review, an Inquiry Panel's recommendation for certification must be reviewed and voted on by the Committee.[440] This further review by the Committee is invisible to applicants while it is occurring; they do not participate as witnesses or advocates in the Committee's review, nor do they have notice of the Inquiry Panel's decision recommending certification or the Committee's affirmance or reversal of that decision until after a written report has been submitted to the Director.[441]

The rules express no rationale for this unique review by the full Committee of Inquiry Panel decisions in favor of certification, but it may be inferred that this step is intended to reinforce the standard of proof and to further strengthen a presumption against admission—rebuttable only with clear and convincing evidence—when any facts cast any doubt on an applicant's good moral character or general fitness.

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436 RULES OF PROC. 6.5.

437 RULES OF PROC. 8.3.

438 RULES OF PROC. 8.3(a).

439 RULES OF PROC. 8.3 (a), (c). If this review occurs at a meeting of the Committee, twelve members who did not sit on the Inquiry Panel constitute a quorum, and the affirmative vote of a majority of those present and eligible is necessary to affirm the Panel's recommendation. RULES OF PROC. 8.3(b)(ii). Alternatively, all eligible Committee members may be polled separately without a meeting, and the concurrence of a majority is required. *Id.*

440 *Compare* RULES OF PROC. 8.2(a), *with* RULES OF PROC. 8.3(b).

441 *See* RULES OF PROC. 8.3(b)(i)–(iv), (c). Where the Committee affirms the Inquiry Panel's recommendation, the written report is the report of the Inquiry Panel; where the Inquiry Panel is reversed, the Committee's Chairperson or Vice-Chairperson submits the report on behalf of the Committee. *See id.* The rules do not require notice to the applicant that the Inquiry Panel's recommendation was reversed, but the Committee's report typically references it, and in any event, the Inquiry Panel's report becomes part of the applicant's file and thus is available for inspection if a full hearing is requested pursuant to IBAB Rule 8.3c. *See* RULES OF PROC. 8.3(c), 9.4.

D. Hearing: IBAB Rule 9

Upon receiving the report of an Inquiry Panel or the Committee declining to certify, an applicant may request and will be allowed a full evidentiary hearing before a Committee Hearing Panel.[442] The hearing is a *de novo* review of the applicant's character and fitness file.[443] That is, all of the facts, materials, and information previously considered at the prior stages of the process are to be considered and evaluated afresh by the Committee Hearing Panel, and no disposition made at any earlier stage is deemed conclusive or binding.[444]

Applicants sometimes assume their goal at the Rule 9 hearing is to refute the Inquiry Panel's report or persuade the Hearing Panel to "reverse" the Inquiry Panel, as in an appeal of a jury verdict or trial court decision. That assumption is incorrect, but it is understandable. All the written materials generated at earlier levels of review, including determinations made and the reasons for them, become part of the applicant's file and are received by the Hearing Panel as evidence in the case. For example, if the Inquiry Panel found that the applicant's responses to certain questions at the interview were evasive or misleading and therefore declined to certify the applicant for failure to clearly and convincingly prove her or his honesty and candor, the Hearing Panel would not be bound by the Inquiry Panel's ultimate *conclusion*, but would accept, consider, and weigh as *evidence* the Inquiry Panel's finding that the applicant had been evasive or misleading.[445] An Inquiry Panel's decision adverse to the applicant is not controlling, but the basis for that decision is evidence the applicant must try to overcome. Stated differently, if one panel of the Committee has determined that the applicant has not met the burden of proof, the subsequent panel is likely to consider that determination, thus adding some measure of difficulty to an already high standard of proof.

Many applicants successfully overcome that difficulty by emphasizing at the hearing evidence that the Inquiry Panel did not consider. Although much of the evidence presented to the Hearing Panel and reviewed *de novo* will consist of previously considered material, the Panel also will consider

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442 RULES OF PROC. 8.3(c), 9.1. The Hearing Panel is comprised of five Committee members, none of whom have served on the Inquiry Panel, and is chaired by the Committee's Chairperson or Vice-Chairperson. RULES OF PROC. 9.3.

443 RULES OF PROC. 9.1.

444 Note that, although Committee members who sat on the Inquiry Panel are disqualified from serving on the Hearing Panel, where an applicant seeks a hearing after the Committee as a whole has reviewed and reversed an Inquiry Panel's recommendation that the applicant be certified, *all* participating Committee members will have reviewed the case, effectively sitting as a kind of super-Inquiry Panel, and by their votes will have expressed their views on the merits. *See* RULES OF PROC. 8.3(b).

445 *See* RULES OF PROC. 9.

new information disclosed in the applicant's Character & Fitness Update and the Director's report of a supplemental investigation.[446] Any new evidence presented at the hearing, including the testimony of the applicant and other witnesses, is received for the first time and is not freighted with prior assessments. The best "new" evidence an applicant can offer is evidence of the applicant's "ability and willingness to accept responsibility for [prior misconduct][,]" as well as the applicant's effective rehabilitation and "positive social contribution"[447] since the misconduct and since the appearance before the Inquiry Panel.[448] It is extremely rare for an applicant to produce evidence at a hearing stage that can cast previously-reviewed misconduct in a more positive light. Far more probative of *present* good character and fitness is clear and convincing evidence of the mitigating factors listed in IBAB Rule 6.5, including persuasive testimony that the applicant has given serious thought to their misconduct, genuinely regrets the misconduct itself (and not merely the personal *consequence* of the misconduct, *i.e.,* delayed or denied admission to the Bar), and has through thought, word, and action become a better and more moral person.[449]

IV. THE CONDUCT OF THE RULE 9 HEARING AND THE ROLE OF RULE 9 COUNSEL

The Rule 9 hearing *de novo* is the step in the character and fitness process that resembles a trial in how it is conducted. Interestingly, the Rules are nearly silent on what must happen in a Rule 9 hearing, providing only that all testimony shall be taken under oath, and a stenographic record of the hearing shall be kept.[450] Although not precluded from structuring the proceeding less formally, Hearing Panels have traditionally maintained the familiar structure of conventional trials in most respects. Opening and closing statements are made by counsel or parties directly, witnesses are examined and cross-examined, and exhibits are offered into evidence.[451] The applicant, who is the petitioner in the case and bears the burden of proof, presents their case first and, if electing to make a rebuttal argument at closing, gets the last word.[452]

Though by tradition structurally similar to a conventional trial, the Rule 9 hearing departs radically from convention in certain respects, and the

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446 RULES OF PROC. 9.2; *see also* RULES OF PROC. 3.3, 5.

447 RULES OF PROC. 6.5(g), (j), (k).

448 *See* RULES OF PROC. 6.6.

449 *See, e.g., In re* Loss, 119 Ill. 2d 186, 194 (1987) (emphasizing the importance of rehabilitation and present good moral character in determining eligibility for admission to the bar).

450 RULES OF PROC. 9.9; *see also* ILL. SUP. CT. R. 709(b).

451 *See* RULES OF PROC. 9.1–9.14.

452 *See* RULES OF PROC. 6.1, 9.

rules authorize those departures explicitly.[453] Most notable among these, the Hearing Panel is not bound by the formal rules of evidence and "may in its discretion take evidence in other than testimonial form, having the right to rely upon records and other materials furnished in response to its requests for assistance in its inquiries pursuant to [the] Rules and Supreme Court Rule 709."[454] Accordingly, the entire contents of the applicant's file is fully admissible as evidence before the Panel, subject only to considerations of weight.[455] The Panel also may exercise broad discretion in whether testimonial evidence will be taken in person at the hearing or by deposition.[456] The hearing is private unless the applicant requests that it be open to the public.[457]

Another departure from conventional litigation is the questioning of witnesses (including the applicant) by members of the Hearing Panel—not unusual in civil bench trials or certain kinds of arbitrations, administrative hearings, and other adversary proceedings.[458] However, Panel members are often significantly more active participants than is typical of other tribunals. The silence of the rules may open the possibility of another departure from conventional practices: whether Panel members, individually or collectively, may independently investigate matters pertaining to the case before them. It is accepted that Inquiry Panel members may do so, consistent with the mixed functions of their role, but Hearing Panel members are assigned to "hear" a case, and it seems inconsistent to both gather evidence and weigh it.[459] In recent years, Panel members have generally avoided dual functions. Hearing Panels seeking supplemental evidence on any matter typically call for its production by the applicant, Rule 9 counsel, or Board staff, with both the request and the results spread of record.[460]

Perhaps the greatest fundamental difference between trials and a Rule 9 hearing is that, while bearing some basic earmarks of adversary proceedings, a Rule 9 character and fitness hearing is not adversarial. The applicant is not opposed at the hearing by another party. Only the applicant can "win," and only the applicant can "lose"—though neither of these terms is truly apt here. The unique non-adversarial nature of the Rule 9 hearing is demonstrated in the role of counsel appointed "from among the members of

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453 *See, e.g.,* RULES OF PROC. 9.5 ("The hearing shall be private unless the applicant requests it to be public."); RULES OF PROC. 9.9 ("A hearing shall not be bound by the formal rules of evidence.").

454 RULES OF PROC. 9.9.

455 ILL. SUP. CT. R. 709(b).

456 RULES OF PROC. 9.9; *see also* RULES OF PROC. 9.7–.8. In practice, live testimony is greatly preferred, but evidence depositions are often used when a witness is unavailable on the hearing date. ILL. SUP. CT. R. 212(b). It also has become common to take the live testimony of out-of-state witnesses by electronic media. ILL. SUP. CT. R. 241.

457 RULES OF PROC. 9.5; s*ee also* ILL. SUP. CT. R. 709(b).

458 RULES OF PROC. 9.7.

459 *See* RULES OF PROC. 9.

460 *See id.*

the bar to prepare and present the matters adverse to the applicant."[461] IBAB Rule 9.6 is as meaningful for what it does *not* say as for what it says. It does *not* say that Rule 9 counsel is appointed to represent the Committee, the Hearing Panel, the supreme court, or any other person or entity; Rule 9 counsel does not represent an interested party in the hearing—indeed, Rule 9 counsel has no client whatsoever.[462] Rule 9 counsel is not appointed to oppose the applicant's admission but rather to marshal and present the evidence adverse to the applicant (which also includes challenging affirmative evidence presented by the applicant).[463]

Rule 9 counsel identifies and offers the evidentiary bases for an outcome adverse to the applicant without expressly advocating that or any other outcome. The objective is to facilitate a decision by the Hearing Panel consistent with the standard of proof and supported by the record.[464] While emphasizing the strongest evidentiary grounds for an adverse decision by the Panel, Rule 9 counsel should acknowledge non-adverse evidence, inasmuch as the Panel's decision must reflect adequate consideration of all the evidence as a matter of basic fairness.

Because Rule 9 counsel is not serving a client in the hearing, they may owe an enhanced duty to the public interest generally. The public surely is interested in individuals lacking in good moral character and fitness not being admitted to positions of trust as members of the bar. Rule 9 counsel's zealous presentation of matters adverse to the applicant serves that interest. The public is also surely interested that determinations of good character and fitness—determinations that may have life-changing effects—be made fairly. Rule 9 counsel may promote fairness in the hearing by showing respect for and acting collegially with applicants and their counsel, offering help with administrative and procedural matters to those unfamiliar with the process, and presenting evidence adverse to the applicant without exaggerated disparagement.

V. POST HEARING MATTERS

After the Rule 9 hearing, the Panel members deliberate and vote to certify the applicant or withhold certification.[465] Certification requires the affirmative vote of no fewer than three of the Panel's five members.[466] The certification vote must be taken within forty-five days of the close of the

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461 RULES OF PROC. 9.6.

462 An attorney appointed pursuant to IBAB Rule 9.6 may come to represent the Committee subsequent to the hearing in the event the applicant appeals an adverse decision to the supreme court, but that subsequent engagement is separate from the Rule 9.6 appointment. *Id.*

463 *See id.*

464 S*ee* RULES OF PROC. 9.11.

465 RULES OF PROC. 9.10.

466 *Id.*

record.[467] Forty-five days after that, the Panel must produce its written findings and conclusions, which must include, *inter alia*, a synopsis of the pertinent facts, "a full and fair explication of each of the matters of concern," and the basis for certifying or declining to certify the applicant.[468] If the decision of the Hearing Panel is not unanimous, a concise statement of the minority's concerns and conclusions must be included.[469]

An applicant who has received an unfavorable decision by the Hearing Panel may file a petition for review by the supreme court.[470] The court accepts review of Hearing Panel decisions only infrequently, and when it does so, the standard of review is deferential: "It is well established that the exercise of discretion by a committee on character and fitness in its consideration of an applicant's fitness for admission to practice law in this State will not be reversed by this court unless certification has been arbitrarily refused."[471]

An applicant denied certification by a Hearing Panel may, not less than two years after the Panel mails its findings and conclusions to the applicant, petition the Committee for a new hearing.[472] In the petition, the rules require the applicant to "(1) address[] the grounds [stated] . . . for denial of certification in the Findings and Conclusions . . . ; (2) [show] the activities and conduct of the applicant since the [denial]; and (3) provide[] an overarching context of how the showing in (2) informs the discourse in (1)."[473] A petition that fails to meet these requirements will be rejected and not considered.[474] A petition that meets these requirements and further "sets forth substantial new matter that would *prima facie* overcome the reasons for the previous denial and establish that the applicant now has the good moral character and general fitness to practice law[,]" will be considered by the Committee, and on the affirmative vote of a majority of the members, a new hearing will be allowed.[475] To the extent possible, the members who comprised the original hearing will serve as the Panel for the new hearing.[476]

For purposes of the new hearing, the reasons for the previous denial are *res judicata*. The new hearing is not a *re*-hearing; the entire focus is on

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467 *Id.*

468 *Id.*

469 RULES OF PROC. 9.11.

470 RULES OF PROC. 12; ILL. SUP. CT. R. 708(h).

471 *In re* Ascher, 81 Ill.2d 485, 498 (1980).

472 The Illinois Board of Admissions to the Bar rules 13.1 and 13.2 also provides for cases in which an applicant who has been certified by the Committee is subsequently denied admission by the supreme court. RULES OF PROC. 13.1; RULES OF PROC. 13.2. In such cases, the applicant may petition the Committee for a new hearing, but not sooner than two years after the court's denial. *See supra* p. 7; *In re* Krule, 741 N.E.2d 259 (2000).

473 RULES OF PROC. 13.3.

474 *Id.*

475 RULES OF PROC. 13.4.

476 RULES OF PROC. 13.6.

what has happened and how the applicant has changed in the two or more years since the original hearing.[477] While the applicant needs only to make a *prima facie* showing to be allowed a new hearing, at the new hearing, the applicant will bear the original burden of proving good moral character and fitness by clear and convincing evidence.[478]

VI. CONSIDERING DISABILITIES IN THE DETERMINATION OF CHARACTER AND FITNESS

Although, as discussed in the previous section, the Character and Fitness process is fundamentally non-adversarial, controversies arise within the process from time to time, bringing applicants into conflict with the Committee, the Board, and the process itself, resulting in civil litigation.[479] Controversies may arise from any aspect of an applicant's interaction with bar authorities but have consistently occurred in connection with an applicant's actual or perceived disabilities.[480] A broad and detailed discussion of the difficulty of considering an applicant's disabilities in the context of bar admissions is well beyond the scope of this Article, but no introduction to the character and fitness process can fail to mention the issue.

From its adoption in 1990, and even before the statute became effective in 1992, it was clear that the Americans with Disabilities Act (ADA)[481] would affect bar admissions, but how and to what extent was less clear. The impact on the bar examination was initially significant, as nonstandard test conditions and accommodations were widely debated. Issues still arise occasionally, but in Illinois nonstandard testing conditions are a well-established feature of the bar examination.[482]

Controversies relating to character and fitness reviews mostly have centered on whether and to what extent the ADA permits or proscribes inquiries regarding an applicant's mental health and substance use. When Congress enacted the ADA, most jurisdictions—but *not* Illinois—included in their character and fitness questionnaire inquiries regarding past or present addiction to or counseling concerning the use of drugs or alcohol; treatment or counseling for any mental, emotional, or nervous disorder; and

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477 The Illinois Board of Admissions to the Bar rule 13.2 provides that an interval shorter than two years may be allowed if the Hearing Panel, in its original Findings and Conclusions, so provides. The applicant also may ask the supreme court to shorten the interval. RULES OF PROC. 13.2.

478 RULES OF PROC. 13.4.

479 *See, e.g.*, Edwards v. Ill. Bd. of Admissions to the Bar, 261 F.3d 723 (7th Cir. 2001) (showing a case where a plaintiff passed the bar but was denied admission and then filed suit, alleging that her disclosure of a mental health diagnosis during her character and fitness evaluation led to the denial).

480 *See, e.g., id.*

481 42 USC § 12101 (2008).

482 *Nonstandard Testing Accommodation*, ILL. BD. OF ADMISSIONS TO THE BAR, https://www.ilbaradmissions.org/appinfo.action?id=9 (last visited Feb. 25, 2025).

commitment to an institution, voluntarily or otherwise, for treatment of a mental, emotional or nervous disorder. These and similar questions were challenged in courts soon after the ADA became law, with varying results.[483] In the ensuing years, most states have narrowed the extremely broad mental health questions that formerly appeared in their bar applications. In contrast, some other states have joined Illinois in having no mental health or addiction questions in character and fitness questionnaires.[484]

Still, the potential for controversy persists. If the ADA limits or proscribes general mental health inquiries directed at *all* applicants, might it also prohibit asking similar questions to *individual* applicants? Among the matters listed in IBAB Rule 6.4 as "cause for further detailed inquiry" is "evidence of conduct indicating instability or impaired judgment[.]"[485] Do the Rules suggest that the Committee, having discovered evidence that might be indicative of a mental illness or other disorder, including addiction to drugs or alcohol, must affirmatively investigate health status and then ground its decision, in whole or in part, on the results of that investigation? If so, the rule and Committee action in strict adherence to it would run headlong into the ADA's proscriptions.

There is no need for a collision, for the rules are consistent with the statute when emphasis is given to "evidence of conduct." The inquiry into character and fitness matters, and the ultimate decision resulting from that inquiry should, in every case, be based on conduct, not status. Where an applicant has exhibited reckless or irrational behavior that was actually or potentially harmful, the question for the Committee is not whether that behavior was symptomatic of a disorder but whether the conduct itself may disqualify the applicant.

When examined on evidence of past misconduct, an applicant will sometimes volunteer information concerning his or her mental or emotional health to explain prior misconduct; the information is offered in mitigation of the prior misconduct, *i.e.,* as a "factor[] underlying the conduct"[486] tending to show that the misconduct was not entirely willful or intentional, but was caused by a mental or emotional disorder. An applicant's offer of what is, in essence, a health-based affirmative defense should not be taken by the Committee as proof of the applicant's propensity for misconduct, but rather as a starting point for inquiry regarding the applicant's rehabilitation.[487] Where the applicant asserts that a health condition caused misconduct, the

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483 *See, e.g.*, Clark v. Va. Bd. Of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995); *see also* Applicants v. Tex. St. Bd. of L. Exam'rs, 1994 WL 923404 (W.D. Tex. 1994).

484 *See Mental Health Character & Fitness Questions for Bar Admission,* AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/disabilityrights/resources/character-and-fitness-mh/ (last visited Feb. 25, 2025).

485 RULES OF PROC. 6.4(j) (ILL. BD. OF ADMISSIONS TO THE BAR 2018).

486 RULES OF PROC. 6.5(e).

487 RULES OF PROC. 6.5(j).

Committee is free to probe the evidence supporting that assertion, most especially any evidence offered to show that the condition has been eliminated or, if not, how it has been and will be effectively controlled. In this respect, misconduct caused by a mental disorder or addiction should not be regarded differently from misconduct caused by bad judgment, immaturity, or anything else. Rehabilitation is crucial, and an applicant who fails to prove rehabilitation with clear and convincing evidence will fail to meet the burden of proof.

CONCLUSION: IN RE KRULE AND ITS THREE VIEWS OF FAIRNESS

The purpose of this Article has been to introduce and comment upon the fundamental elements of the character and fitness process in Illinois for the benefit of anyone whose own experience with and knowledge of that process may be slight. As further introduction and commentary on the character and fitness process, the author commends to the reader the majority, specially concurring, and dissenting opinions in *In re Krule*.[488] *Krule* is the last word on proving character and fitness in Illinois bar admissions: the case was decided on December 1, 2000, and the court has published no decisions on the subject since then.[489] The case is notable not only because it remains the most recent but also because its three opinions frame different concepts of *fairness* in the context of character and fitness proceedings.

Krule was an applicant who had been a licensed insurance professional and had become involved in a fraudulent billing scheme for approximately seven months.[490] He was indicted along with others in the scheme, pleaded guilty to one count of felony theft in exchange for testifying against his co-defendants, and was sentenced to 30 months' probation, 950 hours of community service, and a fine of $5,000 by the court.[491] Completing his sentence, he applied and was admitted to law school and upon graduating, sought admission to the Illinois bar.[492]

Krule's application came before the Committee, which declined to certify him for admission, citing, *inter alia*, his lack of candor in his law school application, his failure to take responsibility for his "illegal and unethical conduct[,]" and the lack of "specific evidence" of rehabilitation.[493] Obtaining a new hearing several years later, Krule presented a record clear of any new misconduct and the testimony of character witnesses who praised

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488 *See generally In re* Krule, 741 N.E. 2d 259 (Ill. 2000).
489 *See generally id.* at 265.
490 *See generally id.*
491 *Id.* at 260.
492 *Id.*
493 *Id.* at 261.

his competence and trustworthiness.[494] Krule testified, expressing remorse for his prior criminal conduct and lack of candor.[495] The Committee again denied his application for admission, holding that he had again failed to show sufficient rehabilitation.[496]

The court, hearing the matter on Krule's petition for review of the Committee's decision, denied his application for admission.[497] Writing for the majority, Chief Justice Harrison acknowledged the positive aspects of Krule's recent conduct but stated that these aspects were "still outweighed by the nature and gravity of the criminal offense . . . ."[498] The majority found that Krule's present work did not entail the kind of exercise of judgment that would enable a prediction of his performance in another setting, while "his criminal scheme arose in the context of circumstances comparable to those with which he would be faced as an attorney, evincing an inability . . . to carry out his professional responsibilities honestly."[499]

The majority opinion concludes by declaring that "an applicant's subsequent exemplary behavior cannot lessen the enormity of an earlier offense . . . The public depends on this court to select qualified professionals who will be conscientious in protecting their clients and upholding the law."[500] It goes on to say: "Krule's admission would deprecate the seriousness of his crime and undermine the integrity of our profession."[501] Significantly, the majority opinion also concludes with the acknowledgment that the Court must depend on the Committee to help assess the future risk to the public that any applicant may pose by failing to adhere to professional responsibilities; here, "the Committee has determined, in effect, that the risk is too great. We cannot say that its determination is arbitrary."[502]

The *Krule* majority thus embraced two notions of fairness that must hold sway in the character and fitness process. One is that the public's interest is very much at stake in every bar admission and that fairness to the public requires a stringent assessment of each applicant's character and fitness. The second is the near-tacit acknowledgment that the Court cannot undertake such stringent assessments wholly on its own but must rely on the help of the Committee, and that such reliance means that, in fairness, the Court must respect the Committee's determination unless it is arbitrary. These two points

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494 *Id.*

495 *Id.*

496 *Id.* at 262. The Committee also relied on a post-hearing report by one of the character witnesses concerning an incident that had caused her to change her opinion of Krule's judgment and trustworthiness. *Id.* at 261. The Court, however, unanimously rejected both the substance of the witness's statement and the procedures by which the Committee handled it. *Id.*

497 *In re* Krule, 194 Ill. 2d 109, 117 (2000).

498 *In re* Krule, 741 N.E. 2d at 264.

499 *Id.*

500 *Id.* at 265.

501 *Id.*

502 *Id.*

of fairness are articulated in various ways in every character and fitness opinion ever issued by the Supreme Court, and they are no less potent in their brief reiteration in *Krule*.[503]

Although concerns for the public and the process are prominent in the majority's conclusion, most of the opinion consists of a recitation of the evidence in the case, with a heavy emphasis on the gravity of Krule's criminal offense and the particular relevance of such an offense to an assessment of the trustworthiness of anyone who seeks to practice law. A lack of sufficient rehabilitation is mentioned,[504] but little in the opinion suggests what further rehabilitation would be sufficient. Justice Miller's special concurrence (joined by Justice Rathje) is explicit: "I believe, [there are] offenses so serious that one who has committed them should never be entitled to admission to the bar in the first place."[505] Justice Miller's blunt call for the categorical exclusion from the bar of individuals deemed guilty of egregious misconduct represents a different notion of fairness—the fairness of drawing clear lines between what kinds of conduct may be acceptable and what kinds can never be, between circumstances where trust can be restored and those where it cannot, between the forgivable and the unforgivable.[506] Justice Miller surely did not intend his special concurrence as a critique of the majority opinion, but it stands as one nonetheless.[507] The majority opinion seems to mean, but does not say, that Krule's rehabilitation could never be sufficient, and the special concurrence seems to suggest that it is fairer to the public and the process to say straight out what is meant.

Justice McMorrow's dissent was clearly intended as a rebuke to the majority and the outcome it and the special concurrence endorsed; interestingly, her explicit criticism mirrors what is implicit in Justice Miller's concurrence, *i.e.*, that the Court did not say what it meant:

> As I studied and pondered the majority opinion, one lingering question always remained: What more could petitioner have done that he did not already do to enable him to be allowed the privilege to practice law? Stated otherwise, is there anything petitioner failed to do to justify refusing him a license to practice law. The majority does not answer this essential question. Instead . . . my colleagues appear to single-mindedly focus upon the seriousness of petitioner's past offense, to the virtual exclusion of the ample amount of positive evidence presented in the petitioner's favor during the Committee hearing.[508]

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503 *See In re* Glenville, 565 N.E.2d 623, 628 (1990); *see also In re* Archer, 411 N.E.2d 1, 8 (1980).
504 *In re* Krule, 741 N.E. 2d at 262.
505 *Id.* at 266 (Miller, J., concurring).
506 *See id.*
507 *See id.*
508 *Id.* at 267 (McMorrow, J., concurring in part and dissenting in part).

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> [T]he majority has determined that regardless of the amount of positive evidence presented in petitioner's favor, the nature of petitioner's offense automatically precludes his admission to the bar.[509]

Justice McMorrow's dissent urges fairness toward the applicant—not just the fairness of saying what is meant, but also the fairness of weighing specific evidence and explaining, if the proof is found to be insufficient, *why* it is insufficient.[510] Yet, applicants to the Bar who are initially unsuccessful in demonstrating their good moral character and general fitness to the Committee are not precluded from trying again.[511] Many do, and some persist through several attempts. Persistence alone does not assure success, nor should it. Applicants, many of whom have stumbled blindly through a first encounter with character and fitness, should not be made to stumble through a second. If an applicant is unsuccessful, it should be fair to ask and get an answer to this question: If not now and on this showing, when and on what showing may the applicant be admitted to practice?

That is a fundamental question for members of Inquiry Panels and Hearing Panels—too fundamental, in truth, to be deferred until deliberations are concluded. Panel members should be mindful, at any stage of their involvement and in every case, of what the applicant must prove or rebut to be recommended for admission, and that awareness should guide their investigations, interrogations, and deliberations. Applicants, too, should carefully assess their cases to determine what they have left out; it may not be evidence that is immediately available, but instead consist of further personal development and rehabilitation, for which additional effort and time may be required. Even lawyers who do not work in the character and fitness arena may find it useful, as professionals, to consider what proof we ought to expect of those who seek to clear the gates of bar admission, as well as what we may expect of the gatekeepers and the gateway to our profession.

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509 *Id.* at 272 (McMorrow, J., concurring in part and dissenting in part).

510 *Id*.

511 RULES OF PROC. 13 (ILL. BD. OF ADMISSIONS TO THE BAR 2018).

A LACK OF INTEREST: WHY ILLINOIS' "EASILY CALCULABLE" REQUIREMENT SHOULD NOT DEFEAT PREJUDGMENT INTEREST FOR POLICYHOLDERS ON UNPAID DEFENSE COSTS.

By: Stanley C. Nardoni*

Illinois' Interest Act provides for prejudgment interest on money due on an "instrument of writing" like an insurance policy.[512] Although not in the statute's language, Illinois courts have long applied a common law rule that restricts awards of such interest to cases in which the amount owed is easily calculable.[513] That easily calculable requirement has figured prominently in defeating interest awards in cases where insurers have breached their policy obligations to defend lawsuits against policyholders. In several such cases, courts have applied the requirement to refuse interest on defense costs those insurers owed because they disputed the reasonableness of those costs.[514]

This Article maintains that the easily calculable requirement should not bar awarding interest in such duty to defend cases and that a court should award interest on the defense costs that were reasonably incurred. It recounts that the easily calculable requirement was developed when courts viewed prejudgment interest as a form of punishment and to protect debtors who could not pay on time due to uncertainty of what they owed. This Article asserts that enforcing that requirement now is out of step with the modern purpose of prejudgment interest, which is compensating a wronged party for the time value of withheld funds, and the requirement's initial purpose is not served by protecting insurers who refused to defend at all.

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512 815 ILL. COMP. STAT. ANN. 205/2 (West 2024).

513 *See e.g.*, Harvey v. Hamilton, 40 N.E. 592, 593 (1895).

514 *See e.g.*, Cont'l. Ins. Co. v. Sargent & Lundy, LLC, 2022 IL App (1st) 210677-U, ¶2.

I. THE INTEREST ACT CALLS FOR PREJUDGMENT INTEREST TO COMPENSATE CREDITORS DUE SUMS UNDER WRITTEN CONTRACTS.

Illinois' Interest Act provides for awards of prejudgment interest for money due under written instruments.[515] It states in its relevant part:

> Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment.[516]

Illinois has allowed interest on written instruments by statute for well over a century, though the rate was slightly higher in the past.[517] On the other hand, Illinois common law does not provide for awarding prejudgment interest "unless the parties have so agreed."[518]

"The Act directs the award of prejudgment interest to fully compensate the injured party for the monetary loss suffered."[519] That intent accords with the modern view of prejudgment interest, which is "to put a party in the position it would have been in had it been paid immediately."[520] "Prejudgment interest focuses on the principle of fairness and the concept of fully compensating an injured party for a monetary loss."[521] In keeping with

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515 815 ILCS 205/2.

516 *Id.*

517 Chicago v. Allcock, 86 Ill. 384, 385 (1877) ("[T]he statute in this State that provides for interest, declares: 'Creditors shall be allowed to receive at the rate of six per cent per annum for all moneys after they become due on any . . . instrument of writing . . . .'"); Walker v. Hadduck, 14 Ill. 399, 399 (1853) (jury should have been instructed that plaintiff was "entitled to recover . . . interest upon each quarter's rent, from the time it fell due.' . . . The statute expressly authorizes interest to be recovered in such a case. It was money due on an 'instrument of writing.'"); Sammis v. Clark, 13 Ill. 544, 546 (1852) ("The question of interest . . . in Illinois . . . is regulated by [a] statute [that] declares: 'Creditors shall be allowed to receive at the rate of six per cent. per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing . . . .'"); Tindall v. Meeker, 2 Ill. 137, 138 (1834) ("'*An act regulating the interest of money*' . . . provides 'that creditors shall be allowed to receive at the rate of six per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument in writing . . . .'").

518 *Sammis*, 13 Ill. at 546.

519 Milligan v. Gorman, 810 N.E.2d 537, 541 (Ill. App. Ct. 2004); *see also* Sheth v. SAB Tool Supply Co., 2013 IL App (1st) 110156, ¶ 96 ("The purpose of an award of prejudgment interest is to fully compensate the injured party for the monetary loss suffered.").

520 Am. Nat'l Fire Ins. Co. v. Yellow Freight Sys. Inc., 325 F.3d 924, 935 (7th Cir. 2003).

521 Chandra v. Chandra, 2016 IL App (1st) 143858, ¶ 48.

that compensatory purpose, interest remains appropriate under the Interest Act where "parties disagree as to their liability . . . Accordingly, not even a good-faith dispute as to which party is responsible for payment . . . would preclude the recovery of prejudgment interest on money due under an instrument of writing."[522]

II. ILLINOIS COURTS ENFORCE AN "EASILY CALCULABLE" REQUIREMENT NOT IN THE STATUTE.

Although no such restriction appears in the Interest Act, Illinois courts have long imposed an "easily calculable" requirement for recoveries of prejudgment interest for amounts due under written instruments.[523] In the 1895 decision of *Harvey v. Hamilton*, the Illinois Supreme Court judged it "safe to say that, in Illinois, interest is not allowable on unliquidated demands in any case where the amount of damages is not ascertainable by simple computation or by reference to general[ly] recognized standards, such as market prices."[524] It quoted a New York Court of Appeals decision that explained this was an "old common law rule" that restricted interest to circumstances in which "it would be possible for the debtor to obtain some approximate knowledge of how much he was to pay."[525]

Over the years, Illinois courts have phrased the rule in various ways. They sometimes say damages must be "liquidated" or "easily calculable . . . to impose prejudgment interest."[526] Other times they say the amount due must be "liquidated and readily ascertainable[,]"[527] or "a fixed or easily ascertainable amount,"[528] or an "easily computed" sum.[529] Despite these subtle differences, the phrase "easily calculable" is used throughout this Article for convenience.

Awards under many types of contracts have run afoul of this easily calculable requirement. In *Farwell Construction Co. v. Ticktin*, for example, the court approved the refusal to award prejudgment interest for a recovery under a contract for a construction company to buy an apartment complex

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522 *Id.* at ¶ 50. Illinois courts have traditionally spoken of prejudgment interest as mandatory for sums due under written instruments, at least where they meet the easily calculable requirement discussed below, though some decisions have spoken of interest as discretionary. *See generally* Stanley C. Nardoni, *A Matter of Interest: Illinois Courts Should Return to the Traditional Rule for Awarding Prejudgment Interest in Insurance Coverage Cases*, 37 S. ILL. U. L. J. 305, 307-13 (2013); Adam N. Hirsh, *Getting What's Due: Prejudgment Interest in Illinois*, 98 ILL. B.J. 412, 413 (2010).

523 *See e.g., Harvey* v. Hamilton, 40 N.E. 592, 593 (Ill. 1895).

524 *Id.* at 593.

525 *Id.* at 593–94 (quoting Mahon v. N.Y. & Erie R.R. Co., 20 N.Y. 463, 469 (1859)).

526 Certain Underwriters at Lloyd's, London v. Abbott Lab'ys, 2014 IL App (1st) 132020, ¶ 38.

527 Dow v. Columbus-Cabrini Med. Ctr., 655 N.E.2d 1, 5 (Ill. App. Ct. 1995).

528 Spagat v. Schak, 473 N.E.2d 988, 993 (Ill. App. Ct. 1985).

529 N.H. Ins. Co. v. Hanover Ins. Co., 696 N.E.2d 22, 28 (Ill. App. Ct. 1998).

building site from a developer because the court did "not believe the damages were so certain or definite as to fall within the statute . . . ."[530] It explained:

> [H]ere the contract price was sharply disputed since it was contingent upon which credits were allowed and for what amount, and the market value of the property was also disputable. Furthermore, the significant difference between the amount demanded in plaintiff's amended complaint ($197,069.71) and the trial court's amended judgment of $154,202.76 is further indication that the amount due was not readily ascertainable.[531]

Similarly, in *Cushman & Wakefield of Ill., Inc. v. Northbrook 500 Limited Partnership*, in which a corporation sued to recover leasing commissions due under a rental agency agreement, a refusal to award prejudgment interest was affirmed where "[t]he commission sought by plaintiff was disputed by defendants[,]" that "dispute was finally resolved by the jury's award[,]" and "[t]he amount of the commission was dependent upon many factors such as amount of rent, length of the lease, and the procuring broker . . . ."[532] In *Stevenson v. ITT Harper, Inc.*, the court reversed an award of prejudgment interest on the amount held due as an executive bonus award because "the complex formula for calculating the amount of the bonus fund and the share of each participant therein" was "not subject to easy computation."[533]

III. THE "EASILY CALCULABLE" REQUIREMENT HAS OFTEN BARRED INTEREST FOR POLICYHOLDERS.

"An insurance policy is considered an 'instrument of writing' within the meaning of [the Interest Act], and it has long been held that interest may be recovered from the time money becomes due under a policy."[534] In the first-party coverage context, interest has been awarded on amounts due under property insurance coverage,[535] uninsured motorist coverage,[536] a bankers

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530 Farwell Constr. Co. v. Ticktin, 405 N.E.2d 1051, 1065 (Ill. App. Ct. 1980).

531 *Id*.

532 Cushman & Wakefield of Ill., Inc. v. Northbrook 500 Ltd. P'ship, 445 N.E.2d 1313, 1321 (Ill. App. Ct. 1983).

533 Stevenson v. ITT Harper, Inc., 366 N.E.2d 561, 570 (Ill. App. Ct. 1977).

534 Cent. Nat'l Chicago Corp. v. Lumbermens Mut. Cas. Co., 359 N.E.2d 797, 802 (Ill. App. Ct. 1977).

535 Old Second Nat'l Bank v. Indiana Ins. Co., 2015 IL App (1st) 140265, ¶ 16 (affirming award to mortgagee of "prejudgment interest pursuant to the Illinois Interest Act . . . from . . . the date Peerless denied coverage . . . .").

536 Marcheschi v. Illinois Farmers Ins. Co., 698 N.E.2d 683, 689 (Ill. App. Ct. 1998) (awarding interest on "[t]he $75,000 needed to bring plaintiff's award up to the policy limits . . . .").

blanket bond,[537] and life insurance policies.[538] The Interest Act also extends to defense costs an insurer owes due to a breach of its duty to defend under third-party liability policies.[539] In *Conway v. Country Casualty Insurance Co.*, an insurer that committed such a breach had "to pay interest on the attorney fees" charged in a statement its policyholder received from his attorney on the date the suit against the policyholder settled.[540] Interest was computed from that date because that was "when the attorney fees became due and capable of exact computation."[541]

Despite those decisions, policyholders have often been refused interest due to the easily calculable requirement in various circumstances, particularly where they recovered less than they sought in damages.

A. Many Cases Have Refused Interest For First-Party Coverage Recoveries.

In *Bise's Supermarket, Inc. v. Valley Forge Insurance Co.*, the owner of a grocery store damaged by fire was denied prejudgment interest by the court on an award for its business interruption loss because it "could not or did not show . . . that the amount in question was liquidated or subject to swift computation . . . ."[542] In *Couch v. State Farm Insurance Co.*, the court affirmed the denial of prejudgment interest on an award an insured won against State Farm for "losses sustained in a fire at his home[]" because its "review of the record" supported the trial judge's finding that "the case did not involve an easily determined amount of damages."[543]

The loss of interest has, at times, been sizable. In *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, underwriters sought to rescind product recall insurance policies issued to Abbott Laboratories to avoid coverage for the recall of the drug Meridia in Italy.[544] The rescission claim failed, and damages of $84.5 million were awarded in that case, but prejudgment interest was denied because the trial court

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537 *Cent. Nat'l Chicago Corp*., 359 N.E.2d at 802 ("Here, although there may have been a legitimate dispute as to Lumbermens' liability, the amount due from Lumbermens' policy is ascertainable as plaintiffs' loss from the purchase of the fraudulent DCASR accounts . . . The order in favor of Lumbermens on the issue of prejudgment interest is therefore reversed.").

538 Aulich v. Aetna Life Ins. Co., 428 N.E.2d 703, 705–06 (Ill. App. Ct. 1981) ("The plaintiff was entitled to prejudgment interest at the statutory rate of 5% from December 2, 1977, the end of the period within which proof of loss was made, until judgment was entered on January 28, 1981.").

539 815 ILCS 205/2; *see, e.g.*, Knoll Pharm. Co. v. Auto Ins. Co., 210 F. Supp. 2d 1017, 1025–27 (N.D. Ill. 2002) (noting that awarding prejudgment interest on a company's defense costs in class action suits against the company is proper).

540 Conway v. Country Cas. Ins. Co., 442 N.E.2d 245, 250 (Ill. 1982).

541 *Id.*; *see also* Am. Serv. Ins. Co. v. China Ocean Shipping Co. (Ams.) Inc., 2014 IL App (1st) 121895, ¶¶ 6-10 (affirming award of "attorney fees and costs and prejudgment interest").

542 Bise's Supermarket, Inc. v. Valley Forge Ins. Co., 363 N.E.2d 186, 190 (Ill. App. Ct. 1977).

543 Couch v. State Farm Ins. Co., 666 N.E.2d 24, 26, 28 (Ill. App. Ct. 1996).

544 Certain Underwriters at Lloyd's, London v. Abbott Lab'ys, 2014 IL App (1st) 132020, ¶¶ 1-2, 72.

"concluded that the damages were neither liquidated nor easily calculable . . . ."[545] In affirming the refusal of prejudgment interest, the appellate court stated:

> Evidence was heard over four days solely on the issue of damages. Testimony included expert witnesses who presented individual regression analyses supported by various econometric models to determine the amount of future lost income that Abbott suffered from the recall of Meridia in Italy, as well as the decrease in worldwide income from Meridia resulting from the ensuing negative publicity. The Underwriters' and Abbott's experts reached wildly differing conclusions: Abbott's expert estimated losses at over $150 million (well in excess of the policy limits), but the Underwriters' expert estimated losses at "only" $33 million (well within the policy limits). Although the trial court ultimately sided with Abbott's expert, Abbott points to nothing in the record—and we see nothing in the 119-volume record—establishing that the Underwriters' expert's much lower damages estimate was patently unreasonable.[546]

In addition to the difficulty of calculation noted in that case, Illinois courts have often cited differences between what policyholders claimed and what was actually awarded as grounds for refusing interest in first-party coverage cases.[547]

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545 *Id.* at ¶¶ 36–38.

546 *Id.* at ¶ 72.

547 *E.g.,* 4220 Kildare, LLC v. Regent Ins. Co., 2022 IL App (1st) 210803, ¶ 15 ("Kildare requested damages in the amount of $739,106 [for frost and ice damage]. Ultimately, the jury awarded $544,366 in damages. Given the disparity between the amount claimed by Kildare and the amount determined to be due … the amount due was not liquidated or easily computed as of Regent's August 2009 denial of coverage."); Greater N.Y. Mut. Ins. Co. v. Galena at Wildspring Condo. Ass'n, 2022 IL App (2d) 210394, ¶ 21 (stressing "the great disparity between the amounts claimed due by the parties, as well as the disparity between those amounts and the final amounts determined to be due by the appraisal panel" that determined the amount of the storm damage loss); Lyon Metal Products, LLC v. Protection Mut. Ins. Co., 747 N.E.2d 495, 510 (Ill. App. Ct. 2001) (observing in affirming a denial of prejudgment interest under a business interruption endorsement that "[t]he large difference between what Lyon claimed in business interruption loss, what Protection Mutual calculated that loss to be, and what the jury ultimately awarded is a strong indication that the sum due pursuant to the business interruption endorsement was not easily determined"); *Couch*, 666 N.E.2d at 28 ("The plaintiff claimed actual losses of $270,670 in his proof of loss. The jury awarded only $35,000. This fact alone serves as a strong indication that the amount of damages was not readily ascertainable."). An opinion in a non-insurance case recently stated, however, that although "a disparity between the amount sought and the amount awarded may support a finding that a claim is unliquidated," the court disagreed "that a disparity alone warrants the denial of interest." Vision Energy, LLC v. Smith, 2025 IL App (3d) 240114, ¶ 93.

B. The Easily Calculable Requirement Has Also Defeated Interest For Defense Costs Under Third-Party Liability Coverage.

Illinois courts have employed similar reasoning in refusing prejudgment interest on recoveries of defense costs from insurers under liability coverage. In Santa's Best Craft, L.L.C. v. Zurich American Insurance Co., the Illinois Appellate Court cited "[t]he vast disparity in the amount" of defense costs a policyholder "sought and the amount awarded, together with the lengthy evidentiary hearing required to calculate the amount of the fees due" to "support the conclusion that the damages were not easily determined, nor were they liquidated."[548]

In A. Kush & Associates Limited v. American States Insurance Co., the Seventh Circuit affirmed a refusal to award prejudgment interest based on the amounts a jury decided were the reasonable costs of policyholder AKA's defense of a copyright infringement action because under Illinois law, "prejudgment interest can only be awarded when the amount due is liquidated or subject to exact computation."[549] The court of appeals reasoned:

> Given that the trial between AKA and American States focused on the determination of the reasonable fees and costs owed to AKA by American States because of American States' duty to defend, it is obvious that the amount due AKA was in dispute. The jury's award of approximately half of what AKA demanded bolsters this point.[550]

Interest has even been refused on defense costs where a policyholder succeeded in recovering what it claimed was due simply because that claim amounted to less than it had spent on its defense, and judicial effort was necessary to rule against the insurer's challenges to the reasonableness of the fees. In Continental Insurance Co. v. Sargent & Lundy, LLC, the Illinois Appellate Court affirmed trial court decisions that granted summary judgment in favor of insured Sargent & Lundy ("S&L") on its claim that insurers collectively referred to as CNA "breached its duty to defend S&L in the underlying actions[,]" but denied prejudgment interest on the defense costs awarded to S&L.[551] The appellate court stated:

> The parties disputed the reasonableness of S&L's legal fees and how much CNA is liable for, and as a result, the trial court was required to determine total damages. And if judgment, discretion, or opinion, as distinguished

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548 Santa's Best Craft, LLC v. Zurich Am. Ins. Co., 941 N.E.2d 291, 308 (Ill. App. Ct. 2010).

549 A. Kush & Assocs. Ltd. v. Am. States Ins. Co., 927 F.2d 929, 936–37 (7th Cir. 1990) (applying Illinois law).

550 *Id.*

551 Cont'l. Ins. Co. v. Sargent & Lundy, LLC, 2022 IL App (1st) 210677-U, ¶ 45.

> from calculation or computation, is required to determine the amount of the claim, it is unliquidated.
>
> S&L makes much of the fact that the trial court did not conduct any evidentiary hearings to determine damages and overruled CNA's reasonableness objections. Nonetheless, the record shows that the trial court thoroughly analyzed CNA's objections to the reasonableness of S&L's legal fees and entered a detailed written order discussing those objections. As the trial court noted in its analysis, the amount that S&L paid in defense costs is not the same as the amount CNA is liable for, which was an amount *carefully determined* by the trial court. Under these circumstances, the total damages were not easily ascertainable, and thus it cannot be said that no reasonable person would deny S&L's requests for prejudgment interest. We therefore find that the trial court did not abuse its discretion in denying S&L's requests for prejudgment interest and we affirm its judgment.[552]

IV. THE "LIQUIDATED OR EASILY CALCULABLE REQUIREMENT SHOULD NOT PRECLUDE INTEREST ON DEFENSE COSTS RECOVERED FOR AN INSURER'S BREACH OF A DUTY TO DEFEND.

Several commentators have argued against continuing to apply restrictions limiting interest to liquidated damages, and at least one has said that most courts agree with that view.[553] Although their commentary presents a sound basis for discarding Illinois' easily calculable requirement entirely, the requirement should at least be jettisoned for defense costs policyholders recover from insurers that breached a duty to defend. Enforcing the requirement against policyholders who were forced to defend themselves defeats the Interest Act's compensatory purpose and protects insurers undeserving of that protection.

A. The Requirement's Purpose Of Avoiding Punishment Is Out Of Step With The Act's Purpose of Full Compensation.

The liquidated or easily calculable requirement is a common law rule developed when prejudgment interest was considered punitive. A commentator has related that in ancient times, charging interest was viewed

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552 *Id.* at ¶¶ 48–49 (citations omitted).

553 Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 351 (1996) ("[B]ecause prejudgment interest prevents the value of an award from being reduced by delay, prejudgment interest should be awarded on both liquidated and unliquidated damages, as most courts and commentators recognize."); Martin Oyos, *Prejudgment Interest in South Dakota*, 33 S. D. L. REV. 484, 507 (1988) ("By eliminating the distinction between liquidated and unliquidated damages as the determinative factor for awarding prejudgment interest, the archaic and illogical reasons now found in S.D.C.L. 21-1-11 are eliminated.").

"as usurious."[554] "By the end of the Middle Ages," however, "the merchant class" and "lenders found loans useful for financing business ventures and argued for the enforcement of loan contracts and for permission to charge interest."[555]

Slowly, English courts acquiesced and permitted the enforcement of loan contracts. Yet the courts initially permitted the collection of interest only when the debtor failed to repay a loan according to the contract terms. In other words, the collection of interest served to punish a dilatory debtor rather than to compensate the lender for the use of the lender's money. With the passage of time, the prohibitions against charging interest for lending money vanished. The concept of punishment remained, however, for interest awarded as damages.[556]

That commentator explained that "[t]he concept of interest as punishment led to the development of the liquidated-unliquidated test to determine whether or not to award interest as damages."[557]

> Interest was allowed for "liquidated" claims but denied when a claim was considered "unliquidated." If the amount of damages was a fixed sum, such as the face amount of an insurance policy, the claim was considered "liquidated" because a defendant knew the amount owing and could immediately pay the damages. If the damages were uncertain, the claim was considered "unliquidated" because a defendant could not determine the extent of liability prior to trial. Therefore, an award of interest was inappropriate. The liquidated-unliquidated test presupposed, as it still does today, that a defendant was liable for prejudgment interest only if the defendant knew or could have determined the amount of damages. Significantly, this principle of English law became a part of our country's common law.[558]

As noted above, the modern purpose of prejudgment interest, which the Interest Act promotes, is not punishment but the compensation of a creditor for the time value of money withheld.[559] It frustrates that purpose to deny interest completely to a policyholder who was wrongfully forced to

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554 Oyos, *supra* note 42, at 486.

555 *Id.*

556 *Id.* at 486–87.

557 *Id.* at 487.

558 *Id.*; *see also* Knoll, supra note 42, at 298 ("Interest was long seen as a means of punishing an egregious defendant rather than compensating a successful plaintiff. That view led to the common-law rule that prejudgment interest was allowed for liquidated claims, but not for unliquidated ones. The logic was that only defendants who could determine exactly what they owed could improperly withhold payment.").

559 *See* Vision Energy, LLC v. Smith, 2025 IL App (3d) 240114, ¶ 78 ("Prejudgment interest under section 2 [of the Interest Act] is intended to fully compensate an injured party for the monetary loss caused by the failure to pay money when due.").

defend itself simply because some of the defense costs the policyholder incurred in its defense were later deemed unreasonable or because the insurer put up a fight over reasonableness. Refusing interest in such circumstances compounds the loss incurred by a policyholder who was supposed to be protected against litigation by the insurer, not forced to undertake it due to an insurer's breach.

B. An Insurer That Refuses To Defend Completely Should Not Be Protected.

In any event, protecting insurers that refuse to defend entirely does not serve the original purpose of the easily calculated requirement. As previously noted, that common law requirement helped to avoid the unfairness of punishing a debtor that could not discharge its obligation due to uncertainty as to what it owed.[560] Insurers that refused to defend because they denied coverage are not the type of debtors the requirement was meant to protect.

Giving such insurers a pass is obviously unfair when the liability insurers' options are considered. Illinois law permits insurers that are doubtful as to whether they owe a duty to defend a particular lawsuit to defend under a reservation of rights while challenging whether they owe a defense obligation in a declaratory judgment action.[561] Where their offer to defend under a reservation of rights is refused due to a conflict of interest created by the grounds they reserved, the insurers can protect themselves against being charged with a breach of contract by reimbursing the fees of independent counsel chosen by the policyholder.[562] Those insurers will be responsible for only reasonable fees from independent counsel.[563] Insurers can even include "an express provision" in their policies allowing them to advance a policyholder's defense costs "pursuant to a reservation of rights" to recoup them if the insurers can show they owed no defense obligation.[564]

Given those options, only insurers that refuse to defend entirely and leave their policyholders to defend themselves will absorb their

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560 *See generally* Hirsch, *supra* note 11, at 414 (discussing how Illinois courts have emphasized that for prejudgment interest to be awarded, the debt must be fixed or easily calculable, which highlights the importance of clear debt quantification).

561 Employ's Ins. of Wausau v. Ehlco Liquidating Tr., 708 N.E.2d 1122, 1134-35 (Ill. 1999); Empire Fire & Marine Ins. Co. v. Clarendon Ins. Co., 642 N.E.2d 790, 793 (Ill. App. Ct. 1994) ("If an insurer is in doubt as to its duty to defend, it should seek a declaratory judgment as to its rights and obligations, or defend under a reservation of rights, or both.").

562 Employ's Ins. of Wausau v. Ehlco Liquidating Tr., 708 N.E.2d 1122, 1137 (Ill. 1999).

563 Santa's Best Craft, LLC v. Zurich Am. Ins. Co., 941 N.E.2d 291, 300 (Ill. App. Ct. 2010) ("Zurich had no obligation to reimburse plaintiffs for those defense expenses that the court found to be unjustified and, therefore, unreasonable."); IMC Glob. v. Cont'l Ins. Co., 883 N.E.2d 68, 80 (Ill. App. Ct. 2007) ("[A]n insurer may discharge its contractual obligations to defend by reimbursing the insured for the reasonable cost of hiring independent counsel.").

564 Gen. Agents Ins. Co. of Am. v. Midwest Sporting Goods Co., 828 N.E.2d 1092, 1104 (Ill. 2005).

policyholder's defense costs. Once such insurers face lawsuits, they will be held liable for only defense costs the court deems reasonable.[565] It would be manifestly unfair to deprive policyholders of compensation for the time value of even the reasonable amounts that a breaching insurer forced them to incur.

C. The Liquidated Or Easily Calculable Requirement Is Unfairly Vague.

The easily calculable requirement is also flawed because it sets an unfairly vague standard. On the one hand, Illinois cases hold that "if the amount is determinable, interest can be awarded on money payable even when the claimed right and the amount due require legal ascertainment."[566] The same cases hold, however, that interest is available only if "the amount was liquidated or was easily computed."[567] The cases fail to make clear how much legal ascertainment will be necessary to prevent the amount due from meeting the easily calculable element of the requirement. This uncertainty opens the matter to arbitrary outcomes difficult to reconcile with the Interest Act's direction that prejudgment interest "shall be allowed . . . for all moneys after they become due on any . . . instrument of writing . . . ."[568]

It would be clearer and fairer to award interest on whatever amounts are deemed owing after the court conducts its reasonableness analysis. That rule should not expose insurers to arbitrary outcomes because a degree of certainty is required by courts for assessing damages in the first place. Under Illinois law, a "plaintiff has the burden of proving damages to a reasonable degree of certainty . . . ."[569] That standard requires "a fair degree of probability" to establish the basis to assess the damages.[570]

D. Awarding Interest In All Cases Would Serve Illinois Public Policy.

The Illinois Supreme Court has noted "that the state has an interest in having an insured adequately represented in the underlying litigation."[571] The knowledge that they will be paying prejudgment interest on defense costs their policyholders recover can only serve that public policy interest by discouraging insurers from withholding a defense they owe. Promoting interest recovery also serves that goal by making certain that insurers that do

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565 Ervin v. Sears, Roebuck & Co., 469 N.E.2d 243, 248 (Ill. App. Ct. 1984) ("The wrongful failure of the insurer to defend an action exposes the insurer to liability for the cost and expense which the insured was put to by the insurer's breach of the insurance contract, and this liability embraces reasonable attorney fees.").

566 N.H. Ins. Co. v. Hanover Ins. Co., 696 N.E.2d 22, 28 (Ill. App. Ct. 1998).

567 *Id.*

568 815 ILCS 205/2.

569 Farwell Constr. Co. v. Ticktin, 405 N.E.2d 1051, 1061 (Ill. App. Ct. 1980).

570 *Id.*

571 Cincinnati Co's. v. West Am. Ins. Co., 701 N.E.2d 499, 505 (Ill. 1998).

discharge their obligations are compensated when others do not. In situations where lawsuits against a policyholder implicate more than one insurer, but one of them wrongfully refuses to defend, insurers assuming the defense can recover interest on the defense costs owed by the breaching insurer.[572] The Interest Act "applies to actions by one insurer against another insurer for reimbursement of defense costs owed under insurance policies."[573]

CONCLUSION

Illinois' easily calculable requirement is a relic of a bygone age when prejudgment interest was deemed a punishment rather than a compensatory measure. Although good grounds exist to discard the requirement entirely, an excellent first step would be declining to enforce it against policyholders forced to defend themselves by a breaching insurer.

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572 Westfield Ins. Co. v. Indem. Ins. Co. of N. Am., 423 F. Supp. 3d 534, 559 (C.D. Ill. 2019) ("Westfield and Star are also entitled to prejudgment interest since the December 17, 2013 re-tender."), *reversed on other grounds*, Westfield Ins. Co. v. Indem. Ins. Co. of N. Am., 58 F.4th 276 (7th Cir. 2023).

573 *Id.* (citing Statewide Ins. Co. v. Houston Gen. Ins. Co., 920 N.E.2d 611, 623-24 (Ill. App. Ct. 2009)) ("Houston General failed to fulfill its duty to defend and indemnify JCC. Therefore, the award of prejudgment interest to Statewide was proper.")).

WHAT IS THE DISTRIBUTION OF NATIONAL HISTORICAL PARKS?

Randall K. Johnson*

INTRODUCTION

In 2015, former U.S. President Barack Obama created the Pullman National Monument in the greater Chicago, Illinois area.[574] This U.S. federal designation, which was made pursuant to a grant of authority that the U.S. Congress gives to every president under the 1906 Antiquities Act, "was an exciting moment for . . . the former . . . factory town . . . [that is considered] . . . the birthplace of the American labor movement [and a key driver of African-American economic and social advancement during the twentieth century]."[575] The only problem is designations "created by the stroke of a president's pen . . . can be undone by the same[,]" as evidenced by subsequent U.S. President Donald Trump's downsizing of Bears Ears National Monument by eighty-five percent.[576]

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* Professor of Law, University of Missouri-Kansas City, School of Law. Special thanks to my various reviewers at the Association for Law, Property and Society (ALPS) Conference at the Pepperdine Caruso University School of Law (Summer 2024) and Progressive Property Law Conference at the Boston University School of Law (Fall 2024).

574 *See* Patty Wetli, *Pullman National Monument Upgraded To National Historical Park – And The Name Change Makes A Big Difference*, WINDOW TO THE WORLD (Jan. 19, 2023, 8:21 PM), https://news.wttw.com/2023/01/19/pullman-national-monument-upgraded-national-historical-park-and-name-change-makes-big (describing the legal process whereby the Pullman National Monument was transformed into the Pullman National Historical Park during Fiscal Year 2022); It should be noted that Pullman is the only *national historical park*, at least as of this writing, which is located in Illinois. Other types of National Park Service-recognized sites also are found within the boundaries of the Prairie State. Among the examples of other Illinois sites, which may use similar naming conventions to the Pullman site, are *national historic sites* (Lincoln Home National Historic Site and New Philadelphia National Historic Site), *national monuments* (Emmett Till and Mamie Till-Mobley National Monument and Springfield 1908 Race Riot National Monument), *national parks* (Gateway Arch National Park), *affiliated areas* (Chicago Portage National Historic Site), *authorized areas* (Ronald Reagan Boyhood Home National Historical Site) and *national heritage* areas (Abraham Lincoln National Heritage Area and Illinois & Michigan Canal National Heritage Corridor). *See About Us: National Park System*, NAT'L PARK SERV. (last updated Feb. 26, 2025), https://www.nps.gov/aboutus/national-park-system.htm [hereinafter *About Us*]. Within this context, it would be fair to say that Illinois is home to ten (10) *national park* sites.

575 Wetli, *supra* note 1.

576 *See* Deepa Shrivara, *Biden Restores Protections For Bears Ears Monument, 4 Years After Trump Downsized It*, NAT'L PUB. RADIO (Oct. 8, 2021, 3:23 PM), https://www.npr.org/2021/10/07/1044039889/bears-ears-monument-protection-restored-biden#:~:text=The%20Bears%20Ears%20National%20Monument,%20which (explaining that in "2017, then-President Donald Trump signed an executive order that dramatically downsized Bears Ears by 85% . . . it was the largest reversal of U.S. land monument protections in history.").

In response, federal legislators proposed a bill to turn the pre-existing Pullman National Monument into the new Pullman National Historical Park.[577] This legislative action was taken and enacted by the 117th U.S. Congress.[578] It was later signed into law by former U.S. President Joseph Biden.[579]

Pullman's re-designation as a National Historical Park constituted more than a mere name change.[580] By transforming it from a *national monument* into a *national historical park*, Congress provided Pullman with additional legal protections.[581] Among the most important of these protections is that future presidents can no longer unilaterally change the boundaries of Pullman National Historical Park.[582] Nor could they, at least without Congressional support, remove it from the National Park System.[583]

In an increasingly polarized nation that can no longer reach any consensus about what is meant by the term "common good,"[584] it might be

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577 *See* RAUL M. GRIJALVA, PULLMAN NATIONAL HISTORICAL ACT, H.R. REP. NO.117-582 (Nov. 17 2022).

578 *See id.*

579 *See* Wetli, *supra* note 1.

580 *See id.*

581 *See id*.

582 *See generally History & Culture*, NAT'L PARK SERV (last updated Feb. 17, 2024), https://www.nps.gov/pull/learn/historyculture/index.htm (explaining that Pullman "was designated . . . on February 19, 2015, making it the first National Park Service unit in Chicago.").

583 *See generally id.* (explaining the benefits that arise from re-designating Pullman).

584 It is not even clear that civil rights groups, including U.S. administrative agencies, agree that the common good still requires full enforcement of U.S. anti-discrimination laws. The Equal Employment Opportunity Commission (EEOC) has been accused of taking certain unlawful discrimination claims more seriously than others, whereas the state-level Missouri Commission on Human Rights (MCHR) has been accused of taking almost none of these claims seriously. *Compare* Maryam Jameel, *More and more workplace discrimination cases are being closed before they're even investigated*, VOX (Jun. 14, 2019), https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination (explaining that "The EEOC said it has focused its limited resources 'on charges where the government can have the greatest impact on workplace discrimination.' But as it cut its backlog by 30 percent in the last decade — much of that in the past two years — the already-low share of workers getting help has dropped. Only 13 percent of all complaints the EEOC closed last year ended with a settlement or other relief for the workers who filed them, down from 18 percent in 2008."), *with* Jonathan Shorman, *How A Dysfunctional Missouri Human Rights Commission Slows Discrimination Lawsuits*, KAN. CITY STAR (Apr. 5, 2023), https://www.kansascity.com/news/politics-government/article273959450.html (explaining that some critics, such as Kansas City-area attorney Gene Graham, "suggested the commission tries to please the business community at the expense of victims of discrimination[]" and "that the [MCHR] rarely determines discrimination occurred. It found probable cause of discrimination in just five cases in . . . 2022 . . . despite receiving more than 1,000 complaints . . . . No probable cause findings were listed for [2020 or 2021]."); one result is unlawful discrimination may go remedied by civil rights groups, including administrative agencies. *See* Aviva Okeson-Haberman, *New Kansas City Manager Starts Job Amid Allegations Of Racism At Previous Position In New Jersey*, KCUR (Dec. 7, 2020), https://www.kcur.org/news/2020-12-06/new-kansas-city-manager-starts-job-amid-allegations-of-racism-at-previous-post-in-jersey-city (explaining that "Kansas City's new city manager Brian Platt starts his job today and already some city council members are questioning his [hiring] following a discrimination lawsuit); *see* Celisa Calacal, *Kansas City and Brian Platt*

wise to extend the exact same protections to other national monuments. But prior to doing so, Congress may want to undertake additional research. This research should build on the existing work of the National Park Service and other interested parties to determine whether and how to expand the number of national historical parks.

This Article explains, at least in part, how Congress could carry out such a research agenda. It does so by introducing a new national historical parks dataset. This dataset, which draws upon National Park Service (NPS) data about the sixty-three existing national historical parks and how they are distributed across national space, may be used to undertake a range of useful analyses.[585] One example of a case in point is a distributional analysis, which could explain how all 63 national historical parks are distributed across national space on the basis of race, income and/or population.[586]

The Article undertakes this kind of distributional analysis in its four (II-V) additional parts. Part II describes the applicable federal law. Part III explains this Article's methodology. Part IV contains its analysis. Part V has its conclusions, recommendations, and its implementation plan.

I. APPLICABLE LAW

For more than 150 years, several federally-regulated parks have been created by the federal government.[587] Through passage of the 1916 Organic Act and other related laws, Congress has charged the National Park Service with safeguarding these scarce "public resources for recreation, education [and] scholarship . . . ."[588] Subsequent federal legislative actions expanded

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sued for discrimination by ousted civil rights director, KCUR (Mar. 14, 2024), https://www.kcur.org/news/2024-03-14/kansas-city-brian-platt-sued-andrea-dorch-discrimination-office-civil-rights-equal-opportunity (explaining that "Andrea Dorch, former head of Kansas City's civil rights department, is suing City Manager Brian Platt and the city for race . . . discrimination. [Alleging] Platt created obstacles that made it difficult for Dorch to carry out her job duties . . . ."); *see* Celisa Calacal, *Civil Rights Leaders Demand Kansas City Manager Brian Platt Resign Over 'Culture of Racism',* KCUR (May 4, 2023), https://www.kcur.org/news/2023-05-04/civil-rights-leaders-demand-kansas-city-manager-brian-platt-resign-over-culture-of-racism (explaining that "A coalition of civil rights leaders and organizations in Kansas City are calling for City Manager Brian Platt to resign, and calling out Mayor Quinton Lucas for being complicit in creating what they say is a culture of racism inside City Hall.").

585 *What We Do (U.S. National Park Service)*, NAT'L PARK SERV., https://www.nps.gov/aboutus/index.htm#:~:text=The%20National%20Park%20Service%20cooperates%20with%20partners,laws%20relating%20to%20the%20National%20Park%20Service (last visited Mar. 17, 2025).

586 Randall K. Johnson, *What Is The Distribution Of National Historical Parks?*, SSRN (Sept. 05, 2024), https://ssrn.com/abstract=4947898.

587 *See generally Brief History of the National Parks*, LIBR. OF CONG., https://www.loc.gov/collections/national-parks-maps/articles-and-essays/brief-history-of-the-national-parks/ (last visited Mar. 16, 2025) (explaining that prior to awarding jurisdiction over U.S. national parks to the National Park Service in 1916, "[f]or four decades the nation's parks, reserves, and monuments were supervised at different times by the departments of War, Agriculture and the Interior.").

588 *Id.*

the responsibilities of this administrative agency so that it regulates "more than 400 scenic parks, monuments [and other sites such as national historical parks] . . . ."[589] One recent example, the 1970 General Authorities Act,[590] did its work by clarifying the legal rights and obligations imposed upon the National Park Service in regulating federally-designated units.[591]

Units of the National Park Service may be created using a range of different federal designations, which have varied over time.[592] Current designation options include the "national park,"[593] "national monument,"[594] "national preserves,"[595] "national reserves,"[596] "national recreation areas,"[597] "national lakeshores/seashores,"[598] "national/wild and scenic rivers,"[599] "national trails,"[600] "national parkways,"[601] "national/international historic sites,"[602] "national historical parks,"[603]

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589 A range of earlier laws, which included the 1864 Yosemite Act, 1872 National Park Protection Act, the 1906 Antiquities Act and the 1916 Organic Act (H.R. 15522), also shaped the mission and/or work of our National Park Service. *Congress Creates the National Park Service*, NAT'L ARCHIVES (Oct. 10, 2020), https://www.archives.gov/legislative/features/national-park-service.

590 54 U.S.C.§ 100101(b).

591 *See generally* LAURA B. COMAY, CONG. RSCH. SERV., RS20158, NATIONAL PARK SYSTEM: ESTABLISHING NEW UNITS 1 (Apr. 6, 2022) (explaining that this 1970 legislative action: "made explicit that all areas managed by [the National Park Service] are part of a single system, and gave all units of the system equal standing with regard to resource protection.").

592 *See generally* LAURA B. COMAY, CONG. RSCH. SERV., R41816, NATIONAL PARK SYSTEM: WHAT DO THE DIFFERENT PARK TITLES SIGNIFY? 1 (Nov. 15, 2023) (explaining that, over time, "[m]ore than 20 different designations have been used.").

593 *See generally id.* (explaining that national parks "typically are large, diverse areas with outstanding national features and ecological resources. They tend to be among the most strictly protected park units.").

594 *Id.* at 1-2 (explaining that national monuments "contain historical or archaeological artifacts, but others are notable for their natural features or recreational opportunities.").

595 *Id.* at 2 (explaining that national preserves "are similar to national parks in their size and natural features but typically allow uses (such as hunting or oil and gas exploration) that Congress considers incompatible with national park designation.").

596 *Id.* (explaining that national reserves "are similar to national preserves except [they] are managed in partnership with state, local or private entities.").

597 *Id.* (explaining that national recreation areas "surround Bureau of Reclamation reservoirs [or urban centers,] and feature water-based recreation.").

598 *Id.* (explaining that national lakeshores/seashores are areas wherein "recreation and natural resource preservation are prioritized in these units.").

599 *Id.* (explaining that national/wild and scenic rivers are areas wherein "Congress has preserved rivers in a free-flowing state (unaltered by dams or channels) . . . . [Which] offer hiking, canoeing, and other outdoor activities[].").

600 *Id.* (explaining that national trails "wind through multiple states. [That] are managed for recreational use, primarily hiking.").

601 *Id.* (explaining that national parkways "encompass roads and surrounding parkland. Sites of cultural interest lie along their routes. [Many are] designed for recreational driving through scenic countryside . . . .").

602 *Id.* (explaining that national/international historical sites "designate places significant to U.S. history. Many are structures of historical interest, such as the homes of notable Americans, or buildings where important events occurred.").

603 *Id.* at 3 (explaining that national historical parks "are notable for their connection with events or people of historical interest. These entities usually extend beyond a single building or property.").

"national battlefields/battlefield sites/battlefield parks/military parks,"[604] "national memorials"[605] and "other designations."[606] Past designations, which are less frequently used, include one that allows the Secretary of the Interior to designate "national historic sites under . . . the Historic Sites Act."[607]

As of this writing, the aforementioned fourteen designations tell us one or more things about a specific National Park Service unit.[608] For example, the designation often provides "information about who established the unit . . . , who manages it, . . . what activities [are] permitted or prohibited …[,] [and/or the observable characteristics of the unit itself]."[609] One example of a case in point is when Pullman was transformed from a national monument to a national historical park, [610] which signals an important change in the level of legal protection provided to this site.

Within this context, what are the currently valid ways to create new National Park Service units, such as national historical parks? It is well-established that U.S. Presidents have a right to create national monument designations and, arguably, may be able to modify or remove designations, but can do nothing else without Congressional authorization.[611] Federal executives may do this limited work, pursuant to a grant of authority that was provided by Congress under the Antiquities Act, at least when three (3) required elements are met.[612] These elements include 1) proposed monuments must be located on federally-controlled land, 2) such lands must

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604 *Id.* (explaining that national battlefields,/battlefield sites/battlefield parks/military parks "designate locations of significant military actions. They include landscapes where battles occurred [], and military and civil structures in those areas.").

605 *Id.* (explaining that national memorials "are structures erected to commemorate people or events.").

606 *Id.* (explaining that other designations are "areas in the Washington, DC, region that do not fit into [other National Park Service] classifications.").

607 Wetli, *supra* note 1; 54 U.S.C. § 320102 (2018).

608 *See generally* COMAY, *supra* note 19, at 1 (explaining that National Park Service unit designations reflect differences in management, permitted activities, and public perception).

609 *Id.* at 2.

610 *Pullman National Historical Park*, NAT'L PARK SERV., https://www.nps.gov/pull/index.htm (last visited Mar. 13, 2025) (providing historical background on Pullman and detailing its redesignation from a national monument to a national historical park).

611 54 U.S.C. § 320301 (2018) (granting the President authority to designate national monuments on federal lands but remaining silent on whether the President may modify or revoke such designations); In 2017, President Trump attempted to reduce the sizes of Bears Ears and Grand Staircase-Escalante National Monument, however, was met with a lawsuit. *NRCS et al. v. Trump et al (Bears Ears National Monument)*, NAT. RES. DEF. COUNS., https://www.nrdc.org/court-battles/nrdc-et-v-trump-bears-ears (last visited Mar. 14, 2025); President Biden then attempted to restore the original boundaries but was challenged in court. Matthew Brown, *Court Dismisses Challenge to Biden's Restoration of Utah Monuments Shrunk by Trump*, ASSOCIATED PRESS (Aug. 11, 2023), https://apnews.com/article/biden-bears-ears-lawsuit-dismissed0e3e0805ba3fe5756c32a944b d7d29bb; A US District Judge dismissed the challenged to Biden's restoration by affirming that the Antiquities Act grants the President broad authority to designate national monuments. *Id.*

612 § 320301.

be improved, and 3) authorizations must be communicated via proclamations.[613]

In contrast, Congress has broad authority to create any type of National Park Service designation.[614] It may do so by explaining "the unit's purpose; [setting] its boundaries; [providing] directions for land acquisition, planning, uses and operations; [and giving] appropriations for acquisition and development."[615] Congress, furthermore, must communicate its intent to the "House Committee on Natural Resources and the Senate Committee on Energy & National Resources . . . ."[616]

When Congress seeks to modify or remove a designation, regardless of who created that National Park Service unit, there may be a number of valid reasons for such federal legislative action. Among the most frequently cited reasons are economic and social ones.[617] But, increasingly, political reasons also inform Congressional decision-making, and they are likely to continue to do so.

In light of the foregoing analysis, even more Congressional re-designations may be on the horizon.[618] Related research, including scholarship about the possibility of additional federal designations that are managed by non-governmental entities or sub-state governments, may also be in order.[619] One line of research could focus on what happens when national monuments, such as the Pullman site in Northern Illinois, are turned into national historical parks.[620] A second line of work may examine the potential benefits of more designations of nonfederal national monuments,[621]

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613 *Id.* (describing the required elements of the process for creating U.S. national monuments).

614 *See generally* COMAY, *supra* note 18, at 2 (describing the process for creating U.S. national parks).

615 *Id.*

616 *Id.*

617 *Id.* at 4 ("NPS studies of potential new areas also must evaluate a variety of other factors, such as . . . the socioeconomic effects of addition . . . .").

618 *See generally* MARK K. DESANTIS, CONG. RSCH. SERV., IF11281, NATIONAL PARK AFFILIATED AREAS: AN OVERVIEW 2 (Dec. 26, 2023), https://www.congress.gov/crs-product/IF11281#:~:text=Download%20PDF%20(390KB)("In 2022, Congress authorized the establishment of five affiliated areas associated with the Brown v. Board of Education National Historical Park []. Establishment of these areas—located in multiple states—was to be made following the identification . . . of an 'appropriate management entity' for each site"). [The National Park Service] has indicated that no secretarial determination has been made to date.

619 *See generally* LAURA B. COMAY, CONG. RSCH. SERV., R42125, NATIONAL PARK SYSTEM: UNITS MANAGED THROUGH PARTNERSHIPS Summary (Apr. 5, 2016), https://www.congress.gov/crs-product/R42125 ("In recent decades, it has become more common for the National Park Service [] to own and manage units of the National Park System in partnership with others in the federal, tribal, state, local or private sectors. Such units of the park system are often called *partnership parks*. Congressional interest in partnership parks has grown, especially as Congress seeks ways to leverage limited financial resources for park management.")

620 *See generally A story of American Opportunity*, NAT'L PARK SERV., https://www.nps.gov/pull/index.htm (last visited Mar. 17, 2025) (explaining the many benefits that arise from the re-designation of Pullman).

621 *See generally* JACOB R. STRAUS & LAURA B. COMAY, CONG. RSCH. SERV., R45741, MEMORIALS AND COMMEMORATIVE WORKS OUTSIDE WASHINGTON, DC: BACKGROUND, FEDERAL ROLE, AND

such as the Lorraine Hansberry Historic Home in Chicago.[622] A final line of research could examine the viability of national historical parks that are managed through partnerships between the federal government and certain third-parties such as nonprofits.[623] Such a narrow focus is appropriate, as it builds upon recent theoretical and practical research. For example, recent research has underscored the need for more distributional analysis of U.S. public goods. By using certain easy-to-understand methodologies, such as composition-based approaches to proportionality, this research may explain whether public goods are distributed in standard ways.

It must be acknowledged, however, that distributional analysis may have numerous limitations. Among the most glaring is that distributional analysis may have "a modest ability to determine the direction or strength of any relationship between variables . . . ."[624] But, notwithstanding these

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OPTIONS FOR CONGRESS 11 (Sept. 18, 2024) ("On numerous occasions, Congress has designated an existing nonfederal memorial as a 'national memorial' without any further federal affiliation. These memorials generally do not receive federal funds or support for maintenance or programming. Legislation designating these national memorials often includes explicit language stating that the memorial is not [a National Park Service] unit and that federal funds shall not be provided for the memorial.").

622 *See generally* Lyonette Louis-Jacques, *Lorraine Hansberry: Here Chicago Law Story*, UNIV. OF CHI. L. LIBR. NEWS, (Mar. 6, 2013), https://www.lib.uchicago.edu/about/news/lorraine-hansberry-her-chicago-law-story/ (explaining that the "Hansberry family home (6140 S. Rhodes Ave.) was declared an historical landmark by the Chicago City Council on February 10, 2010.").

623 *See generally* COMAY, *supra* note 46, at 1 ("The partnership parks of the National Park System are those units that the National Park Service [] owns and/or manages along with one or more partners . . . . Congress has created a growing number of partnership parks among the system's 410 units. Of the units added to the National Park Service in the Administrations of Presidents William Clinton, George W. Bush, and Barack Obama, nearly half might be considered partnership parks.").

624 Randall K. Johnson, *What Is The Optimal Basis For Imposing Government Liens?*, 2023 U. ILL. L. REV. ONLINE 128, 133 (2023) [hereinafter *Optimal Basis*] (explaining how to find out the distribution of government liens in Illinois); *see, e.g.,* Randall K. Johnson, *Ella P. Stewart And The Benefits Of Owning A Neighborhood Pharmacy*, 8 ADM. L. REV. ACCORD 101, 114–15 (2023) (explaining how to find out the distribution of certain public goods and/or services that are dispensed by pharmacists on behalf of U.S. governments); *see, e.g.,* Randall K. Johnson, *Why Illinois Should Reevaluate Its Video Tolling (V-Toll) Subsidy*, 106 IOWA L. REV. 2303, 2313–17 (2021) (explaining, in part, the distribution of a specific transportation subsidy in Illinois); *see, e.g.,* Randall K. Johnson, *How Mobile Homes Correlate With Per Capita Income*, 11 CAL. L. REV. ONLINE. 91, 97–100 (2020) (explaining the distribution of mobile homes in Illinois); *see, e.g.,* Randall K. Johnson, *Uniform Enforcement Or Personalized Law? A Preliminary Examination Of Parking Ticket Appeals*, 93 IND. L. J. SUPP. 34, 58–60 (2018) (explaining the distribution of parking ticket appeals in Chicago, Illinois); *see, e.g.,* Randall K. Johnson, *Medical Malpractice Claims in Mississippi: A Preliminary Analysis*, 34 MISS. C. L. REV. 191, 193–94 (2015) (explaining the distribution of medical malpractice claims in Mississippi); *see, e.g.,* Randall K. Johnson, *Who Wins Residential Property Tax Appeals*, 6 COLUM. J. OF TAX L. 209, 216–19 (2015) (explaining the distribution of residential property tax appeals in Cook County, Illinois); *see, e.g.,* Randall K. Johnson, *Why We Need A Comprehensive Recording Fraud Registry*, 2014 N.Y.U. J. LEGIS. PUB. POL'Y QUORUM 88, 93–95 (2014) (explaining the distribution of fraudulent document notices in Cook County, Illinois); *see, e.g.,* Randall K. Johnson, *How Tax Increment Financing (TIF) Districts Correlate With Taxable Properties*, 34 N. ILL. U. L. REV. 39, 45–47 (2013) (explaining the distribution of tax increment financing districts in Cook County, Illinois); *see, e.g.,* Randall K. Johnson, *Why Police Learn From Third-Party Data*, 3 WAKE FOREST L. REV. ONLINE 1, 4–5 (2013)

limitations, distributional analysis still may inform government work. It may do so simply by limiting the conclusions that can be draw from showing "who gets what."

If successful, the distributional analysis may be used to improve U.S. governmental decision-making. It may do so by "provid[ing] a simple way to test different null hypotheses."[625] This methodological approach also has "the potential to show how public goods and services are distributed across space during a particular year and over time."[626] And, lastly, "any such analyses may identify when similarly-situated [legal persons] are treated in non-standard ways . . . ."[627] Thus, this Article properly views "the act of undertaking a distributional analysis as an important step . . . ." in showing how national historical parks are designated in an individual year and over time.[628]

II. METHODOLOGY

This Article introduces a new dataset that draws on publicly available information about national historical parks.[629] These data are initially used to identify this public good's current distribution during Fiscal Year (FY) 2024.[630] Unlike this author's past work on the distribution of other public goods and services, as well as on the distribution of disamenities such as closed schools in Chicago, only means will be computed for each subset of states and the sample population.[631]

(explaining the distribution of published Section 1983 cases, at least among certain law enforcement agencies); *see, e.g.,* Randall K. Johnson, *Do Police Learn From Lawsuit Data?*, 40 RUTGERS L. REC. 30, 35–38 (2012) (explaining the distribution of published Section 1983 cases, at least among certain law enforcement agencies).

625 *Optimal Basis*, *supra* note 51, at 133.

626 *Id.* at 134.

627 *Id.*

628 *Id.*

629 *See generally National Park System*, NAT'L PARK SERV., https://www.nps.gov/aboutus/national-park-system.htm (last visited Mar. 4, 2025) (describing the state-level location of all 63 national historical parks in the U.S.).

630 *Infra* Appendix.

631 *See, e.g.,* Randall K. Johnson, *Where Schools Close In Chicago*, 7 ALB. GOV. L. REV. 508, 511 (2014) (explaining the distribution of school closings in Chicago). This Article employs almost the exact same approach as the author's 2015 paper on school closings in Chicago. As such, it uses similar language, analysis and citations. The goal in doing so is to build on this author's previous scholarly work: in order to show that his earlier analysis may be validly applied to new and/or different situations.

The mean is the average of a series of numbers, whereas the median is the middle number.[632] Both are valid measures of central tendency.[633] Although their relative values depend on the issues presented.[634]

Within this context, the Article uses a single measure of central tendency to find out if U.S. national historical parks are disproportionately located in more privileged parts of the country. Means are used for several interrelated reasons. First, the null hypothesis is that national historical parks are distributed on a normal basis.[635] Next, the relative certainty about the distribution of U.S. national parks counsels for the use of means.[636] Lastly, means provide a wealth of information.[637]

For the purposes of this Article, each distribution is viewed as disproportionately-high whenever a group-level average is greater than the population average. Whereas a distribution is considered to be disproportionately-low whenever a group-level average is less than the population average. And, lastly, each distribution is considered proportionate when it equals the population average.

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632 Anthony McClusky & Abdul Ghaaliq Lalkhen, *Statistics II: Central Tendency and Spread of Data*, 7 CRITICAL CARE & PAIN 127, 127 (2007), http://ceaccp.oxfordjournals.org.

633 *Id.*

634 *Id.*

635 Johnson, *supra* note 58, at 511 (citing Joseph P. Healy, *Statistics: A Tool for Social Research* 239 (Lin Marshall et al. Eds., 6th ed. 2002)) ("With small samples, to justify the assumption of a normal sampling distribution and to form a pooled estimate of the standard deviation of the sampling distribution, we must assume that the variances of the populations of interest are equal . . . . The assumption of equal variance in the population can be tested by an inferential statistical technique known as the analysis of variance . . . . For our purposes here, however, we will simply assume equal population variances without formal testing. This assumption can be considered justified as long as samples sizes are approximately equal."). This essay takes a similar approach.

636 Michael J. Saks, *Do We Really Know Anything About the Behavior Of The Tort Litigation System – And Why Not?*, 140 U. PA. L. REV. 1147, 1250 n.376 (1992) ("Which is the 'correct' one to use? The convention among statisticians is to use means to describe the central tendency of 'normal' distributions (the familiar bell-shaped curve) and medians to describe the central tendency of skewed distributions. This convention is not arbitrary. It is a solution to the problem of trying to give as meaningful a sense of where a distribution sits as possible using a single number. Because of this convention and its reasoning, some researchers [] consistently use medians to report the central tendencies [of their subject matter] and eschew means. Other researchers [] take pains to present both, leaving to their readers the responsibility to make the choice and the interpretation.") (citations omitted). I, however, focus upon means.

637 LALIT ROY, ON MEASURES OF RACIAL/ETHNIC DISPROPORTIONALITY IN SPECIAL EDUCATION: AN ANALYSIS OF SELECTED MEASURES, A JOINT MEASURES APPROACH AND SIGNIFICANT DISPROPORTIONALITY 2 (Cal. Dep't of Educ., 2012) ("In general, *disproportionality* may be defined as a situation when two or more proportions are not the same or are not within an agreed upon range of values. If two proportions are the same or are within an agreed upon range of values, then it is implied that there is *no disproportionality* between the two proportions. If, on the other hand, the two proportions are not the same or are outside the agreed upon range of values, then the proportions are considered *disproportionate*.").

By taking these methodological positions,[638] the Article invokes a composition-based approach to proportionality.[639] It should be acknowledged, however, that such an approach may not be useful if it fails to account for selection effects, omitted variables and other key issues.[640] Selection effects, for example, are addressed by focusing on the fifty U.S. states where national parks were located in FY 2024.[641] In contrast, omitted variables are dealt with by use of federally-collected data. Additional methodological issues may be avoided through limiting of the article's analysis to a single fiscal year.

III. ANALYSIS

This Article collects publicly-available data about the current distribution of the sixty-three national historical parks that exist as of FY 2024.[642] It then analyzes this information using a composition-based approach to proportionality. Lastly, the Article makes a series of findings.

The aforementioned methodological approach requires this Article to make a disproportionality finding whenever group-level averages are higher or lower than the sample population average. Whereas a proportionality finding is made whenever group level averages equal population averages. The expectation is perfect equality of treatment between states, which is to say the null hypothesis is that subsets of states are treated the same (perhaps due to federal Equal Protection requirements).

This Article makes its modest findings only after subtracting population averages from subset averages. The results of this analysis, which focuses on

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638 Vernon Davies, *The Measurement of Disproportionality*, 23 SOCIOMETRY 407, 413–14 (1960) ("Desirable properties of a coefficient to measure degree of disproportionality include: directionality, a value of zero with statistical independence, a value of unity with perfect correlation, freedom from change when the differential quotas remain constant, applicability to contingency tables of all sizes, and ease of computation."). This Article focuses on the first property (directionality) and the last property (ease of computation). As such, this Article employs a composition-based approach to find out whether U.S. national parks, disproportionately, are located in more advantaged parts of the country.

639 ROY, *supra* note 64, at 6-7 ("*Composition* attempts to answer a question like this: Question: What percentage of all students in a district receiving special education and related services under the identification of the ID category is Black or African-American? Measure: [(Number of Black or African-American students in the ID category)/(Total number of students in all racial/ethnic groups in the ID category]*100 . . . if the percentage is *higher* in special education than in general education, then the racial/ethnic group is *overrepresented* and if the percentage is *lower* then it is *underrepresented*."). This Article takes an analogous approach that has 1) a different focus of analysis (the geographic location of U.S. national parks) and 2) uses a similar computational formula (Subset Average - Population Average = Difference. There is disproportionality whenever there is *any* discrepancy between a subset average and a population average).

640 *See*, *e.g.*, John Antonakis et al., *On Making Causal Claims: A Review and Recommendations*, 21 LEADERSHIP Q. 1086 (2010).

641 *See infra* Table 1.

642 *See infra* Table 1.

three characteristics commonly associated with societal privileges (i.e., race, income, or population), are summarized in Sub-Parts A, B, and C. Each of these test results is expressly limited to FY 2024. Please note that any national historical parks located in more than a single state are excluded from my analysis, which results in only fifty-four national historical parks being eligible for any consideration.

A. RACE

States with higher-than-average White populations (i.e., the twenty-five jurisdictions with the most significant percentage of residents are White, at least in 2024) had disproportionately-low shares of national historical parks that are entirely within a single state (14 of 54, which equals 26% of the total).[643] The reason is that this subset had thirteen fewer national historical parks than expected. In other words, there was a twenty-four (-24) percentage point difference in the expected share and actual share of parks.

In contrast, states with lower-than-average White populations (i.e., jurisdictions with the lowest percentage of residents who are White) had disproportionately high shares of U.S. national parks (40 of 54, which equals 74% of the total).[644] That is to say, this subset had thirteen more national historical parks than expected. As such, there was a twenty-four (+24) percentage point difference in shares.

When these results are compared, national historical parks are disproportionately found in less privileged states with respect to race. As such, the null hypothesis fails to be accepted. Therefore, in terms of race, it is clear this Article's expectation of perfect equality of treatment cannot be met.

B. INCOME

States with higher-than-average incomes (i.e., the twenty-five jurisdictions with the greatest per capita incomes, at least as of 2024) had disproportionately high shares of U.S. national parks (38 of 54, which equals 70%).[645] The reason is this subset had eleven more national historical parks than expected. One result was that there was a twenty (+20) percent increase in the expected park share.

In contrast, states with lower-than-average incomes (i.e., the twenty-five jurisdictions with the smallest per capita incomes) had disproportionately-low shares (16 of 54, which equals 30%).[646] That is to

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643 *Compare infra* Table 2, *with infra* Table 1.
644 *Compare infra* Table 3, *with infra* Table 1.
645 *Compare infra* Table 4, *with infra* Table 1.
646 *Compare infra* Table 5, *with infra* Table 1.

say, this subset had eleven fewer national historical parks than expected. Thus, there was a twenty (-20) percent difference in the expected share of historical parks and the actual share of parks.

When these results are compared, national historical parks are disproportionately found in less privileged states with respect to per capita incomes. As such, the null hypothesis of perfect equality of treatment fails to be accepted. Therefore, in terms of per capita income, it is clear that this Article's expectation of perfect equality of treatment cannot be satisfied during this essay's study period.

C. POPULATION

States with higher-than-average populations (i.e., the twenty-five jurisdictions with the greatest populations, at least as of 2024) had disproportionately-high shares of national historical parks (38 of 54, which equals 70%).[647] The reason is this subset had eleven more national historical parks than expected. In other words, there was a twenty (+20) percent difference in the observed shares of parks.

In contrast, states with lower-than-average populations (i.e., the twenty-five jurisdictions with the smallest populations) had disproportionately low shares (16 of 54, which equals 30%).[648] That is to say, this subset had eleven fewer national historical parks than expected. Accordingly, there was a twenty (-20) percentage point difference in the expected share of historical parks and the actual share of parks.

When these results are compared, parks are disproportionately found in less privileged states with respect to population. And as such, the null hypothesis of perfect equality of treatment fails to be accepted. Thus, in terms of population, it is clear that the Article's expectation of equality is not satisfied.

CONCLUSION

This Article finds that national historical parks are disproportionately found in more privileged areas with respect to two out of the three categories of advantage.[649] As a result, these surprising findings have positive and normative implications. Among the positive ones are that no one may claim that states are treated the same, whether this analysis involves race, income, or population.[650]

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647 *Compare infra* Table 6, *with infra* Table 1.

648 *Compare infra* Table 7, *with infra* Table 1.

649 *Compare infra* Table 6, *and infra* Table 7, *with infra* Table 1.

650 *Compare infra* Table 2, *and infra* Table 3, *and infra* Table 4, *and infra* Table 5, *and infra* Table 6, *and infra* Table 6, *with infra* Table 1.

Normative implications of this finding, in contrast, are somewhat less clear. For example, the federal government may address its unequal distribution of national historical parks by awarding more national historical parks to jurisdictions with higher percentages of White residents, lower incomes, and lower populations. This sovereign could also provide substitute performance, in the form of direct federal transfer payments, in order to partially-compensate states with below-average numbers of national historical parks. Lastly, the federal government may take an interim step by giving priority to such jurisdictions whenever it considers increasing the number of national historical parks in the future.

In light of the foregoing analysis, Congress should prioritize those reform options that encourage socially beneficial goals such as increasing the availability of park funds, encouraging efficient use of scarce park resources, and increasing the equitable distribution of scarce parkland.[651] One way to do so is by increasing the number of federal park designations, including designations in underserved areas,[652] which is sorely needed in states with serious budget deficits like Illinois.[653] Another option is to enhance the number of statutory designations of non-federal national parks, which may include historic sites that have already been landmarked such as the Lorraine Hansberry Historic Home, especially when other sources of funding are available at the state or local level.[654] The final option is increase the number of designations of *partnership parks*, which are sites that are managed

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651 *Cf*. Daniel B. Rosenbaum, *A Legal Map of New Local Parkland*, 105 MARQ. L. REV. 721 (2022) (explaining the potential distributional effects of park siting decisions, including a range of non-economic impacts upon residents).

652 *See* Susan Smith Richardson, *Inequity in Park Access Lingers*, THE CHI. REP. (Aug. 7, 2014), https://www.chicagoreporter.com/inequity-park-access-lingers/ (explaining that "In 1982, the Chicago Park District was sued by the U.S. Justice Department for lavishing federal dollars on parks in white areas while shortchanging those in black and Latino communities. The district was under a court order for six years to make its parks more equitable . . . . Angela Caputo examines how city parks have fared since then. The court order made a difference. Today, black communities have more money for staff and maintenance than white ones. But a disproportionate number of Latino communities . . . don't have adequate services and facilities.").

653 *See State Budget Plan Cuts Millions from Chicago Parks*, THE CHI. REP. (Mar. 31, 2015), https://www.chicagoreporter.com/state-budget-plan-cuts-millions-from-chicago-parks/ (explaining that, almost ten years ago, "27 projects in 25 parks across Chicago [may have lost] $28 million for improvements . . . ." due to budget cuts).

654 *Compare* CITY OF CHI. DEP'T OF PLAN. & DEV., ECONOMIC INCENTIVES FOR THE REPAIR AND REHABILITATION OF HISTORIC BUILDINGS 2 (2010), https://www.chicago.gov/content/dam/city/depts/zlup/Historic_Preservation/Publications/Historic_Incentives_Flyer_Rev%2010-8-19.pdf (describing the Chicago subsidies available to historic buildings, especially residential ones), *with* CHI. DEP'T OF PLAN. & DEV., CLASS 'L' PROPERTY TAX INCENTIVE FOR LANDMARK REHABILITATIONS 2 (2019), https://www.chicago.gov/content/dam/city/depts/zlup/Historic_Preservation/Publications/Class_L_Application_Document_2019.pdf (describing the Cook County subsidies available to historic buildings, especially residential ones).

through partnerships between the federal government and various non-state actors.[655]

In the event that any of these recommendations are taken up, the federal government will need to create a viable implementation plan. For example, the National Park Service could do this work by revamping its existing programming.[656] A future U.S. President may choose instead to direct this federal agency to issue new regulations, which does the same thing.[657] Lastly, Congress could pass legislation that expressly explains what to do about unequal distributions of national parks.[658]

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655 *See*, *e.g.*, *The 501c3 Partner of the Chicago Parks*, CHI. PARKS FOUND. (2024), https://www.chicagoparksfoundation.org ("Since 2013, the Chicago Parks Foundation has operated in a private-public partnership with the Chicago Park District as an independent 501c3 organization . . . . [Its] goal is to help . . . bring community ideas to action, raising funds and awareness for park projects.").

656 *See generally* COMAY, *supra* note 19, at 5–7 (describing various National Park Service programs and their individual sources of legal authority).

657 *Id.*

658 *Id.*

IV. APPENDIX

TABLE 1. National Historical Parks In The Fifty (50) U.S. States

Race[659]	Income[660]	Population[661]	Name Of U.S. Jurisdiction	Parks Within U.S. Jurisdiction[662]	Number Of Parks[663]	Share of Parks[664]
67.50% **(37)**	28934 **(46)**	5143033 **(24)**	**Alabama**	N/A	0	0 of 63
63.36% **(42)**	37094 **(12)**	733536 **(48)**	**Alaska**	Sitka National Historical Park	1	1 of 63
73.77% **(29)**	32340 **(23)**	7497004 **(14)**	**Arizona**	Tumacacori National Historical Park	1	1 of 63
75.37% **(27)**	27724 **(48)**	3089060 **(33)**	**Arkansas**	N/A	0	0 of 63
56.05% **(48)**	38576 **(5)**	38889770 **(1)**	**California**	Rosie the Riveter/World War II Home Front National Historical Park;	2	2 of 63

659 *US States by Race 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/states/by-race [https://web.archive.org/web /20241002201923/https://worldpopulationreview.com/states/by-race] (archived on Oct. 2, 2024) [hereinafter *States by Race*] (describing the distribution of U.S. residents by race, at least with respect to the 50 U.S. states, using the latest Census data).

660 *Per Capita Income by State 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/per-capita-income-by-state [https://web.archive.org/web/20240913075216/https://worldpopulationreview.com/state-rankings/per-capita-income-by-state] (archived on Sept. 13, 2024) [hereinafter *States by Income*] (describing the distribution of U.S. residents by per capita incomes, at least with respect to the 50 U.S. states, using the latest Census data).

661 *US States – Ranked by Population 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/states [https://web.archive.org/web/20240 926102128/https://worldpopulationreview.com/states] (archived on Sept. 26, 2024) [hereinafter *States by Population*] (describing the distribution of U.S. residents, at least with respect to the 50 U.S. states, using the latest Census data).

662 *About Us, supra* note 1.

663 *Id.*

664 *Id.*

				San Francisco Maritime National Historical Park		
81.52% **(19)**	39545 **(11)**	5914181 **(21)**	**Colorado**	N/A	0	0 of 63
74.22% **(28)**	45668 **(3)**	3625646 **(29)**	**Connecticut**	Weir Farm National Historical Park	1	1 of 63
67.44% **(38)**	36574 **(17)**	1044321 **(45)**	**Delaware**	First State National Historical Park	1	1 of 63
41.07% **(31)**	32848 **(27)**	22975931 **(3)**	**Florida**	N/A	0	0 of 63
57.25% **(47)**	32427 **(21)**	11145304 **(8)**	**Georgia**	Jimmy Carter National Historical Park; Martin Luther King, Jr. National Historical Park; Ocmulgee Mounds National Historical Park	3	3 of 63
24.15% **(50)**	37013 **(6)**	1430877 **(40)**	**Hawaii**	Kalaupapa National Historical Park; Kaloko-Honokohau National Historical Park; Pu'uhonua o Honaunau National Historical Park	3	3 of 63
88.41% **(7)**	29494 **(38)**	1990456 **(37)**	**Idaho**	N/A	0	0 of 63
69.79% **(34)**	37306 **(14)**	12516863 **(6)**	**Illinois**	Pullman National Historical Park	1	1 of 63

82.28% **(17)**	30693 **(39)**	6892124 **(17)**	**Indiana**	George Rogers Clark National Historical Park	1	1 of 63
89.09% **(6)**	33021 **(32)**	3214315 **(31)**	**Iowa**	N/A	0	0 of 63
82.96% **(15)**	32798 **(30)**	2944376 **(34)**	**Kansas**	Brown v. Board of Education National Historical Park	1	1 of 63
86.25% **(9)**	29123 **(45)**	4540745 **(26)**	**Kentucky**	Abraham Lincoln Birthplace National Historical Park	1	1 of 63
61.25% **(45)**	29522 **(44)**	4559475 **(25)**	**Louisiana**	Cane River Creole National Historical Park; Jean Lafitte National Historical Park and Preserve; New Orleans Jazz National Historical Park	3	3 of 63
93.68% **(1)**	33774 **(35)**	1402106 **(42)**	**Maine**	N/A	0	0 of 63
54.24% **(49)**	43352 **(4)**	6196525 **(19)**	**Maryland**	Harriet Tubman Underground Railroad National Historical Park	1	1 of 63
76.56% **(26)**	45555 **(2)**	7020058 **(16)**	**Massachusetts**	Adams National Historical Park; Boston National Historical Park;	5	5 of 63

				Lowell National Historical Park; Minute Man National Historical Park; New Bedford Whaling National Historical Park		
77.56% **(24)**	32854 **(31)**	10041241 **(10)**	**Michigan**	Keeweenaw National Historical Park	1	1 of 63
81.64% **(18)**	38881 **(13)**	5761530 **(22)**	**Minnesota**	N/A	0	0 of 63
58.00% **(46)**	25444 **(50)**	2940452 **(35)**	**Mississippi**	Natchez National Historical Park	1	1 of 63
81.29% **(20)**	31839 **(36)**	6215144 **(18)**	**Missouri**	Saint-Genevieve National Historical Park	1	1 of 63
87.80% **(8)**	32463 **(41)**	1142746 **(43)**	**Montana**	N/A	0	0 of 63
85.31% **(11)**	33205 **(29)**	1988698 **(38)**	**Nebraska**	Homestead National Historical Park	1	1 of 63
62.08% **(44)**	32629 **(24)**	3210931 **(37)**	**Nevada**	N/A	0	0 of 63
91.98% **(4)**	41234 **(10)**	1405105 **(41)**	**New Hampshire**	Saint-Gaudens National Historical Park	1	1 of 63
65.50% **(41)**	44153 **(1)**	9320865 **(11)**	**New Jersey**	Morristown National Historical Park; Paterson Great Falls National Historical Park;	3	3 of 63

				Thomas Edison National Historical Park		
70.00% **(33)**	27945 **(47)**	2115266 **(36)**	**New Mexico**	Chaco Culture National Historical Park; Pecos National Historical Park	2	2 of 63
62.31% **(43)**	40898 **(8)**	19469232 **(4)**	**New York**	Harriet Tubman National Historical Park; Saratoga National Historical Park; Women's Rights National Historical Park	3	3 of 63
67.58% **(36)**	31993 **(33)**	10975017 **(9)**	**North Carolina**	N/A	0	0 of 63
85.68% **(10)**	36289 **(22)**	788940 **(47)**	**North Dakota**	N/A	0	0 of 63
80.47% **(21)**	32465 **(34)**	11812173 **(7)**	**Ohio**	Dayton Aviation Heritage National Historical Park; Hopewell Culture National Historical Park	2	2 of 63
71.15% **(32)**	29873 **(43)**	4088377 **(28)**	**Oklahoma**	N/A	0	0 of 63
82.59% **(16)**	35393 **(19)**	4227337 **(27)**	**Oregon**	N/A	0	2 of 63
79.37% **(22)**	35518 **(20)**	12951275 **(5)**	**Pennsylvania**	Independence National Historical Park;	2	2 of 63

				Valley Forge National Historical Park		
79.00% **(23)**	37504 **(16)**	1098082 **(44)**	**Rhode Island**	Blackstone River Valley National Historical Park	1	1 of 63
66.51% **(39)**	30727 **(42)**	5464155 **(23)**	**South Carolina**	Ft. Sumter/Ft. Moultrie National Historical Park; Reconstruction Era National Historical Park	2	2 of 63
83.61% **(14)**	31415 **(37)**	928767 **(46)**	**South Dakota**	N/A	0	0 of 63
76.73% **(25)**	30869 **(40)**	7204002 **(15)**	**Tennessee**	N/A	0	0 of 63
69.16% **(35)**	32177 **(10)**	30976754 **(2)**	**Texas**	Lyndon B. Johnson National Historical Park; Palo Alto Battlefield National Historical Park; San Antonio Missions National Historical Park	3	3 of 63
85.14% **(12)**	30986 **(15)**	3454232 **(30)**	**Utah**	Golden Spike National Historical Park	1	1 of 63
93.60% **(2)**	35854 **(25)**	647818 **(49)**	**Vermont**	Marsh-Billings-Rockefeller National Historical Park	1	1 of 63
66.32% **(40)**	41255 **(7)**	8752297 **(12)**	**Virginia**	Appomattox Court House National Historical Park; Cedar Creek and Belle Grove National Historical	3	3 of 63

				Park; Colonial National Historical Park		
73.53% **(30)**	40837 **(9)**	7841283 **(13)**	**Washington**	San Juan Island National Historical Park	1	1 of 63
92.52% **(3)**	27346 **(49)**	1766107 **(39)**	**West Virginia**	N/A	0	0 of 63
84.30% **(13)**	34450 **(28)**	5931367 **(20)**	**Wisconsin**	N/A	0	0 of 63
90.35% **(5)**	34415 **(26)**	586485 **(50)**	**Wyoming**	N/A	0	0 of 63
N/A	**N/A**	**N/A**	**Multi-State Or Entirely Within Non-U.S. State**	Chesapeake and Ohio Canal National Historical Park (Maryland and West Virginia); Cumberland Gap National Historical Park (Kentucky, Tennessee and Virginia); Harpers Ferry National Historical Park (Maryland, Virginia and West Virginia); Klondike Gold Rush National Historical Park (Alaska and Washington); Lewis and Clark National Historical Park (Oregon and Washington);	9	9 of 63

				Manhattan Project National Historical Park (New Mexico, Tennessee and Washington); Nez Perce National Historical Park (Idaho, Montana, Oregon and Washington); Salt River Bay National Historical Park and Ecological Reserve (Virgin Islands); War in the Pacific National Historical Park (Guam)		
Mean: 74.96%	Mean: 34486	Mean: 6717428	50 U.S. States	63 U.S. National Historical Parks	63	63 of 63 = 100%

TABLE 2. Twenty-Five (25) U.S. States With Highest Percentage Of White Residents

Race[665]	**Income**[666]	**Population**[667]	**Name Of U.S. Jurisdiction**	**Parks Within U.S. Jurisdiction**[668]	**Number Of Parks**[669]	**Share of Parks**[670]

665 *States by Race*, *supra* note 86.
666 *States by Income*, *supra* note 87.
667 *States by Population, supra* note 88.
668 *About Us, supra* note 1 (describing the state-level location of all 63 national historical parks in the U.S.).
669 *Id.*
670 *Id.*

81.52% **(19)**	39545 **(11)**	5914181 **(21)**	**Colorado**	N/A	0	0 of 63
88.41% **(7)**	29494 **(38)**	1990456 **(37)**	**Idaho**	N/A	0	0 of 63
82.28% **(17)**	30693 **(39)**	6892124 **(17)**	**Indiana**	George Rogers Clark National Historical Park	1	1 of 63
89.09% **(6)**	33021 **(32)**	3214315 **(31)**	**Iowa**	N/A	0	0 of 63
82.96% **(15)**	32798 **(30)**	2944376 **(34)**	**Kansas**	Brown v. Board of Education National Historical Park	1	1 of 63
86.25% **(9)**	29123 **(45)**	4540745 **(26)**	**Kentucky**	Abraham Lincoln Birthplace National Historical Park	1	1 of 63
93.68% **(1)**	33774 **(35)**	1402106 **(42)**	**Maine**	N/A	0	0 of 63
77.56% **(24)**	32854 **(31)**	10041241 **(10)**	**Michigan**	Keeweenaw National Historical Park	1	1 of 63
81.64% **(18)**	38881 **(13)**	5761530 **(22)**	**Minnesota**	N/A	0	0 of 63
81.29% **(20)**	31839 **(36)**	6215144 **(18)**	**Missouri**	Saint-Genevieve National Historical Park	1	1 of 63
87.80% **(8)**	32463 **(41)**	1142746 **(43)**	**Montana**	N/A	0	0 of 63

85.31% **(11)**	33205 **(29)**	1988698 **(38)**	**Nebraska**	Homestead National Historical Park	1	1 of 63
91.98% **(4)**	41234 **(10)**	1405105 **(41)**	**New Hampshire**	Saint-Gaudens National Historical Park	1	1 of 63
85.68% **(10)**	36289 **(22)**	788940 **(47)**	**North Dakota**	N/A	0	0 of 63
80.47% **(21)**	32465 **(34)**	11812173 **(7)**	**Ohio**	Dayton Aviation Heritage National Historical Park; Hopewell Culture National Historical Park	2	2 of 63
82.59% **(16)**	35393 **(19)**	4227337 **(27)**	**Oregon**	N/A	0	2 of 63
79.37% **(22)**	35518 **(20)**	12951275 **(5)**	**Pennsylvania**	Independence National Historical Park; Valley Forge National Historical Park	2	2 of 63
79.00% **(23)**	37504 **(16)**	1098082 **(44)**	**Rhode Island**	Blackstone River Valley National Historical Park	1	1 of 63
83.61% **(14)**	31415 **(37)**	928767 **(46)**	**South Dakota**	N/A	0	0 of 63
76.73% **(25)**	30869 **(40)**	7204002 **(15)**	**Tennessee**	N/A	0	0 of 63
85.14% **(12)**	30986 **(15)**	3454232 **(30)**	**Utah**	Golden Spike National Historical Park	1	1 of 63

93.60% **(2)**	35854 **(25)**	647818 **(49)**	**Vermont**	Marsh-Billings-Rockefeller National Historical Park	1	1 of 63
92.52% **(3)**	27346 **(49)**	1766107 **(39)**	**West Virginia**	N/A	0	0 of 63
84.30% **(13)**	34450 **(28)**	5931367 **(20)**	**Wisconsin**	N/A	0	0 of 63
90.35% **(5)**	34415 **(26)**	586485 **(50)**	**Wyoming**	N/A	0	0 of 63
P. Mean: 74.96% S. Mean: 84.93%	P. Mean: 34486 S. Mean: 33657	P. Mean: 6717428 S. Mean: 4193974	25 U.S. States	14 U.S. National Historical Parks	14	14 of 54 = 26%

TABLE 3. Twenty-Five (25) U.S. States With Lowest Percentage Of White Residents

Race[671]	**Income** [672]	**Population** [673]	**Name Of U.S. Jurisdiction**	**Parks Within U.S. Jurisdiction**[674]	**Number Of Parks**[675]	**Share of Parks**[676]
67.50% **(37)**	28934 **(46)**	5143033 **(24)**	**Alabama**	N/A	0	0 of 63

671 *States by Race, supra* note 86.
672 *States by Income, supra* note 87.
673 *States by Population, supra* note 88.
674 *About Us, supra* note 1.
675 *Id.*
676 *Id.*

63.36% **(42)**	37094 **(12)**	733536 **(48)**	**Alaska**	Sitka National Historical Park	1	1 of 63
73.77% **(29)**	32340 **(23)**	7497004 **(14)**	**Arizona**	Tumacacori National Historical Park	1	1 of 63
75.37% **(27)**	27724 **(48)**	3089060 **(33)**	**Arkansas**	N/A	0	0 of 63
56.05% **(48)**	38576 **(5)**	38889770 **(1)**	**California**	Rosie the Riveter/World War II Home Front National Historical Park; San Francisco Maritime National Historical Park	2	2 of 63
74.22% **(28)**	45668 **(3)**	3625646 **(29)**	**Connecticut**	Weir Farm National Historical Park	1	1 of 63
67.44% **(38)**	36574 **(17)**	1044321 **(45)**	**Delaware**	First State National Historical Park	1	1 of 63
41.07% **(31)**	32848 **(27)**	22975931 **(3)**	**Florida**	N/A	0	0 of 63
57.25% **(47)**	32427 **(21)**	11145304 **(8)**	**Georgia**	Jimmy Carter National Historical Park; Martin Luther King, Jr. National Historical Park; Ocmulgee Mounds National Historical Park	3	3 of 63
24.15% **(50)**	37013 **(6)**	1430877 **(40)**	**Hawaii**	Kalaupapa National Historical Park;	3	3 of 63

				Kaloko-Honokohau National Historical Park; Pu'uhonua o Honaunau National Historical Park		
69.79% **(34)**	37306 **(14)**	12516863 **(6)**	**Illinois**	Pullman National Historical Park	1	1 of 63
61.25% **(45)**	29522 **(44)**	4559475 **(25)**	**Louisiana**	Cane River Creole National Historical Park; Jean Lafitte National Historical Park and Preserve; New Orleans Jazz National Historical Park	3	3 of 63
54.24% **(49)**	43352 **(4)**	6196525 **(19)**	**Maryland**	Harriet Tubman Underground Railroad National Historical Park	1	1 of 63
76.56% **(26)**	45555 **(2)**	7020058 **(16)**	**Massachusetts**	Adams National Historical Park; Boston National Historical Park; Lowell National Historical Park; Minute Man National Historical Park; New Bedford Whaling National Historical Park	5	5 of 63

58.00% **(46)**	25444 **(50)**	2940452 **(35)**	**Mississippi**	Natchez National Historical Park	1	1 of 63
62.08% **(44)**	32629 **(24)**	3210931 **(37)**	**Nevada**	N/A	0	0 of 63
65.50% **(41)**	44153 **(1)**	9320865 **(11)**	**New Jersey**	Morristown National Historical Park; Paterson Great Falls National Historical Park; Thomas Edison National Historical Park	3	3 of 63
70.00% **(33)**	27945 **(47)**	2115266 **(36)**	**New Mexico**	Chaco Culture National Historical Park; Pecos National Historical Park	2	2 of 63
62.31% **(43)**	40898 **(8)**	19469232 **(4)**	**New York**	Harriet Tubman National Historical Park; Saratoga National Historical Park; Women's Rights National Historical Park	3	3 of 63
67.58% **(36)**	31993 **(33)**	10975017 **(9)**	**North Carolina**	N/A	0	0 of 63
71.15% **(32)**	29873 **(43)**	4088377 **(28)**	**Oklahoma**	N/A	0	0 of 63

66.51% **(39)**	30727 **(42)**	5464155 **(23)**	**South Carolina**	Ft. Sumter/Ft. Moultrie National Historical Park; Reconstruction Era National Historical Park	2	2 of 63
69.16% **(35)**	32177 **(10)**	30976754 **(2)**	**Texas**	Lyndon B. Johnson National Historical Park; Palo Alto Battlefield National Historical Park; San Antonio Missions National Historical Park	3	3 of 63
66.32% **(40)**	41255 **(7)**	8752297 **(12)**	**Virginia**	Appomattox Court House National Historical Park; Cedar Creek and Belle Grove National Historical Park; Colonial National Historical Park	3	3 of 63
73.53% **(30)**	40837 **(9)**	7841283 **(13)**	**Washington**	San Juan Island National Historical Park	1	1 of 63
P. Mean: 74.96% S. Mean:	P. Mean: 34486 S. Mean:	P. Mean: 6717428 S. Mean:	25 U.S. States	40 U.S. National Historical Parks	40	40 of 54 = 74%

63.77	35315	9240881				

TABLE 4. Twenty-Five (25) U.S. States With Highest Per Capita Incomes

Race[677]	**Income** [678]	**Population** [679]	**Name Of U.S. Jurisdiction**	**Parks Within U.S. Jurisdiction**[680]	**Number Of Parks**[681]	**Share of Parks**[682]
63.36% **(42)**	37094 **(12)**	733536 **(48)**	**Alaska**	Sitka National Historical Park	1	1 of 63
73.77% **(29)**	32340 **(23)**	7497004 **(14)**	**Arizona**	Tumacacori National Historical Park	1	1 of 63
56.05% **(48)**	38576 **(5)**	38889770 **(1)**	**California**	Rosie the Riveter/World War II Home Front National Historical Park; San Francisco Maritime National Historical Park	2	2 of 63
81.52% **(19)**	39545 **(11)**	5914181 **(21)**	**Colorado**	N/A	0	0 of 63
74.22% **(28)**	45668 **(3)**	3625646 **(29)**	**Connecticut**	Weir Farm National Historical Park	1	1 of 63

677 *States by Race, supra* note 86.
678 *States by Income, supra* note 87.
679 *States by Population, supra* note 88.
680 *About Us, supra* note 1.
681 *Id.*
682 *Id.*

67.44% **(38)**	36574 **(17)**	1044321 **(45)**	**Delaware**	First State National Historical Park	1	1 of 63
57.25% **(47)**	32427 **(21)**	11145304 **(8)**	**Georgia**	Jimmy Carter National Historical Park; Martin Luther King, Jr. National Historical Park; Ocmulgee Mounds National Historical Park	3	3 of 63
24.15% **(50)**	37013 **(6)**	1430877 **(40)**	**Hawaii**	Kalaupapa National Historical Park; Kaloko-Honokohau National Historical Park; Pu'uhonua o Honaunau National Historical Park	3	3 of 63
69.79% **(34)**	37306 **(14)**	12516863 **(6)**	**Illinois**	Pullman National Historical Park	1	1 of 63
54.24% **(49)**	43352 **(4)**	6196525 **(19)**	**Maryland**	Harriet Tubman Underground Railroad National Historical Park	1	1 of 63
76.56% **(26)**	45555 **(2)**	7020058 **(16)**	**Massachusetts**	Adams National Historical Park; Boston National Historical Park; Lowell National Historical Park; Minute Man National Historical Park;	5	5 of 63

				New Bedford Whaling National Historical Park		
81.64% **(18)**	38881 **(13)**	5761530 **(22)**	**Minnesota**	N/A	0	0 of 63
62.08% **(44)**	32629 **(24)**	3210931 **(37)**	**Nevada**	N/A	0	0 of 63
91.98% **(4)**	41234 **(10)**	1405105 **(41)**	**New Hampshire**	Saint-Gaudens National Historical Park	1	1 of 63
65.50% **(41)**	44153 **(1)**	9320865 **(11)**	**New Jersey**	Morristown National Historical Park; Paterson Great Falls National Historical Park; Thomas Edison National Historical Park	3	3 of 63
62.31% **(43)**	40898 **(8)**	19469232 **(4)**	**New York**	Harriet Tubman National Historical Park; Saratoga National Historical Park; Women's Rights National Historical Park	3	3 of 63
85.68% **(10)**	36289 **(22)**	788940 **(47)**	**North Dakota**	N/A	0	0 of 63
82.59% **(16)**	35393 **(19)**	4227337 **(27)**	**Oregon**	N/A	0	2 of 63
79.37% **(22)**	35518 **(20)**	12951275 **(5)**	**Pennsylvania**	Independence National Historical Park;	2	2 of 63

				Valley Forge National Historical Park		
79.00% **(23)**	37504 **(16)**	1098082 **(44)**	**Rhode Island**	Blackstone River Valley National Historical Park	1	1 of 63
69.16% **(35)**	32177 **(10)**	30976754 **(2)**	**Texas**	Lyndon B. Johnson National Historical Park; Palo Alto Battlefield National Historical Park; San Antonio Missions National Historical Park	3	3 of 63
85.14% **(12)**	30986 **(15)**	3454232 **(30)**	**Utah**	Golden Spike National Historical Park	1	1 of 63
93.60% **(2)**	35854 **(25)**	647818 **(49)**	**Vermont**	Marsh-Billings-Rockefeller National Historical Park	1	1 of 63
66.32% **(40)**	41255 **(7)**	8752297 **(12)**	**Virginia**	Appomattox Court House National Historical Park; Cedar Creek and Belle Grove National Historical Park; Colonial National Historical Park	3	3 of 63
73.53% **(30)**	40837 **(9)**	7841283 **(13)**	**Washington**	San Juan Island National Historical Park	1	1 of 63
P. Mean: 74.96%	P. Mean: 34486	P. Mean: 6717428	25 U.S. States	38 U.S. National Historical Parks	38	38 of 54 = 70%

S. Mean: 71.05%	S. Mean: 37962	S. Mean: 8236791				

TABLE 5. Twenty-Five (25) U.S. States With Lowest Per Capita Incomes

Race[683]	**Income** [684]	**Population** [685]	**Name Of U.S. Jurisdiction**	**Parks Within U.S. Jurisdiction**[686]	**Number Of Parks**[687]	**Share of Parks**[688]
67.50% **(37)**	28934 **(46)**	5143033 **(24)**	**Alabama**	N/A	0	0 of 63
75.37% **(27)**	27724 **(48)**	3089060 **(33)**	**Arkansas**	N/A	0	0 of 63
41.07% **(31)**	32848 **(27)**	22975931 **(3)**	**Florida**	N/A	0	0 of 63
88.41% **(7)**	29494 **(38)**	1990456 **(37)**	**Idaho**	N/A	0	0 of 63
82.28% **(17)**	30693 **(39)**	6892124 **(17)**	**Indiana**	George Rogers Clark National Historical Park	1	1 of 63
89.09% **(6)**	33021 **(32)**	3214315 **(31)**	**Iowa**	N/A	0	0 of 63

683 *States by Race, supra* note 86.
684 *States by Income, supra* note 87.
685 *States by Population, supra* note 88.
686 *About Us, supra* note 1.
687 *Id.*
688 *Id.*

82.96% **(15)**	32798 **(30)**	2944376 **(34)**	**Kansas**	Brown v. Board of Education National Historical Park	1	1 of 63
86.25% **(9)**	29123 **(45)**	4540745 **(26)**	**Kentucky**	Abraham Lincoln Birthplace National Historical Park	1	1 of 63
61.25% **(45)**	29522 **(44)**	4559475 **(25)**	**Louisiana**	Cane River Creole National Historical Park; Jean Lafitte National Historical Park and Preserve; New Orleans Jazz National Historical Park	3	3 of 63
93.68% **(1)**	33774 **(35)**	1402106 **(42)**	**Maine**	N/A	0	0 of 63
77.56% **(24)**	32854 **(31)**	10041241 **(10)**	**Michigan**	Keeweenaw National Historical Park	1	1 of 63
58.00% **(46)**	25444 **(50)**	2940452 **(35)**	**Mississippi**	Natchez National Historical Park	1	1 of 63
81.29% **(20)**	31839 **(36)**	6215144 **(18)**	**Missouri**	Saint-Genevieve National Historical Park	1	1 of 63
87.80% **(8)**	32463 **(41)**	1142746 **(43)**	**Montana**	N/A	0	0 of 63
85.31% **(11)**	33205 **(29)**	1988698 **(38)**	**Nebraska**	Homestead National Historical Park	1	1 of 63

70.00% **(33)**	27945 **(47)**	2115266 **(36)**	**New Mexico**	Chaco Culture National Historical Park; Pecos National Historical Park	2	2 of 63
67.58% **(36)**	31993 **(33)**	10975017 **(9)**	**North Carolina**	N/A	0	0 of 63
80.47% **(21)**	32465 **(34)**	11812173 **(7)**	**Ohio**	Dayton Aviation Heritage National Historical Park; Hopewell Culture National Historical Park	2	2 of 63
71.15% **(32)**	29873 **(43)**	4088377 **(28)**	**Oklahoma**	N/A	0	0 of 63
66.51% **(39)**	30727 **(42)**	5464155 **(23)**	**South Carolina**	Ft. Sumter/Ft. Moultrie National Historical Park; Reconstruction Era National Historical Park	2	2 of 63
83.61% **(14)**	31415 **(37)**	928767 **(46)**	**South Dakota**	N/A	0	0 of 63
76.73% **(25)**	30869 **(40)**	7204002 **(15)**	**Tennessee**	N/A	0	0 of 63
92.52% **(3)**	27346 **(49)**	1766107 **(39)**	**West Virginia**	N/A	0	0 of 63
84.30% **(13)**	34450 **(28)**	5931367 **(20)**	**Wisconsin**	N/A	0	0 of 63

90.35% **(5)**	34415 **(26)**	586485 **(50)**	**Wyoming**	N/A	0	0 of 63
P. Mean: 74.96% S. Mean: 77.64%	P. Mean: 34486 S. Mean: 31009	P. Mean: 6717428 S. Mean: 5198065	25 U.S. States	16 U.S. National Historical Parks	16	16 of 54 = 30%

TABLE 6. Twenty-Five (25) U.S. States With Highest Number of Residents

Race[689]	**Income** [690]	**Population** [691]	**Name Of U.S. Jurisdiction**	**Parks Within U.S. Jurisdiction**[692]	**Number Of Parks**[693]	**Share of Parks**[694]
67.50% **(37)**	28934 **(46)**	5143033 **(24)**	**Alabama**	N/A	0	0 of 63
73.77% **(29)**	32340 **(23)**	7497004 **(14)**	**Arizona**	Tumacacori National Historical Park	1	1 of 63
56.05% **(48)**	38576 **(5)**	38889770 **(1)**	**California**	Rosie the Riveter/World War II Home Front National Historical Park; San Francisco Maritime National Historical Park	2	2 of 63

689 *States by Race, supra* note 86.
690 *States by Income, supra* note 87.
691 *States by Population, supra* note 88.
692 *About Us, supra* note 1.
693 *Id.*
694 *Id.*

81.52% **(19)**	39545 **(11)**	5914181 **(21)**	**Colorado**	N/A	0	0 of 63
71.64% **(31)**	32848 **(27)**	22975931 **(3)**	**Florida**	N/A	0	0 of 63
57.25% **(47)**	32427 **(21)**	11145304 **(8)**	**Georgia**	Jimmy Carter National Historical Park; Martin Luther King, Jr. National Historical Park; Ocmulgee Mounds National Historical Park	3	3 of 63
69.79% **(34)**	37306 **(14)**	12516863 **(6)**	**Illinois**	Pullman National Historical Park	1	1 of 63
82.28% **(17)**	30693 **(39)**	6892124 **(17)**	**Indiana**	George Rogers Clark National Historical Park	1	1 of 63
61.25% **(45)**	29522 **(44)**	4559475 **(25)**	**Louisiana**	Cane River Creole National Historical Park; Jean Lafitte National Historical Park and Preserve; New Orleans Jazz National Historical Park	3	3 of 63
54.24% **(49)**	43352 **(4)**	6196525 **(19)**	**Maryland**	Harriet Tubman Underground Railroad National Historical Park	1	1 of 63
76.56% **(26)**	45555 **(2)**	7020058 **(16)**	**Massachusetts**	Adams National Historical Park;	5	5 of 63

				Boston National Historical Park; Lowell National Historical Park; Minute Man National Historical Park; New Bedford Whaling National Historical Park		
77.56% **(24)**	32854 **(31)**	10041241 **(10)**	**Michigan**	Keeweenaw National Historical Park	1	1 of 63
81.64% **(18)**	38881 **(13)**	5761530 **(22)**	**Minnesota**	N/A	0	0 of 63
81.29% **(20)**	31839 **(36)**	6215144 **(18)**	**Missouri**	Saint-Genevieve National Historical Park	1	1 of 63
65.50% **(41)**	44153 **(1)**	9320865 **(11)**	**New Jersey**	Morristown National Historical Park; Paterson Great Falls National Historical Park; Thomas Edison National Historical Park	3	3 of 63
62.31% **(43)**	40898 **(8)**	19469232 **(4)**	**New York**	Harriet Tubman National Historical Park; Saratoga National Historical Park;	3	3 of 63

				Women's Rights National Historical Park		
67.58% **(36)**	31993 **(33)**	10975017 **(9)**	**North Carolina**	N/A	0	0 of 63
80.47% **(21)**	32465 **(34)**	11812173 **(7)**	**Ohio**	Dayton Aviation Heritage National Historical Park; Hopewell Culture National Historical Park	2	2 of 63
79.37% **(22)**	35518 **(20)**	12951275 **(5)**	**Pennsylvania**	Independence National Historical Park; Valley Forge National Historical Park	2	2 of 63
66.51% **(39)**	30727 **(42)**	5464155 **(23)**	**South Carolina**	Ft. Sumter/Ft. Moultrie National Historical Park; Reconstruction Era National Historical Park	2	2 of 63
76.73% **(25)**	30869 **(40)**	7204002 **(15)**	**Tennessee**	N/A	0	0 of 63
69.16% **(35)**	32177 **(10)**	30976754 **(2)**	**Texas**	Lyndon B. Johnson National Historical Park; Palo Alto Battlefield National Historical Park;	3	3 of 63

				San Antonio Missions National Historical Park		
66.32% **(40)**	41255 **(7)**	8752297 **(12)**	**Virginia**	Appomattox Court House National Historical Park; Cedar Creek and Belle Grove National Historical Park; Colonial National Historical Park	3	3 of 63
73.53% **(30)**	40837 **(9)**	7841283 **(13)**	**Washington**	San Juan Island National Historical Park	1	1 of 63
84.30% **(13)**	34450 **(28)**	5931367 **(20)**	**Wisconsin**	N/A	0	0 of 63
P. Mean: 74.96% S. Mean: 70.14%	P. Mean: 34486 S. Mean: 35601	P. Mean: 6717428 S. Mean: 11258664	25 U.S. States	38 U.S. National Historical Parks	38	38 of 54 = 70%

TABLE 7. Twenty-Five (25) U.S. States With Highest Number of Residents

Race[695]	Income[696]	Population[697]	Name Of U.S. Jurisdiction	Parks Within U.S. Jurisdiction[698]	Number Of Parks[699]	Share of Parks[700]
63.36% **(42)**	37094 **(12)**	733536 **(48)**	**Alaska**	Sitka National Historical Park	1	1 of 63
75.37% **(27)**	27724 **(48)**	3089060 **(33)**	**Arkansas**	N/A	0	0 of 63
74.22% **(28)**	45668 **(3)**	3625646 **(29)**	**Connecticut**	Weir Farm National Historical Park	1	1 of 63
67.44% **(38)**	36574 **(17)**	1044321 **(45)**	**Delaware**	First State National Historical Park	1	1 of 63
24.15% **(50)**	37013 **(6)**	1430877 **(40)**	**Hawaii**	Kalaupapa National Historical Park; Kaloko-Honokohau National Historical Park; Pu'uhonua o Honaunau National Historical Park	3	3 of 63
88.41% **(7)**	29494 **(38)**	1990456 **(37)**	**Idaho**	N/A	0	0 of 63
89.09% **(6)**	33021 **(32)**	3214315 **(31)**	**Iowa**	N/A	0	0 of 63

695 *States by Race, supra* note 86.
696 *States by Income, supra* note 87.
697 *States by Population, supra* note 88.
698 *About Us, supra* note 1.
699 *Id.*
700 *Id.*

82.96% **(15)**	32798 **(30)**	2944376 **(34)**	**Kansas**	Brown v. Board of Education National Historical Park	1	1 of 63
86.25% **(9)**	29123 **(45)**	4540745 **(26)**	**Kentucky**	Abraham Lincoln Birthplace National Historical Park	1	1 of 63
93.68% **(1)**	33774 **(35)**	1402106 **(42)**	**Maine**	N/A	0	0 of 63
58.00% **(46)**	25444 **(50)**	2940452 **(35)**	**Mississippi**	Natchez National Historical Park	1	1 of 63
87.80% **(8)**	32463 **(41)**	1142746 **(43)**	**Montana**	N/A	0	0 of 63
85.31% **(11)**	33205 **(29)**	1988698 **(38)**	**Nebraska**	Homestead National Historical Park	1	1 of 63
62.08% **(44)**	32629 **(24)**	3210931 **(37)**	**Nevada**	N/A	0	0 of 63
91.98% **(4)**	41234 **(10)**	1405105 **(41)**	**New Hampshire**	Saint-Gaudens National Historical Park	1	1 of 63
70.00% **(33)**	27945 **(47)**	2115266 **(36)**	**New Mexico**	Chaco Culture National Historical Park; Pecos National Historical Park	2	2 of 63
85.68% **(10)**	36289 **(22)**	788940 **(47)**	**North Dakota**	N/A	0	0 of 63

71.15% **(32)**	29873 **(43)**	4088377 **(28)**	**Oklahoma**	N/A	0	0 of 63
82.59% **(16)**	35393 **(19)**	4227337 **(27)**	**Oregon**	N/A	0	2 of 63
79.00% **(23)**	37504 **(16)**	1098082 **(44)**	**Rhode Island**	Blackstone River Valley National Historical Park	1	1 of 63
83.61% **(14)**	31415 **(37)**	928767 **(46)**	**South Dakota**	N/A	0	0 of 63
85.14% **(12)**	30986 **(15)**	3454232 **(30)**	**Utah**	Golden Spike National Historical Park	1	1 of 63
93.60% **(2)**	35854 **(25)**	647818 **(49)**	**Vermont**	Marsh-Billings-Rockefeller National Historical Park	1	1 of 63
92.52% **(3)**	27346 **(49)**	1766107 **(39)**	**West Virginia**	N/A	0	0 of 63
90.35% **(5)**	34415 **(26)**	586485 **(50)**	**Wyoming**	N/A	0	0 of 63
P. Mean: 74.96% S. Mean: 78.55%	P. Mean: 34486 S. Mean: 33371	P. Mean: 6717428 S. Mean: 2176191	25 U.S. States	16 U.S. National Historical Parks	16	16 of 54 = 30%

EVEN IN DEATH, DIVIDED BY LAW: THE PERMANENT INJUSTICE OF CEMETERY SEGREGATION IN SOUTHERN ILLINOIS AND THE LEGACY OF ISAAC BURNS, LOCAL CIVIL WAR VETERAN

Taylor Phillips*

INTRODUCTION

Is death truly the great equalizer? This Article explores the history of cemetery segregation and the permanent injustice that results when the laws are ambiguous and the public is unaware. Starting with an overview of the history of cemetery segregation, this Article centers on the story of Isaac Burns, a local Civil War veteran.[701] His journey from enslavement to service in the Union Navy, along with his personal life until his passing, humanizes this issue. It also highlights our collective failure as citizens to promptly recognize and address this concern. Burns's burial place is far less than ideal, sitting in what used to be the segregated section of the International Order of Odd Fellows Cemetery in Pinckneyville, Illinois.[702] His grave is a site of neglect and experiences flooding, unlike the graves outside of the segregated section.[703] However, Burns's grave is not an isolated incident. His final resting place represents a broader pattern of segregation. This pattern is even present in a well-known cemetery in Gettysburg, Pennsylvania, the Lincoln Cemetery, which was created to keep black veterans out of Arlington Cemetery.[704]

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701 *U.S. Civil War Sailors Database*, NAT'L PARK SERV., https://www.nps.gov/civilwar/search-sailors.htm#score+desc&q=Isaac+Burns [hereinafter *Sailors Database*] (last visited Mar. 17, 2025).

702 *Isaac Burns*, FIND A GRAVE, https://www.findagrave.com/memorial/58865083/isaac-burns (last visited Mar. 17, 2025); Map of International Order of Odd Fellows Cemetery, Pinckneyville, Illinois (Apr. 29, 1937) (on file with author) [hereinafter Pinckneyville Map].

703 *Isaac Burns*, *supra* note 2.

704 Kellie B. Gormly, *Near the Site of the Gettysburg Address*, *These Black Civil War Veterans Remain Segregated, Even in Death,* SMITHSONIAN MAG. (Feb. 21, 2024), https://www.smithsonianmag.com/history/near-the-site-of-the-gettysburg-address-these-black-civil-war-veterans-remain-segregated-even-in-death-180983790/.

Cemetery segregation was allowed through the 1950s until courts considered cemeteries to be "public accommodations" following the Supreme Court ruling in *Shelley v. Kraemer*.[705] However, this ruling did not completely eradicate the issue. There are modern examples of cemetery segregation, specifically in the case of Pedro Barrera, a Mexican American man who was denied burial in San Domingo Cemetery in 2016.[706] His case is documented, but there are likely many other cases like his that are unknown because of how laws are written and the lack of public knowledge on this issue, which this Article will address.

Another pressing issue addressed in this Article is the disappearance and destruction of African American Cemeteries.[707] Several of these historic cemeteries risk being erased if they continue to be ignored, neglected, and mistreated. Several modern advocates are fighting to restore dignity to these forgotten cemeteries.[708] The efforts of Rose Sturdivant Young, Sandra Arnold, and Lisa Fager show the importance of preserving African American burial grounds.[709] These modern advocates are providing critical restoration to African American burial grounds, ensuring that the stories of those who were marginalized in life are not forgotten in death.[710] Their work offers a valuable blueprint for future preservation efforts across the United States.[711]

Although Illinois law prohibits cemetery segregation via a combination of the Illinois Human Rights Act,[712] the Illinois Civil Rights Act of 2003,[713] and the Cemetery Protection Act,[714] these regulations remain insufficient in

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705 *See generally* Shelley v. Kraemer, 334 U.S. 1 (1948).

706 Alexa Ura, *Texas Cemetery Sued Over "Whites Only" Policy*, THE TEX. TRIB. (May 5, 2016, 6:00 am), https://www.texastribune.org/2016/05/05/texas-cemetery-sued-over-whites-only-policy/.

707 *See generally* Ashley Lemke, "*Missing Cemeteries" and Structural Racism: Historical Maps and Endangered African/African American and Hispanic Mortuary Customs in Texas*, 54 HIST. ARCHAEOLOGY 605 (2020); *see* The Associated Press, *Black Cemeteries are Reflection of Deep Segregation History*, THE REPUBLIC (Apr. 29, 2012), https://www.therepublic.com/2021/04/29/ap-us-racial-injustice-segregated-cemeteries/ [hereinafter *Black Cemeteries*] (showing examples of minority cemeteries hidden under gold courses, universities, and hotel parking lots).

708 *Friends of Old Westview Cemetery in Wadesboro Seeks Government Funds*, ANSON REC. (June 11, 2017), https://ansonrecord.com/news/5138/friends-of-old-westview-cemetery-in-wadesboro-seeks-government-funds [hereinafter *Friends of Old Westview*]; Patrick Verel, *Fordham to Launch Burial Database Project of Enslaved African Americans*, INSIDE FORDHAM (Oct. 15, 2012), https://now.fordham.edu/inside-fordham/fordham-to-launch-burial-database-project-of-enslaved-african-americans/ [hereinafter *Westview Cemetery*]; Mirika Rayaprolu, *The Black Georgetown Foundation Works to Protect Georgetown's African American Cemeteries*, THE WASH (Oct. 31, 2023), https://thewash.org/2023/10/31/the-black-georgetown-foundation-works-to-protect-georgetowns-african-american-cemeteries/#:~:text=The%20foundation%20has%20been%20working%20to%20preserve%20and,which%20is%20tucked%20away%20on%20Georgetown's%20Q%20Street.

709 *Westview Cemetery, supra* note 9; Verel, *supra* note 9; Rayaprolu, *supra* note 9.

710 *Westview Cemetery, supra* note 9; Verel, *supra* note 9; Rayaprolu, *supra* note 9.

711 *Westview Cemetery, supra* note 9; Verel, *supra* note 9; Rayaprolu, *supra* note 9.

712 775 ILL. COMP. STAT. 5 (1980).

713 740 ILL. COMP. STAT. 23 (2004).

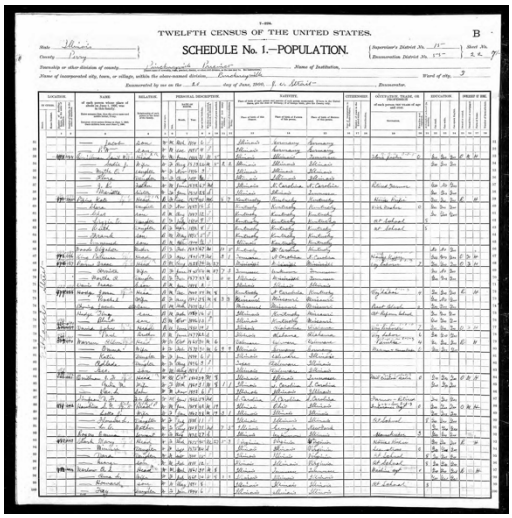
714 765 ILL. COMP. STAT. 835 (1990).

explicitly addressing the issue or providing effective means of enforcement. The laws concerning cemetery segregation in California, Texas, and Florida reflect a broader trend across the United States.[715] While these laws may adhere to federal standards, their limited language reduces the likelihood of legal challenges arising in the first place.[716]

This Article presents a foundational draft that aims to prohibit cemetery segregation explicitly. It utilizes key terms such as "cemetery" and "segregation," while also providing a clear definition of "cemetery segregation." The intent is to establish a definitive and enforceable standard that ensures equitable treatment in burial spaces, making it easier for the public to understand and access this information.

I. BURNS'S HISTORY

While not directly relevant to the legal issues or proposed legislation in this Article, a discussion of Burns's history is necessary to provide an example of cemetery segregation, but also to directly combat the erasure of individuals' identities and histories that cemetery segregation has caused.


TWELFTH CENSUS OF THE UNITED STATES.

SCHEDULE No. 1.—POPULATION.

1900 U.S. Census record showing Isaac Burns, his wife and two of his daughters.

A. Burns's Journey: From Enslavement to Service in the Union Navy

Born in Yazoo City, Mississippi,[717] in 1831,[718] Burns

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715 TEX. HEALTH & SAFETY CODE ANN. § 711.032 (West 1993); FLA. STAT. ANN. § 497.159 (West 2021); CAL. HEALTH & SAFETY CODE § 8301.5 (West 1996).

716 § 711.032; § 497.159; § 8301.5; 42 U.S.C. § 2000(a) (1964).

717 *Sailors Database*, *supra* note 1 (showing results of a search for "Isaac Burns").

718 There are discrepancies in his date of birth. He was either born in 1828, 1831, 1837, or 1840. *See* 1900 FEDERAL POPULATION CENSUS—PART 7, *microformed on* Nat'l Archives Microfilm Publ'n T623 Roll 320, Pinckneyville, Perry Cnty., Ill., Enumeration Dist. 55, Sheet 22, Line 68) (indicating 1828 date of birth); Name Index: Illinois Deaths and Stillbirths, 1916-1947, FAM. SEARCH, https://www.familysearch.org/en/search/collection/1438856 (last visited Mar. 14, 2025) (showing results of a search for Isaac Burns, 29 January 1916 indicating 1831 date of birth); *Sailors Database, supra* note 1 (showing results of a search for "Isaac Burns indicating birth year of 1837"); 1880 FEDERAL POPULATION CENSUS—PART 7, *microformed on* Nat'l Archives Microfilm Publ'n T9 Roll 719,Perry Cnty., Ill., Enumerated Dist. 73, Sheet 88C, Line 6 (indicating birth year of 1840).

likely started his life as an enslaved person.[719] Burns's early life was likely similar to any other enslaved person living in Mississippi during the Civil War, cultivating and harvesting large cotton fields.[720] Burns was also likely subjected to the harsh conditions most enslaved people in Mississippi had to endure[721] until the Union Army took control of Vicksburg in July of 1863.[722] The fall of Vicksburg resulted in a mass migration of 20,000 enslaved African Americans fleeing from the surrounding areas, many of whom subsequently enlisted to fight in the Union Army, including Burns.[723] Boarding the USS Samson on September 30, 1863, Burns worked as a 1st Class Boy, who was charged with maintaining the Union's control of the Mississippi River.[724]

The USS Samson played a critical role in servicing larger ships on the Mississippi. It was responsible for carrying out the Union's plan to stifle the Confederacy's use of the waterways.[725] Burns's Service continued until March 31, 1865, indicating he was crucial to the Union's efforts to close the war.[726]

For the remainder of the paper, it is assumed year of birth is 1831 as indicated by Isaac Burns's grave. *Isaac Burns*, *supra* note 2.

719 *See* Max Grivno, *Antebellum Mississippi*, MISS. HIST. NOW (July, 2015), https://mshistorynow.mdah.ms.gov/issue/antebellum-mississippi (explaining how Mississippi's slave population grew significantly during the 1830's following The Indian Removal Act of 1830, which opened up land for cotton planting after the relocation of Native American Tribes).

720 *See* Lauren Holt, History of Plantations and Slavery in Mississippi, (2018) (general narrative for educators) (on file with Preserve Marshall County and Holly Springs, Inc.), https://www.behindthebighouse.org/wp-content/uploads/2018/08/General_Narrative.pdf (telling the story of enslaved individuals living at the same time Isaac was).

721 *See id.*

722 *See generally* A.S. Abrams, *Detailed History of the Siege of Vicksburg,* 2 CONFEDERATE IMPRINTS 1 (1863) (describing the fall of Vicksburg).

723 *See Sailors Database, supra* note 1 (showing Isaac enlisted in Vicksburg in August 1863, less than two months after the Union took control of the area).

724 *U.S. African American Civil War Sailor Index, 1861-1865*, ANCESTRY.COM (last visited Mar. 4 2025), https://www.ancestry.com/discoveryui-content/view/8855:9748?ssrc=pt&tid=199979235&pid=172613783766.

725 *Vicksburg Campaign,* BRITANNICA (last visited Mar. 4, 2025), https://www.britannica.com/event/Vicksburg-Campaign.

726 *See Sailors Database, supra* note 1 (showing Isaac enlisted in Vicksburg in August 1863, less than two months after the Union took control of the area).

B. Life After the War: Burns's Northern Migration and Family Life

Like many African Americans following the Civil War, Burns moved north to settle down.[727] Burns married his wife, Armity, in 1873,[728] and together they had three daughters between 1873 and 1878 in Du Quoin, Illinois.[729] Burns worked as a day laborer following the war[730] until his death in 1916.[731] Probate records show his wife as the petitioner and executrix of his will, which included his heirs.[732]


TWELFTH CENSUS OF THE UNITED STATES.

SCHEDULE No. 1.—POPULATION.

1880 U.S. Census record listing Isaac Burns, his wife, and his 3 daughters--reflecting his life as a Black man in Southern Illinois post the Civil War.

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727 Samantha Gibson & Digit. Publ. Libr. of Am., *Exodusters*: *African American Migration to the Great Plains* DIGIT. PUB. LIBR. OF AM. (2018), https://dp.la/primary-source-sets/exodusters-african-american-migration-to-the-great-plains.

728 Inez Bost Eisenhauer, *1900 Perry County, Illinois Census*, INTERNET ARCHIVE (Mar., 1998), https://archive.org/details/001-perrycountycensus/mode/1up (indicating a marriage which had lasted 27 years).

729 Inez Bost Eisenhauer, *1880 Perry County Census*, INTERNET ARCHIVE (July, 1997), https://archive.org/details/1880perrycocensus-finished/mode/1up (indicating their first born child was born in 1873 and their last child was born in 1878 in Du Quoin, though there are inconsistencies with the exact years of each child).

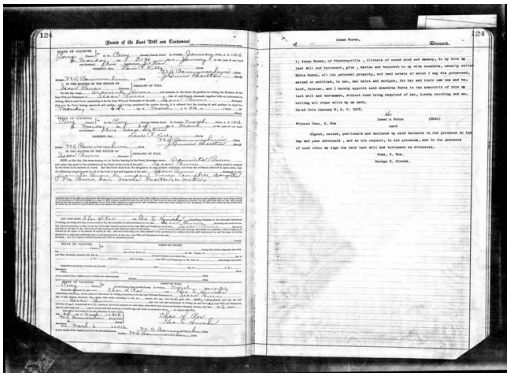
730 *Id.* (indicating he worked as a day laborer following the war).

731 *See* In re Estate of Isaac Burns, In Record of the Last Will and Testament, Perry County (1916) (reporting Isaac's death on January 29, 1916).

732 *See id.* (recording his heirs as two daughters and one son, inconsistent with the census reports).

C. Segregation in Burial: Burns's Final Resting Place

Burns was buried in Pinckneyville Cemetery.[733] Like many African Americans from this time,[734] Isaac's final resting place is situated in the segregated section of the cemetery.[735] Isaac's grave is located within a low-lying section of the cemetery.[736] This low-lying section was established as a segregated section and often floods due to its low-lying nature.[737] This low section keeps the remainder of the graves are dry, and conveniently, the dry graves are predominantly of the majority ethnicity, white.[738] Thus, at the expense of Burns and his fellow minority members, the cemetery remains dry.[739] Whether done with purpose or incidentally, the flooding of the segregated graves is a travesty that must be known and corrected.[740] Because of its location, the grave is now stained brown, making it hard to read.[741] Over time, Burns's grave will be washed away, and this history will be forgotten, with the potential to be repeated as a result.[742]



Isaac Burns's last will and testament, detailing the distribution of his estate.

Tombstone of Isaac Burns, local Civil War veteran, buried in what was once the segregated section of the cemetery—reflecting the enduring legacy of racial segregation, even in death, in Southern Illinois.

733 *Isaac Burns*, *supra* note 2.

734 *See generally* David Sherman, *Grave Matters: Segregation and Racism in U.S. Cemeteries*, THE ORDER OF THE GOOD DEATH (Apr. 20, 2020), https://www.orderofthegooddeath.com/article/grave-matters-segregation-and-racism-in-u-s-cemeteries/.

735 Pinckneyville Map, *supra* note 2.

736 *Id.*

737 *Id.*

738 *Id.*

739 *Id.*

740 *Id.*

741 *Isaac Burns, supra* note 2.

742 *Id*; Pinckneyville Map, *supra* note 2.

D. A Broader Pattern of Segregation: Lincoln Cemetery and Beyond

To make matters worse, Burns's case is not isolated.[743] Following the Civil War, several cemeteries either excluded or segregated African American Veterans.[744] For example, Lincoln Cemetery in Gettysburg, Pennsylvania, established two years after the war, was created with the sole purpose of burying African American veterans who were denied burial in Soldiers' National Cemetery, which is the designated cemetery for soldiers killed during the Battle of Gettysburg.[745] Although African American citizens dug the graves for these white veterans, 450 African American citizens were buried within walking distance of honor, 136 of whom rest in unmarked graves.[746]

Map of the Pinckneyville cemetery showing the segregated section where Isaac Burns is buried and the ditch around the segregated section causing frequent flooding.

Lincoln Cemetery Entrance

The practice of segregation in cemeteries extended into the 20th century. For example, Arlington National Cemetery segregated African American soldiers for 82 years until their policy was abolished in 1948 by Executive Order 9981, which integrated the military.[747]

Cemetery Segregation was allowed through the 1950s until courts considered cemeteries to be "public accommodations" following the Supreme Court ruling in *Shelley v. Kraemer*, which ruled that state enforcement of racially restrictive covenant in land deeds violated the 14th Amendment equal protection clause.[748] This ruling directly affected the

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743 *See* Gormly, *supra* note 5.

744 *See id.*

745 *See id.* (explaining President Abraham Lincoln designated the area for more than 3,500 Union Troops killed during the battle of Gettysburg in July of 1863).

746 *Id.*

747 *Executive Order 9981: Desegregation of the Armed Forces*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/executive-order-9981 (last visited Mar. 2, 2025).

748 Atlas Obscura Contributor, *The Persistent Racism of America's Cemeteries*, SLATE (Jan. 16, 2017, 2:30PM) https://slate.com/human-interest/2017/01/america-s-segregated-cemeteries-are-important

desegregation of cemeteries because whites-only restrictions on cemetery plots could no longer be held up. However, the issue remained because the public opinion of Jim Crow laws, especially in small towns in the South, was slow to change.[749]

E. Modern Examples of Cemetery Discrimination

Neglecting history may seem minor at the time, but this history will repeat itself when its lessons are covered. For example, in 2016, Pedro Barrera, a Mexican American man, was denied burial in San Domingo Cemetery in Normanna, Texas.[750] Dorthy Barrera, his wife of over 40 years, sought to bury Pedro in this cemetery in hopes they would be buried next to each other one day.[751] According to the Texas Tribune:

> [C]emetery operator Jimmy Bradford told Barrera that her request to bury her husband at the cemetery had been denied by the Normanna Cemetery Association. When Barrera questioned the vote, Bradford allegedly responded Pedro Barrera couldn't be buried there "because he's a Mexican" and directed her to "go up the road and bury him with the n----- and Mexicans," the federal complaint details.[752]

Dorthy filed a suit against the cemetery, alleging discriminatory practices in refusing to bury her husband's remains within its cemetery property.[753] The suit quickly ended and resulted in the cemetery changing its Jim Crow policy.[754]

While it may seem like an issue rooted in the actions of our ancestors, it is our present-day ignorance—our failure to confront a history of division, hate, and discrimination—that leaves us vulnerable to repeating it. If we do not actively address this issue, the same war will never end, and those already left behind will remain buried under a pile of forgotten history.

F. The Disappearance and Destruction of African American Cemeteries

In civilian cemeteries, many segregated cemeteries were in marginalized areas and were later destroyed or repurposed for urban

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-troves-of-forgotten-black-history.html#:~:text=From%20the%201920s%20through%20the, longer%20hold%20up%20in%20court.

749 *See generally* Gail Williams O'Brien, Book Review, 83 N.C. HIST. REV. 503 (2006) (reviewing Clive Webb, Massive Resistance: Southern Opposition to the Second Reconstruction (2005)).

750 Ura, *supra* note 7.

751 *Id.*

752 *Id.*

753 *Id.*

754 *Id.*

development. Thus, not only were African American veterans and citizens barred from being buried next to white citizens, but several of these cemeteries were in areas neglected, poorly maintained, or forever covered up.[755] An example of this vulnerability is shown in Mt. Forest Cemetery, an African American Cemetery that lies in overgrown brush.[756] Although the city took ownership of the property in 1977, many of the headstones have been vandalized, missing, or tarnished due to a lack of maintenance.[757] Several of these segregated cemeteries are going missing from our history.[758] A study done in Texas to locate missing cemeteries identified 36 cemeteries found on historical maps from 1887 to 1960 that were not marked on the corresponding modern maps.[759] Of these 36 missing cemeteries, most were for minorities.[760]

The gravestones of a father and son buried in Booker T. Washington Cemetery in Southern Illinois.

The grave of William Chapman in St. George Cemetery in Illinois

Illinois runs the same risk of losing minority cemeteries. The gravestone of a father and son buried in Booker T. Washington Cemetery in Southern Illinois lies in a large bowl at the bottom of a hill that floods often.[761] Their graves sit back, deep in the woods, largely going unnoticed.[762]

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755 *See Black Cemeteries*, *supra* note 8 (explaining that many Black Americans took it upon themselves to build their own cemeteries after being excluded from white cemeteries, and these cemeteries are vulnerable to neglect and vandalism).

756 *Mt. Forest Cemetery*, VILL. OF THORNTON HIST. SOC'Y & MUSEUM, https://www.thorntonilhistory.com/mtforestcemetery (last visited Feb. 24, 2025).

757 *Id.*

758 *See generally* Lemke, *supra* note 8 (discussing how cemeteries across this country are in danger because of development, neglect, and vandalism).

759 *Id.* at 607; *see also Black Cemeteries, supra* note 8 (showing examples of minority cemeteries hidden under golf courses, universities, and hotel parking lots).

760 Lemke, *supra* note 8, at 607.

761 Jerrel Floyd, *I Went in Search of Abandoned African-American Cemeteries*, PRO PUBLICA (June 29, 2018, 4:00 am), https://www.propublica.org/article/abandoned-african-american-cemeteries-illinois-jerrel-floyd.

762 *Id.*

Several headstones are crushed, vandalized, and neglected.[763] It is reported that logging trucks drove through the cemetery in July 2016, crushing multiple headstones in their path.[764] The grave of William Chapman, an African American Civil War Veteran, lies among dozens of scattered and knocked-over headstones in the brush part of St. George Cemetery in Illinois.[765] Illinois state has not kept detailed records of the cemeteries within the state.[766] However, funeral directors estimate several plots on private and public property that are lost, abandoned, or destroyed.[767] Moreover, there is a lack of research within the state on locating or identifying these cemeteries, making an already challenging issue impossible to fix.[768] Both Brooker T. Washington Cemetery and St. George Cemetery are clear examples of African American cemeteries that have been neglected and written out of our history.[769]

G. Modern Advocacy: Restoring Dignity to Forgotten Cemeteries

Rose Sturdivant Young was a key leader in the fight to restore and preserve abandoned African American cemeteries in North Carolina.[770] Rose founded the Friends of Old Westview Cemetery in Wadesboro, a nonprofit organization fighting to restore abandoned minority cemeteries.[771] She began this fight in 2001 when she laid her mother to rest in Old Westview Cemetery and discovered the cemetery's neglected condition.[772] She has since vowed to restore the cemetery and return it to the map.[773] Her efforts led to the cemetery being placed on the National Register of Historical Places in 2015.[774]

Sandra Arnold founded the National Burial Database of Enslaved Americans in 2013 to identify and preserve burial sites of enslaved African Americans buried across the United States.[775] The database documents locations of unmarked graves that have been lost due to neglect or development.[776] Sandra began this journey when she discovered her great-grandfather, a former slave, was buried in an undocumented grave in

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763 *Id.*
764 *Id.*
765 *Id.*
766 *Id.*
767 *Id.*
768 *Id.*
769 *Id.*
770 *Friends of Old Westview, supra* note 9.
771 *Id.*
772 *Id.*
773 *Id.*
774 *Id.*
775 Verel, *supra* note 9.
776 *Id.*

Tennessee.[777] This inspired her to prevent other burial sites from going unnoticed.[778] Her organization works with scholars and the public to create a national registry that helps protect the burial grounds of enslaved people.[779] Often, slaves were buried in a desultory fashion, and headstones were a luxury in the South.[780] When asked about her mission, Sandra stated, "The burial grounds of the enslaved are sacred spaces; they mark their place in the world and are a testimony to the humanity of a people denied dignity in life . . . . We must remember, recover, and restore these spaces. Doing so is a testimony to our own humanity."[781]

Lisa Fager is the Executive Director of the Black Georgetown Foundation,[782] dedicated to preserving the Mount Zion and Female Union Band Society Cemeteries in Washington, D.C., and other historic African American burial sites.[783] The foundation's mission is fulfilled through donations and volunteers willing to upkeep the property, preserve artifacts, and record historical data.[784] Volunteers also work to provide cemetery property surveys, maintain the grounds, and conduct genealogical research.[785] When asked about the iron posts around the cemetery's border, one volunteer stated, "The garbage trucks would back into the grounds on graves and get stuck . . . . Imagine that, people are buried there, and so we put up posts to protect."[786] The mission believes it is important to honor Black history and remember how the city worked to restore other parts of American history.[787] In 2021, Lisa intervened to stop the National Park Service from abruptly replacing an old bike trail in Rock Creek Park.[788] To survey the area, the National Park Service was using old maps and documents that referred to Mount Zion as "colored cemeteries."[789] By law, the National Park Service is required to inform adjoining property owners of any project it undertakes.[790] Thus, once Lisa was informed, she acted quickly to get a six-month

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777 *Id.*

778 *Id.*

779 *Id.*

780 Slaves were often buried quickly and graves left unmarked. *See Fordham Student Sandra Arnold Creates Database to Protect Slave Burial Sites*, BLACK YOUTH PROJECT (Mar. 20, 2013), https://blackyouthproject.com/fordham-student-sandra-arnold-creates-database-to-protect-slave-burial-sites/.

781 Verel, *supra* note 9.

782 She is the executive director. *About Us*, THE MT. ZION FEMALE UNION BAND HIST. MEM'L PARK, INC. (BLACK GEORGETOWN FOUND.), https://www.mtzion-fubs.org/about_us (last visited Mar. 4, 2025).

783 Rayaprolu, *supra* note 9.

784 *Id.*

785 *Id.*

786 *Id.*

787 *Id.*

788 *Id.*

789 *Id.*

790 *Id.*

injunction granted until archaeologists could scan the grounds to preserve what history may be discovered.[791] Lisa was successful, and archeologists worked tirelessly to preserve the history of the grounds throughout the project.[792]

The efforts of Rose Sturdivant Young, Sandra Arnold, and Lisa Fager underscore the importance of preserving African American Burial grounds. These modern advocates are providing critical restoration to African American burial grounds, ensuring that the stories of those who were marginalized in life are not forgotten in death. Their work offers a valuable blueprint for future preservation efforts across the entire United States. Additionally, their work also demonstrates how individuals and private groups have had to step up to remedy cemetery segregation when legislation and other governmental efforts have fallen short.

II. ANALYSIS

Illinois law prohibits cemetery segregation through a combination of the Illinois Human Rights Act, the Illinois Civil Rights Act of 2003, and the Cemetery Protection Act.[793] However, the language contained within these statutes is wholly inadequate. These combined laws permit the lack of attention to this issue and further exacerbate it by failing to define the problem directly. Additionally, the use of three separate statutes to remedy this single issue demonstrates the ineffectiveness of each of these statutes standing alone; cemetery segregation should be addressed in a single statute.

For example, under the Illinois Human Rights Act, it is against the law for any public place of accommodation to deny someone services based on discrimination.[794] Specifically, it states, "It is a civil rights violation for any person based on unlawful discrimination to: . . . [d]eny or refuse to another, . . . the full and equal enjoyment of the . . . facilities [goods, and services of any public place]."[795] Here, the language vaguely prohibits cemetery segregation by providing equal protection to those using public accommodations. However, who is to say that plot placement is discriminatory in the first place? If someone were given Plot A instead of Plot B in the same cemetery, is there anything inherently discriminatory about that? Generally, the answer would be no under this law because, given either Plot A or Plot B, an individual would have equal access to the same cemetery. But what if Plot A was separated from the rest of the cemetery by a fence in a neglected area? Would access to plot A instead of plot B violate

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791 *Id.*

792 *Id.*

793 775 ILL. COMP. STAT. 5 (1980); 740 ILL. COMP. STAT. 23 (2004); 765 ILL. COMP. STAT. 835 (1990).

794 775 ILL. COMP. STAT. 5/5-102 (2007).

795 Pinckneyville Map; 5/5-102.

this law? A grave in the San Domingo Cemetery[796] provides an example of how this statute would not prevent segregation under these facts. Santiago Ramirez's grave stands broken and attached with wire to the outside of the San Domingo Cemetery fence.[797] At the time of Barrera's suit, discussed previously, there were no burial sites for Hispanic residents within the chain-linked fence enclosure.[798] However, the lawsuit revealed Santiago's burial just outside the cemetery property.[799] One might assume, given its proximity to the cemetery, that his burial was once a part of the cemetery grounds, only separated by a fence. What stops this conduct from continuing? This question calls back to the history of segregation in schools, where equal access to a different school was claimed to provide equal opportunity until *Brown v. Board of Education*.[800] However, the decision in that case has never been applied in the same manner to cemeteries. Thus, the cemetery cannot exclude someone from being buried in the cemetery but could dictate where someone can be buried within the cemetery and still be in compliance with this law.

Broken grave of Santiago Ramierez, attached with wire to the outside of the San Domingo Cemetery fence.

Another example is under the Illinois Civil Rights Act of 2003, "[n]o unit of State, county, or local government in Illinois shall: exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender . . . ."[801] Here, the same issue addressed previously arises. Under this statute, it prohibits the exclusion of people on the basis of discrimination.[802] However, cemeteries do not always exclude people from being buried on their grounds; rather, they dictate where the individual is buried. Oftentimes, without the decedent's family knowing of their burial placement based upon their race or ethnicity because there are no signs indicating what sections are segregated or historically have been segregated, and often, the tombstones in the segregated section are in such

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796 Ura, *supra* note 7.
797 *Id.*
798 *Id.*
799 *Id.*
800 Brown v. St. Bd. Edu., 355 So.2d 512 (Table) (Fla. 1978).
801 740 ILL. COMP. STAT. 23/5 (2025).
802 *Id.*

disrepair that they are illegible, hiding any indication or evidence of segregation. This is not to say the law should require cemeteries to put signs up indicating segregated sections, but rather, because the law has required these signs to be taken down while allowing graves to remain segregated, families are likely to be put on notice that discrimination has occurred to create an opportunity for the courts to interpret these statutes when specifically applied to discrimination in cemeteries.

The Cemetery Protection Act is more explicit in its prohibition of cemetery segregation, although it was not added until the Act's amendment in March of 2010.[803] The amendment states:

> Furthermore, no cemetery authority company or legal entity may deny burial space to any person because of race, creed, marital status, sex, national origin, sexual orientation, or color. A cemetery company or other entity operating any cemetery may designate parts of cemeteries or burial grounds for the specific use of persons whose religious code requires isolation. Religious institution cemeteries may limit burials to members of the religious institution and their families.[804]

Here, the language is more explicit than in the last two statutes, but it still fails to bring knowledge to the issue by not using the express language to define cemetery segregation, resulting in the same lack of awareness of the issue.[805] Thus, although it prohibits the conduct, the language refuses to call the conduct what it is, cemetery segregation. Moreover, even though there are three acts that may address this issue, none of the three acts expressly prohibit cemetery segregation; rather, their refusal to do so leaves the public in the dark regarding the problem. On a practical level, if a cemetery tells an individual that all the spaces in section B are full, and thus they have only the option of buying space in section A, the individual is unlikely to know that cemetery segregation may be taking place because the issue is not explicitly identified, even if acts that address the issue, and they may not be any indicators that would otherwise lead them to discovering that cemetery segregation is taking place.

Consider a library in a small town in Illinois. The library, under federal law, is prohibited from segregating. However, under state law and without violating federal law, the library organizes sections and access points to indirectly segregate individuals. Additionally, it is not a matter of public knowledge that library segregation takes place. Who would ever think that the books being organized in such a manner was discriminatory in nature?

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803 765 ILL. COMP. STAT. 835/8 (2025).

804 *Id.*

805 *Compare id., with* 23/5, *and* 775 ILL. COMP. STAT. 5/5-102 (2025).

Without the knowledge of the term 'library segregation,' how would someone know to identify it as an illegal and systemic act?

On the ground level, Illinois laws surrounding cemetery segregation are wholly insufficient and need to be rewritten clearly and concisely to not only expressly prohibit such conduct but also to make the public aware that this is an ongoing issue. Therefore, the key to addressing this issue is to bring awareness. A model statute would directly state and define cemetery segregation as a problem to prevent it from occurring.

III. PROPOSED RESOLUTION

A. Comparative Legal Frameworks: Cemetery Segregation Laws in Other States

To sufficiently draft proper legislation to prohibit cemetery segregation, it is vital to view what language other states use within their states to prohibit this conduct. Below is an overview analysis of language in California, Texas, and Florida laws that prohibit cemetery segregation.[806] The language from each state may be stronger or weaker than Illinois' current prohibitive language; however, it is important to note that no law in any state is as strong as necessary to clearly and expressly prohibit cemetery segregation because no law contains the term "cemetery segregation."[807]

1. *California's Approach to Prohibit Cemetery Segregation*

California law addresses different aspects of cemetery operations.[808] However, no law in California expressly prohibits cemetery segregation.[809] California law provides that a cemetery cannot discriminate against individuals based on race or gender.[810] However, the legislature made clear under California Health and Safety Code § 8301.5 states that cemeteries have the discretion to dictate which plots can be ascertained so long as their efforts are under a basis of inclusivity rather than exclusivity.[811] For example, California recognizes that there are cultural, social, and other reasons for individuals to seek association with specific groups.[812] Thus, California

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806 TEX. HEALTH & SAFETY CODE ANN. § 711.032 (West 2025); FLA. STAT. ANN. § 497.159(5)(a) (West 2025); 835/8.

807 CAL. HEALTH AND SAFETY CODE § 8100-9703 (West 2025).

808 *Id.*

809 *Id.*

810 CAL. HEALTH AND SAFETY CODE § 8301.5 (West 2025).

811 *Id.*

812 *Id.*

cemeteries can be created and operated for specific groups, provided that the purpose is to include people based on sincere association interests rather than to exclude individuals based on race or gender.[813]

2. Texas's Approach to Prohibit Cemetery Segregation

Texas law does prohibit cemetery segregation, but fails to state and define "cemetery segregation."[814] According to the Texas Health and Safety Code § 711.032, a cemetery organization may not adopt or enforce any rule that prohibits burial because of the race, color, or national origin of a decedent.[815] Furthermore, a contract that would prohibit burial on these grounds is considered void.[816] Thus, although the language in Texas laws is stronger than California's, such language is still insufficient because it fails to state "cemetery segregation."[817]

3. Florida's Approach to Cemetery Segregation

Florida law does not explicitly use the term "cemetery segregation."[818] However, Florida Statute § 497.159 addresses the issue by prohibiting cemeteries from denying burial space to any person based on race, creed, marital status, sex, national origin, or color.[819] Like California, it also allows exemptions for religious cemeteries to limit burials to members of religious groups and their families.[820]

4. Federal Approach to Cemetery Segregation

In *Plessy v. Ferguson*, the Court ruled that segregation did not violate the 14th Amendment so long as the separation of Black and White people was equal.[821] Many state laws followed this ruling to permit their own segregation laws.[822] The Court stated:

> The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of

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813 *Id.*

814 TEX. HEALTH & SAFETY CODE ANN. § 711.032 (West 2023).

815 TEX. HEALTH & SAFETY CODE ANN. § 711.032(a) (West 2023).

816 TEX. HEALTH & SAFETY CODE ANN. § 711.032(b) (West 2023).

817 *Compare* § 8301.5, *with* § 711.032.

818 FLA. STAT. ANN. § 497.159 (West 2024).

819 FLA. STAT. ANN. § 497.159(5)(a) (West 2024).

820 *Id.*; CAL. HEALTH & SAFETY CODE § 8301.5(g) (West 2024).

821 Plessy v. Ferguson, 163 U.S. 537, 544, 551 (1896).

822 John A. Powell, *The Law and Significance of* Plessy, 7 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCIS. 20 (2021) (explaining how Plessy v. Ferguson legitimized state-enforced segregation laws across the U.S., reinforcing racial segregation).

> things, it could not have been intended to abolish distinctions based upon color, or the enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[823]

Several states took this language and drafted their own laws permitting segregation.[824] For example, Tennessee segregation law stated, "All railroads carrying passengers in the state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the cars by a partition, so as to secure separate accommodations."[825] The explicit use of language in *Plessy* empowered states, like Tennessee, to draft their own legislation, which resulted in even more explicit verbiage like "separate," which expressly set out what the state intended to do: keep black people separate.[826]

When outlawing segregation in public places, the exact language under federal law states that: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[827] The section goes on to provide examples that meet their definition of public accommodation:[828]

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

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823 *Plessy*, 163 U.S. at 544.

824 Powell, *supra* note 126 ("[Plessy] cemented rather than inaugurated many changes in public policy across the South as White-dominated governments sought new ways to institutionalize racial stratification . . . .").

825 *Jim Crow Laws–Separate Is Not Equal*, SMITHSONIAN NAT'L MUSEUM AM. HIST., https://americanhistory.si.edu/brown/history/1-segregated/jim-crow.html. (last visited Apr. 16, 2025).

826 *Id.*

827 42 U.S.C. § 2000a(a).

828 42 U.S.C. § 2000a(b).

> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.[829]

As indicated above, no law discussed here, nor anywhere in the United States, is as strong as necessary to combat the issue at hand. California law seems to lean into the discretion given to cemeteries in deciding who gets which plots, while Texas and Florida's laws rely on their discretion only in cases of religious exemptions.[830] Federal law provides a list of public accommodations but conveniently leaves off cemeteries.[831] These laws talk about the issue without addressing it by name.[832]

Imagine if this issue applied to restaurants. California law would leave it up to restaurant owners to decide seating charts, whereas Texas and Florida's laws prohibit segregation with a loophole for religious events: the restaurant could segregate individuals for religious events held within the building and at the request of the parties.[833] Federal law would also prohibit segregation in this hypothetical scenario, but would omit restaurants from its list of public accommodations as a result.[834] In all states, the laws technically prohibit segregation but create loopholes through ambiguous language or omissions, which permit inconsistency in the law's application.[835] Just like Illinois, these states mirror the rest of the United States regarding the statutory language in failing to prohibit cemetery segregation.[836]

The question remains as to why. The language is likely intentionally left ambiguous, which limits the effect of the federal law. This means some states may be trying to avoid having to conform to these laws and take action to prohibit cemetery segregation, while still remaining in compliance with federal law. This purpose relies on the notion that when language in a statute is vague, we leave it to the courts to define. However, in the small areas of

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829 *Id.*

830 *Compare* CAL. HEALTH & SAFETY CODE § 8301.5 (West 2024), *with* TEX. HEALTH & SAFETY CODE ANN. § 711.32 (West 2023), *and* FLA. STAT. ANN. § 497.159(5)(a) (West 2024).

831 § 2000a(b).

832 § 2000a; § 8301.5; § 711.32; § 497.159(5)(a).

833 *Compare* § 8301.5, *with* § 711.32, *and* § 497.159(5)(a).

834 § 2000a(b).

835 § 8301.5; § 711.32; § 497.159(5)(a).

836 § 8301.5; § 711.32; § 497.159(5)(a); 765 ILL. COMP. STAT. 835/8 (West 2024); § 2000a.

Illinois that are more susceptible to this issue, the courts have never had to define these terms because the issue has never been brought forward, either due to lack of knowledge or lack of resources on the part of the injured parties. Thus, these states comply with federal law, but are they doing so with limited language and, thus, limited effort in educating the public, preventing claims from being brought and perpetuating this issue.

IV. DRAFT ILLINOIS LAW

TITLE: § Prohibition Against Discrimination or Segregation in Cemeteries (Cemetery Segregation)

Defined Term(s):

1) Cemetery Segregation occurs when there is a separation of individuals based on race, creed, marital status, sex, national origin, sexual orientation, or color, either by assigning them to different cemeteries or to separate sections within the same cemetery.

Section 1. General Prohibition:
No cemetery authority company or legal entity may deny burial space to any person because of race, creed, marital status, sex, national origin, sexual orientation, or color.

Section 2. Designation of Burial Spaces for Religious Purposes:

(a) A cemetery company or other entity operating any cemetery may designate parts of cemeteries or burial grounds for the specific use of a persons whose religious code required isolation so long as such isolation is not discriminatory in nature.
(b) Religious institution cemeteries may limit burials to members of the religious institutions and their families but still comply with this section of the code, meaning the religious institution needs to have set guidelines for those permitted for burial, and those guidelines

must be approved under this section of code prior to implementation.

Section 3. Judicial Review:
This act authorizes the judiciary to do a fact-based analysis to determine whether the segregation was intentional or unintentional. In cases of intentional segregation, such practices will be deemed in violation of this act.

Section 4. Effective Date:
This act shall take effect immediately upon passage.

The title *Prohibition against discrimination or segregation in cemeteries (Cemetery Segregation)* is explicit to reduce any ambiguity as to what the statute is meant to prevent. This helps increase public knowledge of the issue and makes it easier for people who may have been affected by it to find it. The defined term 'Cemetery Segregation' then follows to help ensure the person who is searching for the law better understands the issue before reading the language prohibiting it. The provision stating, 'so long as such isolation is not discriminatory in nature' balances the freedom of those who hold religious views to dictate their burial but also ensures their freedom is not abused in bad faith. This is also addressed in 'but still comply with this section of the code' as this language limits the religious loophole created in the original code. Moreover, ensuring the religious institutions have clear set rules to follow is addressed in the last part of the draft: 'meaning the religious institution needs to have set guidelines for those permitted for burial and those guidelines must be approved under this section of code prior to implementation.'

CONCLUSION

All things come to an end, just like this Article. However, unlike this Article, the end of a human life carries far greater weight. All humans live in the shoes of those who came before us. We remember the good and bad of our history to make the world a better place. But some events from history fall through the cracks, unbeknownst to a significant portion of people. When this happens, the effects can be dangerous.

We spend so much time in school learning about slavery and segregation. We learned of Rosa Parks' heroism in her refusal to give up her seat. We learned of the Montgomery Bus Boycott, which resulted in the Supreme Court's decision to declare segregation on public buses

unconstitutional. We also learned about President Lyndon B. Johnson's signing of the Civil Rights Act of 1964 into law. However, I must admit that I reached my third year of law school before discovering that many cemeteries are segregated. Why does this feel different than buses or restaurants? Of course, all segregation is wrong. Yet, something about the dignity and permanence of a final resting place makes this hard to accept.

I invite you, as the reader, to envision Burns. Beyond his origins as a slave and his fight for freedom in the Union Navy, he was also someone's child, someone's husband, and someone's father. He had experiences similar to yours and mine. He laughed, cried, learned, failed, and succeeded in his life. He had good and bad days. He felt the wind on his face and the grass under his feet. He understood the profound joy of bringing new life into the world and the undeniable challenges that life brings us all. And ultimately, he died, just as we all will. He was mourned by those who loved him most and laid to rest. However, the difference between him and others lies in the permanence of human hatred at his final resting place. Despite this, the legacy of Burns and those like him will never end.

Though the shadow of human hate has obscured it, Burns's story is one of heroism that is invaluable to the research and advocacy in fighting against cemetery segregation. Burns was treated as if he were not equal, even in his death. And then, exactly 100 years after Burns's burial, Pedro Barrera faced the same treatment. If we do not explicitly address cemetery segregation in the legal language, the public will continue to face its consequences, often without realizing that an issue exists. Until Illinois and the rest of the states explicitly prohibit cemetery segregation, death is not truly the great equalizer; many more people like Burns will be buried beneath the shame of our nation's ignorance regarding the dark history of cemetery segregation.

CASE NOTE: CITY OF ROCK FALLS V. AIMS INDUSTRIAL SERVICES, LLC

Emily Buikema*

INTRODUCTION

The ability of Illinois municipalities to enforce municipal ordinances is now clearer after *City of Rock Falls v. Aims Industrial Services, LLC*.[837] In an effort to enforce a city ordinance requiring the defendant to connect to the city's public sewage system, the City of Rock Falls filed a petition for injunctive relief to compel the defendant to comply with the ordinance.[838] What arose from the litigation was a question as to whether the trial court had discretion to balance the equities[839] in deciding whether or not to grant injunctive relief, even after the city had proven that a permanent injunction was an available remedy.[840] While the general rule is that the trial court must balance the equities in order to grant injunctive relief,[841] there is an exception to that rule when the state is seeking the injunction expressly authorized by statute.[842] However, the question still remained as to if this exception would extend to municipalities. The Supreme Court of Illinois answered that question in *City of Rock Falls v. Aims Industrial Services, LLC*[843] and provided an easier path for municipalities seeking to enforce their ordinances in the future.

This Case Note first summarizes the facts of *City of Rock Falls v. Aims Industrial Services, LLC* and its procedural history. It then discusses two of the competing cases prior to the resolution of the issue in *City of Rock Falls*. Finally, this Case Note analyzes the Illinois Supreme Court's decision in *City of Rock Falls v. Aims Industrial Services, LLC,* and highlights the impact of the case as well as the remaining issues. A municipality's ability to enforce its ordinances lies at the heart of its governmental functions; *City of Rock Falls v. Aims Industrial Services, LLC* provided one more way for municipalities to ensure they have the power to carry out this necessary duty.

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* J.D., Southern Illinois University Simmons Law School, Class of 2025. This author would like to thank Attorney Matthew Cole for the inspiration to write this Case Note and for continuing to share his knowledge of municipal law with her.

837 City of Rock Falls v. Aims Indus. Servs., LLC, 2024 IL 129164, ¶ 1.

838 *Id.*

839 Also referred to as balancing the hardships of the parties if the injunctive relief is granted or not. *Id.* at ¶ 15.

840 *See generally id.*

841 *Id.* at ¶ 15.

842 *Id.*

843 *See generally id.*

I. BACKGROUND

A. Facts of the Case

In 2017, Aims Industrial Services, LLC (Aims) purchased a property in Rock Falls, Illinois, to construct a building for industrial purposes.[844] The property had a private sewage disposal system and lacked a connection to the city's public sewage system.[845] At that time, the Rock Falls Municipal Code (Code) required that "upon sale or transfer of property all private sewage disposal systems within the city limits shall connect to the public sanitary sewer when available in accordance with sections 32-186 and 32-190 . . . ."[846] Additionally, the Code stated that:

> The owner of each . . . building or property . . .within the city is required, at his expense, to install suitable toilet facilities therein . . . and to connect such facilities directly with the public wastewater treatment system in accordance with the provisions of this division, and within 60 days after official notice to so connect.[847]

Finally, the Code stated, "Violations of this Code that are continuous with respect to time are a public nuisance and may be abated by injunctive or other equitable relief. The imposition of a penalty does not prevent injunctive relief."[848] Aims did not connect the property to the city's public sewer system as required by the Code, citing cost-prohibitive reasons and a previous waiver granted to another property.[849] In 2019, the City of Rock Falls petitioned the Circuit Court of Whiteside County requesting a fine and an injunction to compel Aims to connect to the city's public sewer system after Aims refused to comply with the ordinance.[850]

B. Circuit Court of Whiteside County

In response to the city's petition, Aims asserted two affirmative defenses, with the second focusing on the feasibility of complying with the Code.[851] Rock Falls filed a motion for summary judgment on this defense, but the court denied it, finding a genuine issue of material fact regarding

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844 *Id.* at ¶ 4.
845 *Id.*
846 *Id.* (quoting ROCK FALLS, ILL. CODE ORDINANCES § 32-186 (2024)).
847 *Id.* (quoting ROCK FALLS, ILL. CODE ORDINANCES § 32-190 (2024)).
848 *Id.* (quoting ROCK FALLS, ILL. CODE ORDINANCES § 1-41(n) (2024)).
849 *Id.* at ¶¶ 4, 11.
850 *Id.* at ¶ 5.
851 *Id.* at ¶ 6.

feasibility.[852] The trial court denied the city's petition based on the "balance of the equities,"[853] considering factors such as financial feasibility, past waivers granted to other businesses, and the lack of "lateral hookups" to the public sewage system.[854] Although these factors are not directly related to the legal issue of whether the court should balance the equities, they may help municipalities or practitioners facing similar enforcement challenges—especially when seeking a preliminary injunction rather than a permanent injunction—which this Case Note addresses in more detail in Part IV.

C. Fourth District Court of Appeals

The appellate court began its analysis by determining that the trial court did find that there was a triggering event requiring connection—the sale of the property—and that this finding was not against the manifest weight of the evidence.[855] However, the appellate court ultimately concluded that "the trial court erred in incorporating a comparative cost analysis and in considering the absence of lateral connections when deciding whether a connection to the sewer main was 'available' under the Code[]" and reversed and remanded these issues to the trial court.[856] It reasoned that these factors were outside the language of the code as they did not prevent connection to the municipal sewage system from being "available" as defined in the Code.[857]

As to whether the court should balance the equities, the appellate court noted the long-recognized power of a city to maintain a public sewer system and to compel others to connect to it.[858] Additionally, it noted that municipalities have the power to prevent and abate nuisances under the Illinois Municipal Code, and according to the Illinois Supreme Court, they do not need to "wait until a particular private sewage system becomes an immediate hazard to the public health before it can require a connection to the public sewage system."[859] Further, the court discussed how the general requirements to obtain injunctive relief, including to balance the equities, do not apply to government agencies with express authority to seek injunctive relief.[860] One of the cases the appellate court cited to in support of this position was *People ex rel. Sherman v. Cryns,*[861] which they then

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852 *Id.* at ¶ 7.
853 *Id.* at ¶¶ 8–13.
854 *Id.* at ¶ 13.
855 *Id.* at ¶¶ 19–20.
856 *Id.* at ¶ 32.
857 *Id.* at ¶¶ 22–31.
858 *Id.* at ¶ 42.
859 *Id.* at ¶ 43.
860 *Id.* at ¶¶ 44–45.
861 *Id.* at ¶ 45.

distinguished from *County of Kendall v. Rosenwinkel*,[862] both of which are discussed below. Ultimately, the appellate court determined that the city was only required to show that Aims had violated the ordinance to receive injunctive relief, which was the only available remedy in the Code, thereby reversing the trial court's judgment and remanding the cases.[863]

II. PRIOR CASELAW

A. People ex rel. Sherman v. Cryns

The City of Rock Falls relied on *People ex rel. Sherman v. Cryns* to support its argument that the trial court could not exercise discretion in balancing the equities to determine whether to grant its petition for a permanent injunction.[864] In *Cryns*, Sherman, the Director of Professional Regulation, filed for injunctive relief against Cryns, who was a midwife accused of violating the Nursing and Advanced Practice Nursing Act (the Act).[865] Through this Act's authority, Sherman was seeking injunctive relief to enforce compliance with the Act.[866] Most relevant to *City of Rock Falls*, the Illinois Supreme Court in *Cryns* stated that "[w]here, as here, the State or a governmental agency is expressly authorized by statute to seek injunctive relief, the traditional equitable elements necessary to obtain an injunction need not be satisfied"[867] and that "[t]he State or the agency seeking the injunction need only show that the statute was violated and that the statute relied upon specifically allows injunctive relief."[868] The Illinois Supreme Court reasoned that a statute that authorizes injunctive relief to enforce it implies that any violation causes harm to the general public that requires equitable relief.[869] Therefore, the court determined that "[o]nce it has been established that a statute has been violated, no discretion is vested in the circuit court to refuse to grant the injunctive relief authorized by that statute."[870] While similar to the issues in *City of Rock Falls*, *Cryns* solely focused on enforcing a statute by the state and did not address whether the same rule would apply when the facts involved a county or city ordinance.

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862 *Id.* at ¶¶ 46–49.
863 *Id.* at ¶¶ 50–53.
864 *Id.* at ¶ 19.
865 People *ex rel*. Sherman v. Cryns, 786 N.E.2d 139, 144–45 (Ill. 2003).
866 *Id.*
867 *Id.* at 149.
868 *Id.* at 150.
869 *Id.*
870 *Id.* (citing Midland Enters. v. City of Elmhurst, 624 N.E.2d 913, 920 (Ill. App. Ct. 1992)).

B. County of Kendall v. Rosenwinkel

The defendant, Aims, relied on *County of Kendall v. Rosenwinkel* to support its position that the court may, and should, balance the equities in determining whether to grant a permanent injunction.[871] *Rosenwinkel* also involved an alleged ordinance violation and a county's petition for a permanent injunction.[872] The court of appeals in *Rosenwinkel* stated, "a court need not balance the equities before enjoining a zoning ordinance violation if the violation is intentional . . . but such balancing is permissible."[873] While the court of appeals did not itself balance the equities in its opinion, it did direct the trial court on remand to consider certain facts when balancing them.[874] In doing so, the court in *Rosenwinkel* departed from the ruling in *Cryns* and found that a court still had the discretion to balance the equities, even if they were not required to.[875] The decision in *Rosenwinkel*, as well as subsequent cases, demonstrates the split in the appellate courts: Is the *Cryns* decision a rule that must be followed, or is it simply a guideline that the courts can choose to ignore? This split in the appellate courts is likely what prompted the Illinois Supreme Court to hear *City of Rock Falls.*

III. ANALYSIS

A. Illinois Supreme Court's Ruling

The Illinois Supreme Court, like the appellate court, also addressed *Cryns* in its analysis.[876] Agreeing with both of these decisions, the court acknowledged a difference between "seeking injunctive relief pursuant to a court's inherent equitable authority and one seeking relief pursuant to a statute."[877] Additionally, the Illinois Supreme Court followed its past reasoning in *Cryns*, finding that when it comes to injunctive relief authorized by a statute—or here an ordinance—the legislative body has essentially already balanced the equities and determined that the authorized remedy is appropriate.[878] Therefore, "[a] court is not free to disregard or 'rebalance' the policy determinations made by a legislative body[]" and cannot allow the violation of the statute or ordinance to continue.[879] The court then expanded its decision in *Cryns* to include ordinances because they, like statutes, "were

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871 City of Rock Falls v. Aims Indus. Servis., LLC, 2022 IL App (4th) 220208-U, ¶ 46.
872 County of Kendall v. Rosenwinkel, 818 N.E.2d 425, 429 (Ill. App. Ct. 2004).
873 *Id.* at 435 (citation omitted).
874 *Id.* at 443.
875 *Compare id.* at 435, *with Cryns*, 786 N.E.2d at 150.
876 *Aims Indus. Servs., LLC*, 2024 IL 129164, at ¶¶ 19–20.
877 *Id.* at ¶ 21.
878 *Id.*
879 *Id.*

enacted by a legislative body and have the full force of law."[880] In doing so, the court overruled *Rosenwinkel* to the extent it conflicted with *Cryns*.[881]

B. Significance of This Case

Overall, the Illinois Supreme Court reached the correct result. First, as the court reasoned in its opinion, allowing a court to deny the authorized remedy of a permanent injunction after finding that an ordinance was violated would "effectively permit a trial court to second-guess the legislative body as to whether a particular regulatory scheme was equitable or otherwise in the best interests of the public, even though such decisions fall squarely within the realm of legislative determinations."[882] Put simply, the decision in *City of Rock Falls* ensures that the legislative and judicial branches do not encroach on the other's powers.

A more practical benefit of the outcome of this case is that it is consistent with the prior Illinois Supreme Court decision in *People ex rel. Sherman v. Cryns.* Instead of having to carve out an exception or distinguish between which levels of governmental bodies could obtain permanent injunctions as authorized in their statutes or ordinances, the decision in *City of Rock Falls* is a natural progression of the ruling in *Cryns* and will lead to more predictable results.

Finally, while this case addresses a narrow issue that potentially few practitioners outside of municipal law will experience, the impact at the local level is profound. Rock Falls likely continued to appeal this case to ensure that it did not set a potentially harmful future precedent for itself and other small municipalities in Illinois. If a court determined that the city was unable to enforce its ordinance in this case, then it would weaken a power essential to the functioning of a municipality, not only in relation to the public sewer system but also other utilities and ordinances. While the facts here may not seem that dire considering the property already had a functioning private sewer system,[883] under different facts, the threat to public health and safety could be much more severe. Even if a court balances the equities and grants a permanent injunction, it is still possible that the municipality's goal of protecting public health and safety is inhibited.[884] In this case, the Illinois Supreme Court's reasoning goes directly to this point. The balancing of the equities was already done when the state or municipality determined that the ordinance was necessary for the functioning of the local government and

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880 *Id.* at ¶ 22.
881 *Id.* at ¶ 25.
882 *Id.* at ¶ 24.
883 *Id.* at ¶ 4.
884 *Id.* at ¶ 50.

expressly made injunctive relief an available remedy.[885] While it may not seem that every situation warrants the strict enforcement of an ordinance, a municipality should strive to enforce ordinances objectively to avoid further litigation.

This case does not affect a citizen's ability to challenge the constitutionality of an ordinance, prevent the use of provided waiver or exception processes, or reduce the burden a municipality must meet to prove an ordinance was violated. Instead, it ensures that local governmental bodies can enforce their ordinances as written and carry out some of their most important functions.

C. Remaining Issues

Prior to the Illinois Supreme Court's ruling in *City of Rock Falls*, the court in *Village of Riverdale v. American Transloading Services* cited to the appellate court decision of *City of Rock Falls* to distinguish the cases.[886] *Village of Riverdale* involved the village's request to the circuit court to issue a preliminary injunction "preventing defendants from operating their businesses" after the village had denied their applications to renew their licenses according to a village ordinance.[887] Instead of the permanent injunction at issue in *City of Rock Falls*, *Village of Riverdale* focused only on granting a preliminary injunction based on an ordinance.[888] However, both cases were similar in that the defendants argued that the court should balance the equities prior to granting the injunction.[889] The court in *Village of Riverdale* "underst[ood] why a court might think that a balancing of equities is unnecessary when the injunction is brought by the government based on an ordinance violation[,]" but "ha[d] little trouble concluding that, before issuing a *preliminary* injunction, the court must consider the equities and hardships in the particular case."[890] It reasoned that the court must consider if they are "preserving or upsetting the *status quo*[]" by granting a preliminary injunction in order to not detrimentally impact one of the parties "as to effectively decide the case before it is conclusively resolved[.]"[891] Therefore, while the Illinois Supreme Court did not address the issue of preliminary injunctions in *City of Rock Falls*, other cases suggest that the court should balance the equities before concluding the case if a party seeks a preliminary injunction. Without a final determination by the Illinois

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885 *Id.* at ¶ 49.
886 Vill. of Riverdale v. Am. Transloading Servs., 2023 IL App (1st) 230199-U, ¶ 20.
887 *Id.* at ¶ 2.
888 *See generally id.*; *Aims Indus. Servs., LLC*, 2024 IL 129164, at ¶ 1.
889 *See generally id.*
890 *Vill. of Riverdale*, 2023 IL App (1st) 230199-U, at ¶¶ 20–21.
891 *Id.* at ¶ 22.

Supreme Court on the issue of preliminary injunctions, municipalities should be aware of the limitations to their options for an injunction.

Additionally, while the Illinois Supreme Court determined that a permanent injunction should be issued in *City of Rock Falls* without the court balancing the equities, it is yet to be determined how the supreme court's ruling will affect the enforcement of the injunction. Issues involving "fairness" and balancing the equities may arise in contempt proceedings in enforcing the injunction.

D. Takeaways for Practitioners

In addition to the remaining issues discussed above of which city attorneys should be aware, this case offers other lessons. For example, practitioners should be cautious as to what waivers, exceptions, or exclusions they allow to their ordinances and how they grant them. While not directly related to the main issue discussed in this Case Note, the courts at every level of this case acknowledged that another business was granted an exception to the relevant ordinances.[892] Aims also requested a similar exception "to continue utilizing the private sewage disposal system at the Property[;]" however, Aims' request was denied.[893] While a reason for this denial is not given in the case history, this was likely in part due to Aims' request being submitted to the city approximately one week before trial and two years after the city filed its petition, even though Aims' claimed its financial hardship would be higher than that of the other business.[894] This was one of the factors the trial court addressed as favoring Aims in denying the city's petition for injunctive relief.[895] Once again, while this issue was not the main focus of this case and the trial court was ultimately unable to balance the equities here,[896] it may still be wise for practitioners to be cautious of the exceptions they grant and the basis for which they grant them in the event they create unintended precedent or standards.

CONCLUSION

While perhaps not an issue at the heart of most cases, for municipalities, the ability to enforce their ordinances, especially those related to services like utility connections, is essential for them to function. *City of Rock Falls v.*

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892 *See* City of Rock Falls v. Aims Indus. Servs., LLC, 2022 IL App (4th) 220208-U, ¶ 8; *Aims Indus. Servs., LLC*, 2024 IL 129164, at ¶ 10.

893 *Aims Indus. Servs., LLC*, 2022 IL App (4th) 220208-U, at ¶ 8.

894 *Id.* at ¶¶ 8–9.

895 *Id.* at ¶ 13.

896 *See id.*

Aims Industrial Services, LLC provides other municipalities with important case law in the event they face similar noncompliance with their ordinances.

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