No. 13-3790

In the United States Court of Appeals
for the Seventh Circuit

Michael W. Underwood, Joseph M. Vuich, Raymond Scacchitti, Robert McNulty, John E. Dorn, William J. Selke, Janiece R. Archer, Dennis Mushol, Richard Aguinaga, James Sandow, Catherine A. Sandow, Marie Johnston, and 338 other Named Plaintiffs listed in Exhibit 1 to Complaint,	)	District Court No. 13-CV-5687
Plaintiffs,	)	Hon. Judge James F. Holderman
v.	)	
CITY OF CHICAGO, a Municipal Corporation,	)	Previous Nos. in Cook County Circuit Court:
Defendant,	)	01 CH 4962
and	)	87 CH 10134
Trustees of the Policemen's Annuity and Benefit Fund of Chicago;	)	Removed from 2013 CH 17450
Trustees of the Firemen's Annuity and Benefit Fund of Chicago;	)	
Trustees of the Municipal Employees' Annuity and Benefit Fund of Chicago; and	)	
Trustees of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago, et al.	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF
1) MOTION FOR STAY AND/OR AN INJUNCTION PENDING APPEAL AND
2) REQUEST FOR REFERAL TO THE ILLINOIS SUPREME COURT

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The City's brief uses artful combinations of quotes and non-quotes to disingenuously make it appear that the most important issue—whether protected benefits of participation in a pension or retirement system includes healthcare benefits, or is limited to annuities—has been or should be regarded as resolved in its favor. This is not so. We deal with these through the reply and suggest the City's disingenuous presentation of the law should cast appropriate doubt on its legal position.

Contrary to the City's Brief at 2, the issue is not whether the City may reduce a "subsidy," as if it was someone else's obligation. Rather, the issue is whether the healthcare program the City provides participants in the City's four Annuity and Benefit Funds is a benefit of participation in those systems, protected against reduction.

1. Preliminarily, Plaintiffs' Motion for denial of a motion for injunction is properly filed.

Defendants argue that Plaintiffs must move first in District Court. Def. Br. at 1. In this case, Plaintiffs' *did* move first in the District Court, the District Court decided to ignore the Motion for an Injunction and Stay and address the Defendants' Motion to Dismiss first. Then, the District Court denied the injunction as moot. Thus, under Fed. R. App. Pro. 8, an additional motion would be impracticable. Moreover the appeal of a denial of an injunction is appealable. F.R.C.P. 62.

2. Plaintiffs demonstrated they have a Likelihood of Success on the merits.

A. The City's misquoting.

The City's repeated labelling of the constitutional provision at issue as the "pension" clause, Def. Br. at 6, as if it protects only pension or annuity payments, does not address the actual language of the provision, which explicitly protects benefits of participation in a pension or retirement system, from being diminished or impaired:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an

> enforceable contractual relationship, the benefits of which shall not be diminished or impaired. 1970 Illinois Constitution, Article XIII, §5.

The City cannot dispute that healthcare coverage is something that the retirees receive as participants in one of the City's four statutory Annuity & Benefit Funds, each established under an Illinois Pension Code statute. The health insurance is part of the retirees benefit package, and these retiree benefits are benefits of membership in a retirement system, and those benefits continue while or so long as, the status is maintained.

B. City ignores the plain language of the constitution's protection provision.

The City 's argument that the constitutional clause is "devoid" of a reference to health care coverage, simply does not address the truth that healthcare coverage is certainly a benefit. Def. Br. at 8.

The City's citation to *Rousey* is an outrageous misuse of that case. *Rousey v. Jacoway*, 544 U.S. 320, 330 (2005). *Rousey* deals with the issue of whether an IRA comes within the definition of a pension, annuity or similar plans protected from creditors in federal bankruptcy proceedings. The issue was whether IRAs are "similar" to stock bonus, pension, profit sharing or annuity plans or contracts. The Court looked for definitions of "pension" and "annuity" as relating to (one of the definitions the court cited) plans (not limited to those providing periodic payments) that substitute for wages, and found the IRA protected because it, like the pension, annuity, stock plans, etc. all are substitutes for wages lost upon retirement, thus are "similar plan[s] or contract[s]" under 11 USC §522(d)(10)(E). *Rousey*, 544 U.S. at 334. To whatever extent *Rousey* might actually apply here, it supports the participants' arguments that retirement benefits meant to replace benefits of employment are sufficiently similar to pensions, thus protected by even the mislabeled -- short hand "Pension" Clause.

Similarly, the City's disparaging Mr. Madiar's analysis fails to refute the logic of his analysis. Madiar, *"Is Welching on Public Pension Promises An Option"* at Plaintiffs' motion at

page 8 (page 4 of the article), where the dictionary definition of a benefit or of other entitlements available to the employee under the terms of membership are "anything contributing to an improvement in condition." Madiar explains, at 4:

> Accordingly, the word "benefit" refers not only to the specific annuity payment a public employee is eligible to receive, but also other entitlement of membership that advantage the public employee.

Indeed, the common understanding of an employment as also having "benefits" is commonly and plainly understood to mean providing "health insurance." The clause does not have limiting language that benefits are only annuities. And, the clause uses the word "benefits" not "annuity" or "annuity payment." Further, the word used is "benefits" (plural, rather than the singular "benefit") which implies the likelihood that there would be more than one benefit being protected, not just an annuity payment. If the drafters of the provision had intended only to protect a participant's pension or annuity payment, or right to payment, the word "benefits" would have been left out. Alternatively, if the provision had intended to specify a limited list of protected items, that could have been done. Neither was the case. Thus, the City mischaracterizes Madiar's article as not addressing "benefits." Def. Br. at 3. The article certainly does address "benefits," as the plain meaning being inclusive of health benefits.

Rather than addressing the substantive points raised by Mr. Madiar's unique compendium analyzing virtually every Illinois Pension Code decision, the City attacks the Madiar article, labeling it a position paper. Clearly, the article's research, analysis and substantive conclusions are highly persuasive not only by its heft, but also by its detail, and thoroughness of the legislative history, adoption, and review of subsequent case law.

C. The legislative history is supportive of Plaintiffs' plain language view.

The City's argument in this respect is that the actual language of the provision should be ignored, in favor of a totally concocted legislative intent. The plain language protects "benefit"

of participation" and does not limit them to annuity payments. The term benefits is broad, and the clause does not delimit what benefits are protected. Madiar makes explicit, the constitutional conventions' history makes clear the benefits protected were the public employees' "full pension benefits." Plts Br. at 9, *citing*, Madiar, at 24-26. Further, the City does not provide any evidence that the drafters' intent and/or the voters understanding of the clauses' intent was to be limited to solely protect annuity payments.

Indeed, the legislative history supports Plaintiffs' view. "The clearly expressed intention of the framers was to protect public pension benefits, but not to control funding." *McNamee v. State*, 173 Ill. 2d 433, 444 (1996) (related to not requiring full funding and chronic underfunding).[1]

If the clause's protection is only for annuities, then provision would not explicitly protect the "benefits" of participation, by way of "Membership in any…retirement system" and would

[1] The Illinois Supreme Court concluded that section 5 of article XIII does not create a contractual basis for participants to expect a particular level of funding, but a contractual right "that they would receive the money due them at the time of their retirement." *McNamee v. State*, 173 Ill. 2d 433, 444-45 (1996) *citing*, *Lindberg*, 60 Ill.2d at 271. The Court continued to find that money due is not just an annuity payment, but that a diminished benefit is expansively viewed.

> "It is with this understanding of the protection afforded by section 5 of article XIII that this court has consistently invalidated amendments to the Pension Code where the result is to diminish benefits. See, *e.g.*, *Felt v. Board of Trustees of the Judges Retirement System*, 107 Ill.2d 158 (1985) (finding unconstitutional an amendment to Pension Code that changed the salary base for determining pension benefits); *Buddell v. Board of Trustees, State University Retirement System*, 118 Ill.2d 99 (1987) (finding unconstitutional an amendment to Pension Code that eliminated a participant's right to purchase military service credits to increase benefits at retirement). Similarly, the appellate court has also invalidated amendments to the Pension Code only where the result was to diminish benefits. See, *e.g.*, *Kraus v. Board of Trustees of the Police Pension Fund*, 72 Ill.App.3d 833 (1979) (finding unconstitutional an amendment to Pension Code reducing the benefits paid to a beneficiary who changes from disability retirement to regular retirement); *Schroeder v. Morton Grove Police Pension Board*, 219 Ill.App.3d 697 (1991) (finding unconstitutional an amendment to Pension Code that reduced pension benefits based upon receipt of worker's compensation benefits).

McNamee v. State, 173 Ill. 2d 433, 444-45 (1996). (parallel cites omitted)

not also name the "retirement systems" "Annuity and Benefit" Plans. Thus the implication is iron clad, there is an intention to protect "benefits" of membership too.

The City's brief fails to acknowledge that the legislative history certainly does not exclude health benefits. Indeed, the City's quotes employed were simply two examples discussed, neither one as exclusive or limiting; just two examples. Def. Br. at 8-11. If all that was protected is the amount of the annuity, then the example of extending the necessary years of service would not necessarily constitute a lesser annuity. While the City's cited examples are merely hypotheticals, it does not exclude the idea that someone contributing to their retirement system is entitled to all of the benefits of participation in that system.

D. The City's citation to 29 U.S.C. §1002(2)(A) ERISA's definition of a "Pension Plan" is not relevant to the issue either.

Nor is the City's citation to ERISA's definition of a pension helpful to the exercise Def. Br. at 8-9. The issue is not whether healthcare benefits are "pensions" (although a fair reading of the City's citations supports that notion too), the issue is whether the protected "benefits" of participation include healthcare benefits provided to "participants" in the four "Annuity and Benefit" Plans.

E. The decisions interpreting the constitutional provision are split, but may be harmonized by the fact that all decisions in which the health care benefits come by participation in a retirement system are protected, while benefits received under an employment statute might not be.

Fair analysis highlights the critical distinction among the decisions, between benefits under employment statutes versus benefits of participation in a retirement system. Indeed, the fact that *Maag* deals with state employees who get their coverage if at all, via their *employee* status, under an *employment* statute, not a *Pension Code* provision. Nonetheless the Illinois Supreme Court's electing to take up the adverse decision up for direct review suggests that the employee's position there has merit. Indeed, if the state employees prevail in the Illinois

Supreme Court on an employment statute, the City retiree participants whose benefits come via Pension Code provision must necessarily prevail.

Nonetheless, the three highest-court State cases all recognize the critical distinction between employment benefits from benefits that come from participation – membership – in a retirement system. Defendants cite the New York case, *Lippman,* Def. Br. at 12-14, which adversely deals with benefits provided under employment statutes, rather than pension or retirement provisions. Here, the City's manipulations become offensive. The City quotes from *Lippman* without mentioning that both *Lippman* (and *Maag*) deal with people claiming their healthcare coverage from their being a former employee under an employment statute, while this case (like both *Everson* and *Duncan*, *infra*) deals with people whose claims arise from their being participants in a Pension Code protected retirement system. If language means anything, the significance of that difference is critical.

The City's quote from *Lippman* actually highlights the significant difference:

> "Payment of part or all of his or her health insurance premiums is a benefit that comes to a retired employee not as a benefit of membership in a retirement system but because he or she was an employee of the State, or participating employer as to whom the legislature has provided … that part of the premium shall be paid by the employer and the employer may, if it so chooses, increase the portion of the premium that it pays."

Def. Br. at 13, citing *Lippman* at 318-9. Thus, even the city's quote recognizes the difference, which distinguishes both *Maag* and *Lippman* from the case here.

The distinction is underscored in comparing *Lippman* with the Hawaii and Alaska state Supreme Court decisions, *Everson v. State of Hawaii*, 122 Hawai'i 402 (2010) and *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d. 882 (2003) both of which hold health insurance benefits are benefits and are protected from diminishment by the state constitution's non-impairment clauses. While the Illinois Constitutional provision looked to New York, language of the four states' constitutional provisions are essentially identical.

The City cites to *Maag*'s lower court decision against State employees' health benefits, ignoring *Marconi*'s lower court declaration of Constitutional protection, which the Appellate Court remanded for favorably reaching the Constitutional protection issue, without first deciding whether the healthcare benefits are protected by contract with a presumption in favor of contract vesting for retirees, *Marconi v. Joliet*, 2013 IL App. (3d) 110865 (3d Dist. 2013). Def. Br. at 14. The fairest evaluation is that there is a split in the Illinois lower courts, which the Illinois Supreme Court found it sufficiently important to review *Maag*'s adverse holding on direct appeal.

Indeed, *Marconi's* appellate ruling supports the presumption that healthcare benefits are presumed to be protected by contract vesting before even resorting to Constitutional protection. The City's effort to diminish the *Marconi* holding below, just because the appellate court said the lower court should have reviewed the question on a non-constitutional ground before reaching the Article XIII, Section 5 protection, does not diminish its accurate presumption in favor of protection. Nonetheless, the appellate court's remand was notably with direction to apply a presumption in favor of vesting, even on a contract basis. *Marconi*, like most everything else the City argues, is simply different when one actually reads the case.

4. Plaintiffs do show Irreparable Harm (that monetary remedies are inadequate).

A. Regarding the premium increases, the City misstates that most people are paying very little more.

The City diminishes the impact of the increase, minimizing the retirees' increases in a deceptive manner. Def. Br. at 4. While the City admits to a maximum increase of $370 dollars per month, which is $4,440 dollars over a year, the actual increase from reconciled audited charges is higher and exists in all cases.

Each year under the Korshak Settlement, the City's charged rates have been audited and reconciled – between the estimated costs charged against the actual amounts due. Then, each

year, where an overcharge was identified, the reconciliation triggered a refund to the overcharged retirees. The City overcharged annuitants for the coverage virtually every year. Thus, for the new rates being imposed, that we seek to maintain, compared to the reconciled rates, all participants are paying more than their reconciled rates, and will now be paying more and with no counter check of an annual audit and reconciliation. And, while the older retirees' increases may be only $5, families with children are being subjected to increases of up to $376 per month, which is $4,512 annually and general increase of 25% to 35%.

We have attached a table, Exhibit 1[2], which compares the increases taking into consideration the audit-reconciled charges, which show that *every participant category* is experiencing increases from last year's audit-corrected rates. For absolutely every category, including the Korshak/Window Class participants, all will have increases from the true charges corrected for the annual audits, which have shown that the City's rates every year have been much higher than the true applicable amounts of the participants' shares. The difference in amounts is striking. In every single year under the Settlement, virtually every category of participant was charged a premium that the audit resulted in rebates, to virtually every class of participant in each year. This was the result of the fact that the Settlement required the City to pay *at least* a certain percentage, and for an annual audit to determine the correct share. The result was that the projections the City has used have always substantially overstated the expected healthcare costs, requiring reconciliation refunds every single year to virtually every single participant.

[2] The amounts shown in the exhibit compiled by undersigned counsel are the figures from the City's 2013 rates charged, and as corrected by the reconciliation audit, and the City's 2014 rate increase sent to annuitants.

This year in contrast the City's unilaterally declared percentage will be "up to X%", rather than "at least X%", and there will be no audit. Thus, annuitants will be charged at greater than the correct cost share, and without an eventual audit, reconciliation and refund.

Compared to the correct reconciled rates for the latest year 2012, all categories of participants will experience increases, including the Korshak/Window retirees, and some of the increases will exceed $4,400; a vast increase for annuitants, certainly an amount the City can more easily bear while this case proceeds.

B. The City is in the best position to solve the funding issues, and a stay of the raising of the rates to maintain the status quo does not undermine the City's financial position.

The City, at Def. Br. at 5, relies upon the RHBC Report's conclusions[3] (at page 31 of the Report), (Chaired by former Comptroller Ahmad, who has pleaded guilty to corruption charges for his service to the State of Ohio) provide no basis for Mr. Ahmad's conclusions. His bald statements of "untenable" financial consequences for the City, as well as "not a viable course of action" or which would likely "affect both the City's bond rating and its creditworthiness" are utterly unsupported by any data whatsoever, especially considering that this "untenable" amount makes up something less than 6% of the City's annual budget. It is reasonable for the City, rather than the retiree healthcare participants to shoulder the burden and maintain the status quo while this case is being litigated.

C. The Plaintiffs have Shown Irreparable Harm/Inadequate Remedy.

Dumping the retirees in the ACA is the City's declared plan; and it can wait. If retirees elect to take ACA, they will not be able to return to the City's plan without proof of insurability. Thus, in fact, the March 31, 2014 date becomes a irreparable harm as well as an election date, because that deadline is a hard stop date for choosing ACA coverage for the year. If this court

[3]RHBC:http://www.cityofchicago.org/content/dam/city/depts/fin/supp_info/Benefits/RHBC/ReportToMayor/RHBC_Report_to_the_Mayor.pdf

does not see the January, 2014 changes as being irreparable harm yet, the ACA signup deadline surely is.

D. The City's argument that ACA does not require a "forced Interim Decision", versus "alternative coverage for Certain Retirees".

The City's argument essentially asserts that the group here most at risk are the 6,100 Non-Medicare eligible participants, ignoring that they constitute at least 25% of the retirees.

5. Briefing the Certification to Illinois Supreme Court now is proper and efficient.

The City's argument is not that Certification of the Question is wrong, merely premature prior to full briefing on the merits. This Court can by motion or *sua sponte* certify a question to the Illinois Supreme Court. There seems little bona fide dispute that the issues before this court are most appropriately decided by the Illinois Supreme Court, which presently has the related issue of the State retirees pending. The City despite removing the case to federal court, does not contest that the questions sought to be certified by arise under Illinois law, that a similar issue is currently before the Illinois Supreme Court, and should be decided by that court. Under these circumstances, this court has within its discretion the ability to certify and refer the issue now, or hold the matter for that court's ruling in *Maag*.

Either way, the fairest treatment is unquestionably to hold the City's rate increases until the matter is decided.[4]

Respectfully Submitted,

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[4] In order to accommodate the reasonable agreed briefing schedule for both parties, the parties agree that the court should treat the status quo as that existing before the City's announced rate increase.

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Chart of City Rate Changes

		Pre-8/23/1989 Retirees				Retirees 8/23/1989-7/1/2005			
Retiree Category	Medicare Status	2013 Rates Gross	2013 Rates Net	2014 Rates	Percent Increase from Net	2013 Rates Gross	2013 Rates Net	2014 Rates	Percent Increase from Net
Retiree	Medicare	$ 69	$ 64	$ 69	7.25%	$ 69	$ 64	$ 110	41.82%
	Non Medicare	$ 69	$ 64	$ 69	7.25%	$ 318	$ 279	$ 454	38.55%
Retiree & Spouse	M/M	$ 197	$ 187	$ 197	5.08%	$ 197	$ 187	$ 277	32.49%
	M/Non	$ 197	$ 187	$ 197	5.08%	$ 476	$ 433	$ 651	33.49%
	Non M/M	$ 197	$ 187	$ 197	5.08%	$ 446	$ 403	$ 621	35.10%
	Both Non Medicare	$ 197	$ 187	$ 197	5.08%	$ 715	$ 636	$ 982	35.23%
Retiree & Children	Med&Children	$ 184	$ 172	$ 197	12.69%	$ 184	$ 172	$ 277	37.91%
	Non Med & Children	$ 184	$ 172	$ 197	12.69%	$ 423	$ 376	$ 608	38.16%
Retiree Spouse and Children	M/M/C	$ 311	$ 295	$ 325	9.23%	$ 311	$ 295	$ 444	33.56%
	M/N/C	$ 311	$ 295	$ 325	9.23%	$ 581	$ 529	$ 805	34.29%
	Non/M/C	$ 311	$ 295	$ 325	9.23%	$ 551	$ 499	$ 775	35.61%
	Non/Non/C	$ 311	$ 295	$ 325	9.23%	$ 820	$ 733	#####	35.48%
Children only	N/A					$ 26	$ 19	$ 80	76.25%

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Chart of City Rate Changes

Retirees Post 7/1/2005

Retiree Category	Medicare Status	20 Years of Service				15-19 Years of Service				10-14 Years of Service				Less than 10 years			
		2013 Rates Gross	2013 Rates Net	2014 Rates	Percent Increase from Net	2013 Rates Gross	2013 Rates Net	2014 Rates	Percent Increase from Net	2013 Rates Gross	2013 Rates Net	2014 Rates	Percent Increase from Net	2013 Rates Gross	2013 Rates Net	2014 Rates	Percent Increase from Net
Retiree	Medicare	$ 84	$ 79	$ 121	**34.71%**	$ 99	$ 93	$ 132	**29.55%**	$ 114	$ 107	$ 144	**25.69%**	$ 233	$ 223	$ 233	**4.29%**
	Non Medicare	$ 364	$ 321	$ 489	**34.36%**	$ 410	$ 363	$ 524	**30.73%**	$ 456	$ 404	$ 559	**27.73%**	$ 823	$ 737	$ 840	**12.26%**
Retiree & Spouse	M/M	$ 226	$ 215	$ 299	**28.09%**	$ 255	$ 243	$ 321	**24.30%**	$ 284	$ 271	$ 343	**20.99%**	$ 517	$ 496	$ 517	**4.06%**
	M/Non	$ 536	$ 488	$ 697	**29.99%**	$ 596	$ 543	$ 743	**26.92%**	$ 656	$ 598	$ 788	**24.11%**	$ 1,137	$1,041	$ 1,154	**9.79%**
	Non M/M	$ 506	$ 458	$ 667	**31.33%**	$ 566	$ 513	$ 713	**28.05%**	$ 626	$ 568	$ 758	**25.07%**	$ 1,107	$1,011	$ 1,124	**10.05%**
	Both Non Medicare	$ 805	$ 718	$ 1,051	**31.68%**	$ 895	$ 799	$ 1,120	**28.66%**	$ 985	$ 880	$ 1,189	**25.99%**	$ 1,706	$1,530	$ 1,739	**12.02%**
Retiree & Children	Med&Children	$ 211	$ 199	$ 299	**33.44%**	$ 239	$ 225	$ 320	**29.69%**	$ 266	$ 251	$ 342	**26.61%**	$ 487	$ 463	$ 517	**10.44%**
	Non Med & Children	$ 481	$ 428	$ 653	**34.46%**	$ 538	$ 481	$ 698	**31.09%**	$ 596	$ 533	$ 742	**28.17%**	$ 1,056	$ 952	$ 1,101	**13.53%**
Retiree Spouse and Children	M/M/C	$ 353	$ 335	$ 476	**29.62%**	$ 395	$ 375	$ 509	**26.33%**	$ 437	$ 416	$ 541	**23.11%**	$ 771	$ 736	$ 801	**8.11%**
	M/N/C	$ 653	$ 595	$ 860	**30.81%**	$ 724	$ 661	$ 916	**27.84%**	$ 726	$ 727	$ 971	**25.13%**	$ 1,370	$1,256	$ 1,416	**11.30%**
	Non/M/C	$ 623	$ 565	$ 830	**31.93%**	$ 694	$ 631	$ 886	**28.78%**	$ 768	$ 697	$ 941	**25.93%**	$ 1,340	$1,226	$ 1,386	**11.54%**
	Non/Non/C	$ 922	$ 825	$ 1,215	**32.10%**	$ 1,024	$ 917	$ 1,293	**29.08%**	$ 1,125	$1,009	$ 1,372	**26.46%**	$ 1,939	$1,745	$ 2,000	**12.75%**
Children only	N/A	$ 39	$ 32	$ 91	**64.84%**	$ 53	$ 44	$ 102	**56.86%**	$ 66	$ 57	$ 113	**49.56%**	$ 173	$ 159	$ 203	**21.67%**