Appeal Nos. 119618, 119620, 119638, 119639, 119644 (consol.)

IN THE SUPREME COURT OF ILLINOIS

JEFFREY JOHNSON, ROBERT ORLICH, TERRY T. WHITE, FRANK T. LOWERY AND MUNICIPAL EMPLOYEES' SOCIETY, AS ASSOCIATIONAL REPRESENTATIVES FOR ITS MEMBERS,

Plaintiffs-Appellees,

v.

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, AND LABORERS' ANNUITY AND BENEFIT FUND OF CHICAGO,

Defendants-Appellants

MARY J. JONES, LINDA BALLENTINE, SYDELL F. HATCHETT, LAVERNE WALKER, BERNICE MOORE, BARBARA LOMAX, SAMANTHA NEEROSE, WYLENE L. FLOWERS, ARLENE WILLIAMS, GLORIA E. HIGGINS, WILLIE B. WILLIAMS, MARQUETTE DUNN, EMMA G. HOLMES, LAGRETTA GREEN, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 31, CHICAGO TEACHERS UNION LOCAL 1, IFT-AFT, TEAMSTERS LOCAL 700 and ILLINOIS NURSES ASSOCITATION,

Plaintiffs-Appellees

v.

MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO and BOARD OF TRUSTEES OF THE MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO,

Defendants-Appellants.

On Direct Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
Pursuant to Ill. Sup. Ct. Rs. 302(a) and 304(a)
Nos. 2014 CH 20668 & 2014 CH 20027
The Honorable Rita M. Novak, Judge Presiding

Brief of Appellees Jeffrey Johnson, Robert Orlich, Terry T. White, Frank T. Lowery and Municipal Employees Society

POINTS AND AUTHORITIES

NATURE OF THE CASE

This case is one of six consolidated appeals (Nos. 119618, 119620, 119638, 119639, 119644) of two cases (*Johnson* App. No. 119620 and *Jones*[1] App. No. 119618) from the Circuit Court's July 24, 2015 opinion and judgment, granting summary judgment for plaintiffs in both cases, holding P.A. 98-641 was unconstitutional on its face, in violation of article XIII, § 5 of the 1970 Illinois Constitution (the "pension protection clause"). Defendants appealed directly to this Court.

ISSUES PRESENTED

1. Whether Public Act 98-641's reduction and elimination of automatic annual annuity increases is unconstitutional as diminishing or impairing pension benefits in violation of the pension protection clause, over Defendants' argument that the statute improves the City's commitment to increase funding by repealable statute and/or whether such commitment to increase pension funding can offset an unconstitutional diminishment of benefits.
2. Whether the City's commitment to increase funding to the pensions by repealable statute is a benefit within the meaning of the pension protection clause, and/or whether such commitment to increase pension funding can offset an unconstitutional diminishment of benefits.
3. Whether the non-unanimous action of unions, without a vote from its members, can bind its members (and as well retirees) to violation of their individual constitutional rights.

[1] Brought by and for participants in the Municipal Employees' Annuity and Benefit Fund of Chicago and the Laborers' Annuity and Benefit Fund of Chicago.

JURISDICTION

On July 24, 2015, the Circuit Court rendered its judgment by Memorandum Opinion and Order declaring the Act unconstitutional, in violation of article XIII, § 5 of the 1970 Illinois Constitution. C1022-56. The Circuit Court denied Defendants' motion to stay the ruling and entered Rule 304(a) findings finding that there was no just reason to delay appeal or enforcement of its July 24, 2015 Order. *Jones* C2047.

The City filed its notice of appeal on July 29, 2015 (C1061); the MEABF and LABF filed theirs after on July 31, 2015 (C1102, 1147, 1185); the State filed a notice that it was joining the City's appeals on August 4, 2015. C1273. This Court has jurisdiction pursuant to Rules 302(a)(1)(for direct appeals to this Court in which a statute has been held invalid) and 304(a). This Court consolidated all of the aforementioned appeals by order on August 24, 2015.

STATEMENT OF FACTS

I. Relevant Statutory Provisions.

Public Act 98-641 ("the Act") was enacted on June 9, 2014. The Act reduces pension participants' automatic, annual annuity increases and eliminates increases in certain years altogether (including the first year of retirement). Specifically, the version of the statute previously in effect through June 8, 2014 provided compounding, 3% automatic annual annuity increases, *e.g.*:

> An employee who retires from service on or after January 1, 1987 shall, upon the first annuity payment date following the first anniversary of the date of retirement, or upon the first annuity payment date following attainment of age 60, whichever occurs later, have his then fixed and payable monthly annuity increased by 3%, and such annuity shall be increased by an additional 3% of the original fixed annuity on the same date each year thereafter. Beginning in January of 1999, *such increases shall be at the rate*

> *of 3% of the currently payable monthly annuity, including any increases previously granted under this Article.*

40 ILCS 5/11-134.1 (2013)(emphasis added). Here, after the Act's amendments, these same annuity increases have been tied to annual increases in the consumer price index, but cannot exceed 3%, and the increases no longer compound. Specifically, Article 8 changed as follows:

> (b-5) Notwithstanding any provision of this Section to the contrary:
>
> (1) A person retiring after the effective date of this amendatory Act of the 98th General Assembly shall not be eligible for an annual increase under this Section until one full year after the date on which such annual increase otherwise would take effect under this Section.
>
> (2) Except for persons eligible under subdivision (4) of this subsection for a minimum annual increase, there shall be no annual increase under this Section in years 2017, 2019, and 2025.
>
> (3) In all other years, beginning January 1, 2015, the Fund shall pay an annual increase to persons eligible to receive one under this Section, in lieu of any other annual increase provided under this Section (but subject to the minimum increase under subdivision (4) of this subsection, if applicable) in an amount equal to the lesser of 3% or one-half the annual unadjusted percentage increase (but not less than zero) in the consumer price index-u for the 12 months ending with the September preceding each November 1 of the person's last annual annuity amount prior to January 1, 2015, or if the person was not yet receiving an annuity on that date, then this calculation shall be based on his or her originally granted annual annuity amount.
>
> For the purposes of this Section, "consumer price index-u" means the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by all urban consumers, United States city average, all items, 1982-84 = 100.
>
> (4) A person is eligible under this subdivision (4) to receive a minimum annual increase in a particular year if: (i) the person is otherwise eligible to receive an annual increase under subdivision (3) of this

subsection, and (ii) the annual amount of the annuity payable at the time of the increase, including all increases previously received, is less than $ 22,000.

Beginning January 1, 2015, for a person who is eligible under this subdivision (4) to receive a minimum annual increase in the year 2017, 2019, or 2025, the annual increase shall be 1% of the person's last annual annuity amount prior to January 1, 2015, or if the person was not yet receiving an annuity on that date, then 1% of his or her originally granted annual annuity amount.

Beginning January 1, 2015, for any other year in which a person is eligible under this subdivision (4) to receive a minimum annual increase, the annual increase shall be as specified under subdivision (3), but not less than 1% of the person's last annual annuity amount prior to January 1, 2015 or, if the person was not yet receiving an annuity on that date, then not less than 1% of his or her originally granted annual annuity amount.

For the purposes of Section 1-103.1, this subsection (b-5) is applicable without regard to whether the employee was in active service on or after the effective date of this amendatory Act of the 98th General Assembly. This subsection (b-5) applies to any former employee who on or after the effective date of this amendatory Act of the 98th General Assembly is receiving a retirement annuity and is eligible for an automatic annual increase under this Section.

40 ILCS 5/8-137.[2]

Similarly, Article 11 was amended as follows:

(b-5) Notwithstanding any provision of this Section to the contrary:

(1) A person retiring after the effective date of this amendatory Act of the 98th General Assembly shall not be eligible for an annual increase under this Section until one full year after the date on which such annual increase otherwise would take effect under this Section.

(2) Except for persons eligible under subdivision (4) of this subsection for a minimum annual increase, there shall be no annual increase under this Section in years 2017, 2019, and 2025.

[2] 40 ILCS 5/8-137.1 adds the same section (b-5) verbatim for “heretofore retired participants of the MEABF.”

(3) In all other years, beginning January 1, 2015, the Fund shall pay an annual increase to persons eligible to receive one under this Section, in lieu of any other annual increase provided under this Section (but subject to the minimum increase under subdivision (4) of this subsection, if applicable) in an amount equal to the lesser of 3% or one-half the annual unadjusted percentage increase (but not less than zero) in the consumer price index-u for the 12 months ending with the September preceding each November 1 of the person's last annual annuity amount prior to January 1, 2015, or if the person was not yet receiving an annuity on that date, then this calculation shall be based on his or her originally granted annual annuity amount.

For the purposes of this Section, "consumer price index-u" means the index published by the Bureau of Labor Statistics of the United States Department of Labor that measures the average change in prices of goods and services purchased by all urban consumers, United States city average, all items, 1982-84 = 100.

(4) A person is eligible under this subdivision (4) to receive a minimum annual increase in a particular year if: (i) the person is otherwise eligible to receive an annual increase under subdivision (3) of this subsection, and (ii) the annual amount of the annuity payable at the time of the increase, including all increases previously received, is less than $ 22,000.

Beginning January 1, 2015, for a person who is eligible under this subdivision (4) to receive a minimum annual increase in the year 2017, 2019, or 2025, the annual increase shall be 1% of the person's last annual annuity amount prior to January 1, 2015, or if the person was not yet receiving an annuity on that date, then 1% of his or her originally granted annual annuity amount.

Beginning January 1, 2015, for any other year in which a person is eligible under this subdivision (4) to receive a minimum annual increase, the annual increase shall be as specified under subdivision (3), but not less than 1% of the person's last annual annuity amount prior to January 1, 2015 or, if the person was not yet receiving an annuity on that date, then not less than 1% of his or her originally granted annual annuity amount.

For the purposes of Section 1-103.1, this subsection (b-5) is applicable without regard to whether the employee was in active service on or after the effective date of this amendatory Act of the 98th General

> Assembly. This subsection (b-5) applies to any former employee who on or after the effective date of this amendatory Act of the 98th General Assembly is receiving a retirement annuity and is eligible for an automatic annual increase under this Section.

40 ILCS 5/11-134.1.[3]

The Act further increases required employee contributions. 40 ILCS 5/11-170; 40 ILCS 5/8-174.

II. History of Proceedings.

The Act was signed into law and became effective June 9, 2014. Plaintiffs in this matter filed their complaint against the LABF and MEABF, challenging the validity of the Act on behalf of participants of the LABF and MEABF on December 29, 2014 (C3) and their amended complaint on May 16, 2015. C190. Plaintiffs in the *Jones* similarly matter filed their complaint against the MEABF, on behalf of MEABF participants on December 16, 2014. *Jones* C3. The City subsequently intervened in order to defend the Act. C189.

On December 16, 2014, plaintiffs in the *Jones* matter moved for a preliminary injunction (*Jones* C29), which matter proceeded for several days, until the *Jones* plaintiffs filed a motion to stay the proceedings pending this Court's decision in *In re Pension Reform Litigation*. *Jones* C1078. The Circuit Court granted plaintiffs' motion to stay. *Jones* C180.

After this Court invalidated the nearly identical Public Act 98-599 in *In re Pension Reform Litigation* on May 8, 2015, the parties set an expedited briefing schedule (C181) and moved for summary judgment. C253-667. Because this Court rejected the

[3] 40 ILCS 5/11-134.3 adds the same section (b-5) verbatim for "heretofore retired participants of the LABF."

State's police powers defense in *In re Pension Reform Litigation*, the City abandoned the defense in its motion for summary judgment. C665-660. The Circuit Court held a hearing on July 9, 2015 and issued its opinion invalidating the Act on July 24, 2015. C1022-56; A1-36.

The Circuit Court held that "*In re Pension Reform Litigation* control[led] resolution of all the issues presented" and that the City's "net benefit" argument did not survive scrutiny "at several levels." C1043; A22.

First, the Circuit Court rejected the City's assertion that Section 22-403 of the Pension Code freed the City from any pension obligation, opining that Section 22-403 was "not consistent with the rights established by the pension protection clause," which guarantees payment of pension benefits from the government, (C1044-45; A23-24) and that Section 22-403 was a funding provision that could not be incorporated into the contractual relationship created by the pension protection clause. C1045-47; A24-26. The Circuit Court further held that the City's "new" financial obligations under the Act were not "benefits" and were subject to repeal by the General Assembly at any time, which infringed on the pension protection clause's limitation on legislative power to reduce benefits. C1047-48; A26-27.

Second, the Circuit Court rejected the Defendants' assertion that the Act was valid as a "bargained-for-exchange" because (1) "the unions involved in the negotiations were not acting as agents in the collective bargaining process," (C1051; A30) (2) "there [was] no showing that the unions could have acted as agents of retired members while at the same time acting as representatives of active employees," (C1051-52; A30-31) and (3) the individual nature of participants' constitutional rights under the pension protection

clause precluded the City from obtaining waiver of those rights through a collective bargaining process. C1052-53; A31-32.

Lastly, the Circuit Court held that the annuity reducing provisions of the Act could not be severed and the Act was thus invalid in its entirety. C1053-54; A32-33.

Defendants filed a motion to stay enforcement of the decision pending appeal on July 27, 2015 (C2029-43), which the Circuit Court denied on July 29, 2015. C2047.

SUMMARY OF THE ARGUMENT

Governed by *In re Pension Reform Litigation*, the Act here reduces automatic annual annuity increases and eliminates them in certain years altogether; essentially identical to Public Act 98-599 rejected by this Court in all relevant aspects in *In re Pension Reform Litigation*. The only difference here is that, in contrast with the State's police powers argument rejected in *In re Pension Reform Litigation*, the City here asserts two justifications:

First, essentially a rehash of the rejected police powers argument, the City asserts that its reduction of benefits is justified by the City's new commitment to make increased contributions where before, the City was purportedly not required to fund the pensions whatsoever under Section 22-403 of the Pension Code. The Circuit Court correctly held that Defendants' "net benefit" theory failed "[a]t several levels". C1043; A22. This holding was correct because (1) the Act's reduction of the amount of pension annuities participants will receive violates the pension protection clause of the 1970 Illinois Constitution on its face; (2) the pension protection clause already guarantees that pension benefits will be paid, so amendments that would purport to reissue this same guarantee do not provide an enforceable benefit; (3) funding provisions are explicitly excluded as

"benefits" within the meaning of the pension protection clause, and thus cannot provide any type of benefit as a matter of law; and (4) the City's factual argument that participants are "better off" with the Act than without it, is not only false, but nonetheless fails to overcome the Act's invalidity.

The City's alternative assertion that the unconstitutional diminishments are nonetheless enforceable as a bargained-for exchange ignores that (1) there was no actual agreement by the unions involved, (2) they did not follow required procedures to bind their bargaining units (i.e. active employees), (3) lacked any authority to bind retirees (who were never part of the asserted "bargaining unit"), and (4) the constitutional rights at issue here are individual rights, whose waiver can only be obtained individually from retirees, something Defendants never sought, nor obtained.

Lastly, the Circuit Court's finding that the Act here must be invalidated in its entirety should be affirmed because the very provisions which diminish participants' benefits in violation of the pension protection clause were explicitly deemed inseverable from the rest of the Act.

STANDARD OF REVIEW

As here, where the matter concerns the constitutionality of a statute, the Court conducts its review *de novo*. *Hawthorn v. Village of Olympia Fields*, 204 Ill.2d 243, 254-55 (2003).

ARGUMENT

This case presents merely the City of Chicago parallel to Public Act 98-599 which this Court held unconstitutional in *In re Pension Reform Litigation* where it (1) rejected Public Act 98-599's reducing and partially eliminating automatic annuity increases (2)

rejected the State's police powers justification and (3) found the unconstitutional provisions of the statute were not severable from the rest of the statute. Here, where the City reiterates the police powers justification as its "net benefit" argument, the Court must invalidate the Act as well.

I. The Act Diminishes Participants' Pension Annuities in Violation of the Pension Protection Clause.

A. The Act Reduces Annual Automatic Pension Annuity Increases.

As in *In re Pension Reform Litigation*, the Act here diminishes the amount of annuities participants will receive, and thus, diminishes benefits.

The pension protection clause does not operate on a sliding scale nor function by weighing the harm and benefits of a particular statute. Rather, the meaning of the pension protection clause is unambiguous and its language "is given effect without resort to other aids for construction." *Kanerva v. Weems*¸ 2014 IL 115811, ¶¶ 36, 41-42.

Construction of the 1970 Illinois Constitution is governed by the same principles governing the construction of statutes. *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 136 Ill.2d 513, 526-27 (1990). The Court's objective when construing constitutional provisions is to effectuate the common understanding of the citizens who adopted it (*Committee for Educ. Rights v. Edgar*, 174 Ill.2d 1, 13 (1996)) and look to the natural and popular meaning of the language as it was understood when the provision was first adopted. *Hamer v. Bd. of Educ. of Sch. Dist. No. 109*, 47 Ill.2d 480, 486 (1970). Where the language of a constitutional provision is unambiguous, it will be construed without resort to outside aids for construction. *Graham v. Illinois State Toll Highway Authority*, 182 Ill.2d 287, 301 (1998). Lastly, where "there is any question as to legislative intent and the clarity of the language of a pension statute, it must be liberally

construed in favor of the rights of the pensioner." *Prazen v. Schoop*, 2013 IL 115-35, ¶ 39.

Regardless of how the Pension Code or another statute codifies benefits, "eligibility for all of the benefits flows directly from membership in one of the State's various public pension systems." *Kanerva*, 2014 IL 115811 at ¶ 40. These benefits become protected the moment the individual becomes an employee of the City in a position covered by a public retirement system. *See Di Falco v. Bd. of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection Dist. No. One*, 122 Ill.2d 22, 26 (1988). Thus, at that same point an individual enters the public retirement system, any subsequent changes which diminish benefits cannot be applied to that individual. *Buddell v. Bd. of Trustees, State University Retirement System*, 118 Ill.2d 99, 105-06 (1987); *Felt v. Bd. of Trustees of the Judges Retirement System*, 107 Ill.2d 158, 162-63 (1985); *Kraus v. Bd. of Trustees of the Police Pension Fund*, 72 Ill.App.3d 833, -844-48 (1979); *Miller v. Retirement Bd. of Policemen's Annuity & Benefit Fund*, 329 Ill.App.3d 589 (2001); *Schroeder v. Morton Grove Police Pension Bd.*, 219 Ill.App.3d 697 (1991).

Here, the Act diminishes participants' benefits by eliminating or reducing the annual annuity increases to which participants were previously entitled. Specifically, instead of the automatic annual 3% increases in pension annuities every year, the Act now ties annual annuity increases to 50% of the percentage increase in the consumer price index-u, capping any increase at a *maximum* of 3%. In addition, the Act eliminates *any* annuity increases for the years 2017, 2019 and 2025, as well as eliminating annuity increases during participants' first year of retirement. Even worse, the annuity increases no longer compound.

Indeed, the General Assembly's findings with respect to the Act explicitly acknowledge that the Act reduces participants' annuities:

> In sum, the crisis confronting the City and its Funds is so large and immediate that it cannot be addressed through increased funding alone, without modifying employee contribution rates and annual adjustments for current and future retirees.

See Public Act 98-641, Section 1, ¶ 4. Defendants do not deny that the Act diminishes the amount of pension annuities participants are eligible for under the Act.

This Court recently struck down identical amendments in *In re Pension Reform Litigation*, 2015 IL 118585 because they "directly reduce[d] the value of retirement annuities." *Id.* at ¶ 47. As the Circuit Court below correctly noted, *In re Pension Reform Litigation* "controls resolution of all issues presented" in this case. C1043; A22. Accordingly, the Circuit Court held that the Act's annuity diminishing provisions violated the pension protection clause:

> The changes to members' annuities found in P.A. 98-641 are the same type of changes that the Supreme Court invalidated in *In re Pension Reform Litigation*. Here, as in that case, the individual Plaintiffs became members of MEABF and LABF before the Act's effective date. Similarly, here, as there, the changes reduce the amount of the annuity that the Plaintiffs were promised under the Pension Code when they joined the pension systems. It follows then that here, as in the case before the Supreme Court, "there is simply no way that the annuity reduction provisions … can be reconciled with the rights and protections established by the people of Illinois when they ratified the Illinois Constitution of 1970 and its pension protection clause."

C1041-42; A20-21 (quoting *In re Pension Reform Litigation*, 2014 IL 118585 at ¶ 47). Because the Act reduces participants' pension annuities from the statutory amounts previously in effect, the Act diminishes participants' benefits. Under *In re Pension Reform Litigation*, the analysis ends here.

B. No "Net Benefit" Can Result From Amendments to Funding as a Matter of Law.

i. The Act's "Funding Guarantee" is Duplicative of the Guarantee Provided by the Pension Protection Clause.

The City's assertion that the Act here is different because it contains funding provisions different from Public Act 98-599 at issue in *In re Pension Reform Litigation* is not only irrelevant, but patently false. Specifically, the City points to purportedly "key factual and legal distinctions" (City's Opening Brief at 18) where (1) "the Act requires the City to significantly and permanently increase its contributions" according to an actuarial schedule, (2) requires the State to redirect the City's general revenue funds directly to the pension Funds when the City falls short and (3) provides enforcement mechanisms that allow pension boards to initiate mandamus actions to force the City to make required contributions. City's Opening Brief at 12-13.

These same funding measures were included in Public Act 98-599 which were rejected as justifications in *In re Pension Reform Litigation*: (1) a new payment scheduled based on actuarial costs (*e.g.* 40 ILCS 5/2-124), (2) payment directives to require payments from the general revenue fund to make up on deficits in pension funding (*e.g.* 30 ILCS 122/20) and (3) and enforcement provisions allowing pension boards to bring a mandamus action to enforce funding. *In re Pension Reform Litigation*, 2015 IL 118585 at ¶ 25. None of this saved Public Act 98-599 in *In re Pension Reform Litigation*¸ and none of it saves the Act here.

The Act's supposed "actuarial guarantee" of payment does not provide a "net benefit" to Plaintiffs and participants for two reasons: (1) the pension protection clause

already provides a guarantee of pension benefits and (2) the pension protection clause does not protect funding provisions as "benefits."

The fundamental purpose of the pension protection clause, now and at the time of its adoption, was to guarantee the payment of benefits to pension participants. As this Court recognized in *McNamee v. State*, 173 Ill. 2d 433, 446 (1996), "Section 5 of article XIII creates an enforceable contractual relationship that protects only the right to receive benefits." In *People ex rel. Illinois Federation of Teachers v. Lindberg*¸60 Ill. 2d 266, 271 (1975) this Court concluded that the pension protection clause does not create the right to a particular level of funding, but a right "that they would receive the money due them at the time of their retirement." Most recently this court reinforced this notion that the pension protection clause "served to eliminate any uncertainty as to whether state and local governments were obligated to pay pension benefits to the employees[.]" *In re Pension Reform Litigation*, 2015 IL 118585 at ¶ 16 (quoting *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 228-29 (1998)).

The pension protection clause guarantees payment of benefits, independent of the provisions contained within the Pension Code. As the Circuit Court correctly recognized, "contrary to the City's argument, it is not the Pension Code that creates the contractual relationship. Rather, if the State or municipal employer creates a pension system, the contractual relationship that is mandated derives from the constitution, and so does the 'enforceable obligation' to pay benefits." C1044; A23. Indeed, the State of Illinois actually acknowledged this legal truth in *McNamee* when it "d[id] not dispute that section 5 of article XIII of the Illinois Constitution creates contractual rights." 173 Ill. 2d at 439.

Defendants' argument that the Act provides a "benefit" to pension participants by committing to a guarantee of (diminished) pension benefits therefore fails, because this "guarantee" duplicates the protection already afforded by the pension protection clause.

More fundamentally, the City's "net benefit" argument is the same rejected one—that constitutional protections can be violated where economic circumstances become unfavorable. In *In re Pension Reform Litigation*, this Court recounted its longstanding holding that economic circumstances, no matter how dire, do not justify violation of constitutional rights and addressed it directly in rejecting it as a justification for Public Act 98-599:

> The circumstances presented by this case are not unique. Economic conditions are cyclical and expected, and fiscal difficulties have confronted the State before. In the midst of previous downturns, the State or political subdivisions of the State have attempted to reduce or eliminate expenditures protected by the Illinois Constitution, as the General Assembly is attempting to do with Public Act 98-599. Whenever those efforts have been challenged in court, we have clearly and consistently found them to be improper.

Id. at ¶ 53.

ii. Funding Provisions are Not a "Benefit" Within the Meaning of the Pension Protection Clause and are Excluded From the Contractual Relationship Created Thereby.

Furthermore, the pension protection clause does not recognize funding commitments as "benefits" at all.

Defendants' "net benefit" argument relies entirely on the false premise that the Act's funding provisions provide a "benefit" protected by the pension protection clause. By Defendants' logic, if the funding provisions of the Act provide a cognizable "benefit," the funding provisions can be balanced against the Act's diminution of annuities.

Defendants' argument fails because pension funding provisions are not enforceable "benefits" under the pension protection clause.

Indeed, the one crucial distinction delegates at the constitutional convention made when adopting the pension protection clause, was to exclude funding logistics from constitutional protection. This was done explicitly, and in direct contrast to New York's pension protection clause, on which the Illinois pension protection clause was originally based:

> Now we are not in any way suggesting that this $2,500,000,000 that they are in arrears be brought up to date at any one time. The New York Constitution mandated that state to fully fund the program in two years. This would be physical impossible in Illinois. I do believe that if we could contact the actuary of the programs, it may well be in the scheduling, we could come up with the scheduling to do it. But in lieu of a scheduling provision, I believe we have at least put the General Assembly on notice that these memberships are enforceable contracts and that they shall not be diminished or impaired.

McNamee v. State, 173 Ill. 2d 433, 443 (1996)(quoting Delegate Green from 4 Proceedings 2925). This Court has honored the comments of the delegates numerous times, and repeatedly held that funding provisions of the Pension Code are not enforceable under the pension protection clause.

In *McNamee*, this Court held that funding provisions of the Pension Code were not protected under the pension protection clause, and refused to invalidate an amendment that lowered the required contributions to plaintiffs' respective pension funds. 173 Ill. 2d at 446-47. In doing so, this Court rejected plaintiffs' argument in that case "that the 'benefits' that are protected by the constitution include the full benefits of a contractual relationship under the Pension Code." *Id.* at 439.

Similarly, in *People ex rel. Illinois Federation of Teachers v. Lindberg*, 60 Ill. 2d 266, 272 (1975) plaintiff pension participants argued "that the pertinent [funding] provisions of the Pension Code establish and define a contractual relationship between themselves and the State which obligates the State to fulfill its funding commitments." This Court rejected that argument as well because the neither the pension protection clause or statute itself provided a contractual right to enforce funding levels. *Id.* at 275.

In *Sklodowski*, pension participants once again challenged an amendment to the Pension Code which "required a lower level of state contributions than previously required" and argued "that when the General Assembly amended the Pension Code to establish a level of funding that would achieve full funding, those requirements became an enforceable contractual relationship between the beneficiaries and the state. This contractual relationship is then protected by the pension protection clause, as well as the contract clauses of the United States and Illinois Constitutions." 182 Ill. 2d at 229. This argument too, was soundly rejected by this Court, noting that "[t]he framers of the Illinois Constitution were careful to craft in the pension protection clause an amendment that would create a contractual right to benefits, while not freezing the politically sensitive area of pension financing." *Id.* at 233.

Yet, despite this Court's repeated declarations that funding provisions contained in the Pension Code do not become part of the enforceable contractual rights protected by the pension protection clause,[5] the City contends that the purported "actuarial funding guarantee" should be considered a benefit of the Act, protected by the pension protection

[5] Ironically, the City cites *dicta* in *Sklodowski* and *McNamee* to support its assertion that participants' rights under the pension protection clause are *exclusively* defined by the terms of the Pension Code. *See* City's Opening Brief at 32.

clause, because it is "something entirely different" from the "funding schedule[s]" addressed in *Lindberg*, *McNamee* and *Sklodowski*. City's Opening Brief at 25.

Whether taken as a schedule of fixed contributions, or variable obligation set to a specific percentage funding level, the Act's purported "actuarial funding guarantee" remains a funding provision specifically outside the scope of the pension protection clause. The City's contention that the 90% funding guarantee provided in the Act falls under the pension protection clause is blatantly contradicted by the comments of Delegate McKinney who explained the scope of the Pension Protection Clause in the context of actuarial funding commitments:

> That is the thrust of the word "diminished." It was not intended to require 100 percent funding or 50 percent or 30 percent funding or get into any of those problems aside from the very slim area where a court might judicially determine that imminent bankruptcy would really be an impairment.

McNamee, 173 Ill. 2d at 443-44 (quoting Delegate McKinney, 4 Proceedings 2932). It is irrelevant whether the funding provision creates a fixed sum or percentage obligation; funding provisions fall outside the scope of the pension protection clause. As the Circuit Court properly concluded, "[f]unding choices remain in the hands of the political branches and are not 'benefits' within the meaning of the pension protection clause." C1045; A24.

Indeed, the City finds no authority supporting its tenuous proposition, but instead argues that this Court in *McNamee* held "that the actuarial funding requirement—as opposed to the schedule for meeting it—was protected by the pension protection clause." City's Opening Brief at 26. This is simply false and the City notably fails to cite any specific portion of *McNamee* supporting its interpretation. A cursory reading of

McNamee reveals that this Court made no statement about an "actuarial guarantee" contained within the Pension Code, but rather, relied on the inherent guarantee mandated by the pension protection clause, and specifically distinguished Illinois' pension protection clause from New York's, which expressly requires full funding within its pension protection clause. *See* 173 Ill. 2d at 445-46.

Even worse, the Act's funding provisions do not even provide the "guarantee" Defendants assert, because they are subject to repeal at any time. *See McNamee* at 436 (upholding amendment which lowered the actuarial funding schedule by "chang[ing] the beginning date of the 40-year amortization period from January 1, 1980 to July 1, 1993" and "changed the method of computing the annual amount required to amortize the unfunded accrued liability from a level dollar amount to a percentage of payroll."). Actuarial payment guarantees were also contained in the legislation in *In re Pension Litigation*, but they did not save Public Act 98-599 from invalidation. The Circuit Court too recognized that the funding mechanisms in the Act "are subject to change at any time" by subsequent legislatures. C1043; A22, 1047; A26.

Piling on and ignoring the holdings of *Lindberg, McNamee* and *Sklodowski*¸ the City counters that the Act's funding provisions, in this case, are protected from repeal by the pension protection clause and should therefore be considered benefits, because the General Assembly created a vested right to the funding level proscribed in the Act. City's Opening Brief at 27.

In support, the City cites *dicta* from *Sklodowski* for the proposition that a legislative enactment can become a vested right if the legislature expresses an intention to create such vested right. *Id.* The City postures that "[t]he General Assembly's stated

purpose in enacting the Act was to save the Funds from insolvency and to ensure that pension benefits were fully funded thereafter. Confirming tis intent to create a vested right to funding, the General Assembly included two separate enforcement mechanisms to ensure that the required payments are made. *Id.* If these provisions are insufficient to demonstrate a 'legislative intent to establish' an enforceable, contractual right, it is hard to know what would ever be sufficient to do so." *Id*.

The answer to the City is simple: to create a vested right, the legislature merely needed to say "this provision shall create an enforceable, contractual vested right," but it did not. Indeed, as the Circuit Court correctly pointed out, these new "enforcement" sections (40 ILCS 5/8-173.1 and 40 ILCS 5/11-169.1) only state that the LABF or MEABF Funds *may* bring a mandamus action, but are not *required* to and also limit the bringing of such actions to repayment plans that do not "significantly imperil the public health, safety, or welfare." C1033-34; A12-13. Even more troubling, the fact that only the Funds hold the right to bring litigation, at their own discretion (the same Funds that seek to diminish participants' benefits here), rather than allowing participants to bring their own private action, shows that enforcement lies entirely outside of Plaintiffs' and pension participants' hands. An enforcement mechanism that pension participants cannot utilize provides no "vested right" at all.

iii. Section 22-403 Runs Contrary to the Purpose of the Pension Protection Clause.

The City continues its specious arguments with the assertion that "the pension protection clause put no limits on what the General Assembly may include as part of the pension contract with participants" and that Section 22-403 is not "not a funding provision," but a mere "condition on the receipt of benefits." City' Opening Brief at 34-

37. However, Section 22-403 is not a "condition" that must be fulfilled by pension participants, as in *DiFalco* and *Kerner*; it is a unilateral proclamation by the City that it is not obligated to pay pension benefits. It is as much a funding provision as any other funding provision this Court has addressed in the Pension Code because its plain language designates the entities that are legally obligated to *fund* those pensions. *See* 40 ILCS 5/22-403. Indeed, the City's position that it is not obligated to *fund* the pensions is entirely based on Section 22-403.

More importantly, the City's preposterous assertion that it can define a contractual pension benefit as one it does not have to honor, directly contradicts the very purpose of the pension protection clause. Section 22-403 was enacted in 1963, *before* the 1970 Illinois Constitution. It has never been held to free the City from the pension obligations ratified in the 1970 Illinois Constitution.

Indeed, countless statements by delegates at the constitutional convention and by this Court have proclaimed that the very purpose of the pension protection clause is to ensure that the government pays the pension obligations it promises. Accepting the City's interpretation of this archaic statute would undermine the pension protection clause at its core.

Rather, the Pension Code itself obligates the City with fiscal responsibility for the MEABF and LABF pensions in numerous ways. The respective Pension Code provisions of both Funds required the City, even prior to the Act, to levy taxes for the benefit of the Funds. *See* 40 ILCS 5/8-173 (2013); 40 ILCS 5/11-169 (2013). The Pension Code further contain various provisions mandating contributions by the City to the Funds for duty disability benefits, ordinary disability benefits, prior service annuities

and for administration costs. *See* 40 ILCS 5/8-187; 40 ILCS 5/8-188; 40 ILCS 5/8-189; 40 ILCS 5/8-190; 40 ILCS 5/11-176; 40 ILCS 5/11-177; 40 ILCS 5/11-178; 40 ILCS 5/11-179.

The City is, and always been obligated to pay the benefits it promised to pension participants. Yet, once again, the City seeks to shirk its obligations and it is once again, this Court's duty to uphold the same constitutional rights it upheld in *In re Pension Litigation*.

C. Defendants' Factual Assertions Have No Basis and Ignore Their Own Willful Omission to Fund.

i. Defendants' Assertion that Participants are "Better Off" with the Act Relies on a False Dichotomy.

The City's mischaracterization of the Circuit Court's ruling and the underlying facts in this matter is premised entirely on a false dichotomy, a fallacy of argument where only binary choices are considered when there are in fact more alternatives. In this case, the City presents only two possible scenarios: one where the Act is passed, and one where the Act is invalidated *and no other bill or resolution to fund the pensions is attempted in the next decade*. *See* City's Opening Brief at 37. Accordingly, in the City's distorted view, participants can only be better off with the Act, because without it the LABF and MEABF pension Funds will plunge into insolvency. This "fact" is, according to the City, undisputed by both the Circuit Court and Plaintiffs. *See* City's Opening Brief at 37. This could not be further from the truth.

The problem with the City's narrow view, lacking any basis in reality, is that there are alternatives: they can pass a different bill. By the City's own admission 79% of the funding used to shore up the pension Funds from the Act comes from sources that do not

reduce participants' annuities. C279. The City has not shown that an alternative to make up this 21% gap is infeasible, but instead attempts to pass off the obligation of coming up with an alternative solution to Plaintiffs and the Court. *See* City's Opening Brief at 37-38. Neither Plaintiffs' nor this Court are obligated to draft an alternative bill for Defendants, rather, the question before this Court is simply whether the Act violates the pension protection clause on its face.

Nonetheless, Defendants do not actually show they ever attempted "less drastic measures," as this Court found the State failed to do in *In re Pension Reform Litigation*. 2015 IL 118585 at ¶ 67. Indeed, as this Court opined, "[t]he General Assembly could have also sought additional tax revenue." *Id*. The same holds true here, as Defendants never pursued an increase in property taxes. *See* C421 (Senator Raoul discussing the Act (SB1922) and stating "there's nothing in the bill that I'm bringing forth as Senator Raoul that has a property tax in it.") The Circuit Court correctly concluded that "[n]o 'net' benefit can result where the loss of guaranteed rights are exchanged for legislative funding choices, which remain outside the protections of article XIII, section 5." C1047; A26. This holding should be affirmed.

ii. Nor Can Defendants Evade Responsibility for the Current Underfunding Crisis.

The Defendants' asserting the "chicken little", sky-is-falling defense also ignores their own complicity in bringing this crisis about. Reality requires recognition that it could not have been without the City's actions and the Funds' "trustees'" compliance that the funding provisions were never actuarially set , and even cancelled (for the City) for many years, while participants employees were still obligated to contribute. Yet, here,

both the LABF and MEABF assert they were powerless to improve the funding situation. The City asserts it was never obligated to fund the pension Funds in the first place.

The City has failed to make actuarial responsible payments for over a decade, and indeed, never sought to. As the City admits, the benefit levels and funding levels "didn't match up." City's Opening Brief at 7. It could not have been without the City's active involvement that the City's funding obligation was suspended entirely from 2001 to 2006 for its LABF contributions while participants' obligation to contribute by withholding continued unabated.[6] C667-72. In 2006, for instance, the City was allowed to omit contributing $17,194,000. C672.[7] Yet, the LABF trustees, capable of forecasting the incoming deficit, stood idly by and did nothing.

If Defendants can forecast the insolvency of the Funds pending in the next decade, they certainly had the ability to predict the current state of the pensions.

II. There Is No Valid Justification For Diminishment of Participants' Benefits.

A. The Act was not "Bargained For" with Pension Participants.

The City's argument here, that the change is effective as a bargained-for-exchange with participants ignores that (1) it was not a collective bargaining agreement with active union members (i.e. active employees); (2) the City is judicially estopped

[6] The statute in effect at the time read:

> All such contributions shall be credited to the prior service annuity reserve. *When the balance of this reserve equals its liabilities* (including in addition to all other liabilities, the present values of all annuities, present or prospective, according to applicable mortality tables and rates of interest), *the city shall cease to contribute the sum stated in the section*.

40 ILCS 5/11-178 (2000)(emphasis added).

[7] In fact from 2001 to 2006, the City cumulatively was able to omit contributing $102,760,000 to the LABF.

from arguing unions may represent retirees; (3) the unions are nonetheless not the legal representatives of retirees; (4) individual constitution rights cannot be waived by collective bargaining; and (5) the Act violates the pre-existing duty rule of contract law. The Act was not part of a bargained-for exchange.

i. No Collective Bargaining Action Took Place.

Neither the City nor Funds have ever produced an actual *agreement* to show they had the authority or consent of participants or retirees to represent them or bind them. Indeed, the Brandon Affidavit vaguely refers to "an affiliated committee comprised of and established for the benefit of SEIU retirees" that was informed of the "status and progress of the negotiations" as well as the bill's "final terms." C323. There is nothing contained within the Brandon Affidavit, or anywhere on the record, that the CFL or relevant unions had authority to represent or act as agents of Plaintiffs, affected pension participants, or retirees. Nor was there ever a vote. As the Circuit Court correctly found, this matter was nothing more than lobbying by interested entities:

> [F]rom the facts presented, these negotiations were no different in concept than legislative advocacy on behalf of any interest group supporting collective interests to a lawmaking body. They did not act as agents in a collective bargaining process and held no other special status by which they could bind their members.

C1052; A31.

ii. The City is Judicially Estopped From Arguing the Unions Represent Retirees.

Judicial estoppel precludes the City from even asserting the unions' authority to negotiate for retirees, because the City has repeatedly defeated union efforts to weigh in on retiree matters, asserting that retirees are not part of the bargaining unit. For example, the City successfully thwarted union's intervention for retirees in *City of Chicago v.*

Korshak et al, ("Korshak") 01 CHI 4962 (Cir. Crt. Cook County, Chancery Division), when the Fraternal Order of Police (FOP) sought to intervene to represent a class of retirees regarding heath care benefits. In fact, *the City itself* cited that "the Seventh Circuit has commented skeptically about the ability of a union to represent both active and retired employees, because of the *potential conflicting interests between current employees and annuitants*" and further cited *Rossetto v. Pabst Brewing Co., Inc.*, 128 F.3d 538, 541 (7th Cir. 1997) and *Merk v. Jewel Food Companies*, 848 F[.]2d 761, 766 (7th Cir. 1988). C969-70. The City successfully argued that "the FOP cannot adequately represent any class members [retirees] and should not be allowed to intervene in this action" because that negotiation situation "would only have serious labor relations consequences involving the City's future obligations to collectively bargain with the FOP, *but also would have serious consequences if other unions also seek to petition to join this litigation." Id.*; C972-73. Having successfully opposed union standing to assert, represent or bind retirees, the City is estopped from asserting that the unions acted as an informal rump group to bind retirees at all; let alone, without notice, vote, or any other minimal requirements of due process, class notice, or collective bargaining.

Judicial estoppel bars a party from making a representation in one case after they have successfully taken a contrary position in another case. *Shoup v. Gore*, 2014 IL App (4th) 130911, ¶ 8. The purpose of judicial estoppel is to protect the integrity of the justice system and "prevent a party from manipulating and making a mockery of the system of dispensing justice in all its forms." *Id.* at ¶ 9. "At its heart, this doctrine prevents chameleonic litigants from 'shifting positions to suit the exigencies of the moment' [citations], engaging in 'cynical gamesmanship' [citation] or '[h]oodwinkin' a

court." *Id.* (quoting *Ceres Terminals, Inc. v. Chicago City Bank & Trust, Co.*, 259 Ill.App.3d 836, 850 (1st Dist. 1994)).

Judicial estoppel applies where (1) two positions are taken by the same party; (2) the positions are taken in judicial proceedings; (3) the positions are taken under oath; (4) the party successfully maintains the first position, and receives some benefit thereby; and (5) the two positions are totally inconsistent. *Shoup*, 2014 IL App (4th) 130911, ¶ 10. The "technical requirement" of oath is essentially met where "the record clearly reflect[s] that the party intended the trier to accept the truth of the party's position. This requirement carries out the policies supporting the doctrine of judicial estoppel, without unduly restricting the doctrine." *Dept. of Transp. v. Coe*, 112 Ill.App.3d 506, 510 (4th Dist. 1983).

Here, the City took a clear position in *Korshak* that a union cannot represent its retirees because of inherent conflicts of interest between active employees and retirees, and in this matter the City takes the opposite position; that the working group unions are able to represent LABF or MEABF retirees and negotiate a diminishment of their benefits on their behalf. Second, the City took both these positions in judicial proceedings. Third, the oath requirement is met because the City filed signed pleadings, and nonetheless, clearly intends for the trier to accept the "working group's" authorization to negotiate on behalf of retirees as true. Fourth, the City successfully maintained the position that a union, there the FOP, cannot represent its retirees, and prevented the FOP's intervention as a result, allowing the City to avoid having to negotiate with the FOP regarding retiree health benefits. Lastly, the two positions are clearly completely inconsistent, as the City advocates that the working group unions can

bargain with the City on the retirees' behalf, completely ignoring the legal authority and policy it used to previously support the position that such representation by the unions of its retirees was not possible. Accordingly, the City must be judicially estopped from asserting the working group unions had any authority to "negotiate" for the diminishment of the MEABF and LABF retirees' automatic annual annuity increases in this matter.

iii. The Unions or "Working Group" Cannot Represent Retirees as a Matter of Law.

The Chicago Federation of Labor (CFL) and the unions composing the supposed "working group" are inherently precluded from representing or bargaining for people who have retired. As a matter of law, inherent conflicts of interest prevent a labor union from representing *both* its active employees *and* retirees without the explicit consent of retirees:

> Here, even if, as the Board found, active and retired employees have a common concern in assuring that the latter's benefits remain adequate, they plainly do not share a community of interests broad enough to justify inclusion of retirees in the bargaining unit. Pensioners' interests extend only to retirement benefits, to the exclusion of wage rates, hours, working conditions, and all other terms of active employment. Incorporation of such a limited-purpose constituency in the bargaining unit would create the potential for severe internal conflicts that would impair the unit's ability to function and would disrupt the processes of collective bargaining. Moreover, the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits.

Allied Chemical & Aklali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 173 (1971); *see also Id.* at n.12 ("[I]n representing retirees in the negotiation of retirement benefits, the union would be bound to balance the interests of all its constituents, with the result that the interests of active employees might at times

be preferred to those of retirees."); *Rossetto v. Pabst Brewing Co.*, 128 F.3d 538, 539-40 (7th Cir. 1997)("A union's power to negotiate with management derives from the fact that the union is the exclusive bargaining representative of a group of people. *Labor jurisprudence is clear that retirees cannot be a part of this group or 'bargaining unit.'*")(emphasis added); *Carnock v. City of Decatur*, 253 Ill.App.3d 892, 899 (4th Dist. 1993)("As courts have pointed out, there is difficulty in representing active employees and retirees in the negotiation process, as well as in the contract administration process. Union leadership may legitimately decide to use those limited resources to serve only the interests of the active employees, not those of the union retirees.").

iv. Defendants Neither Sought Nor Obtained Participants' Consent to Waive their Individual Constitutional Rights.

Defendants' argument that bargaining by a rump group binds all participants ignores a fundamental problem—that constitutional rights operate on an *individual* level. Indeed, what Defendants essentially argue here is that pension participants and retirees waived their rights to their constitutional rights under the pension protection clause. But this simply cannot have occurred here, where there no opportunity for participants and retirees to consent or be heard on an individual level. Indeed, waiver of constitutional rights must be *knowing* and *voluntary*. *See United States v. Robinson*¸8 F. 3d 418, 421 (7th Cir. 1993)(citing cases). Here, Defendants obtained neither. And as the Circuit Court further noted, the individual nature of the pension protection clause is what allows individuals to challenge statutes that diminish their benefits (C1052-53) as occurred here.

v. The "Bargained-For Exchange" Lacks Consideration Under the Pre-Existing Duty Rule.

Even if Defendants' *had* utilized the proper procedures to obtain consent of pension participants and retirees, the terms of the Act do not legally form a contract between pension participants and Defendants—the Act lacks consideration because it provides only partial performance of a pre-existing obligation.

The purported "funding guarantee" Defendants assert the Act provides violates a most basic and fundamental concept of contract law—the pre-existing duty rule— that performance of a duty already owed under contract is not consideration. *Gavery v. McMahon & Elliot*, 283 Ill.App.3d 484, 489 (1st Dist. 1996)("The preexisting duty rule provides that where a party does what it is already legally obligated to do, there is no consideration because there has been no detriment."); *Johnson v. Maki & Assocs.*, 289 Ill.App.3d 1023, 1028 (obligation to release escrow funds was a preexisting legal duty under real estate contract and did not constitute consideration for a release contained in cancellation agreement).

As shown *supra*, payment of pension benefits is already guaranteed by the pension protection clause and Defendants are obligated to pay it. Accordingly, while the Court in *In re Pension Litigation* noted that the State may *increase employee contributions* in exchange for "additional benefits" to pension participants as consideration (2015 IL 118585 at ¶ 46, n.12), the City cannot claim anything that constitutes "additional benefits" in this matter. A promise to fulfill something which has already been promised is not a benefit. In fact, it is a detriment here because the Act allows Defendants to pay less than previously promised. Unsurprisingly, no Illinois court has ever held that the City or State may *diminish pension benefits* in consideration for other "additional benefits." The Pension Protection Clause simply does not allow it.

III. The Act is Not Severable.

The Act's explicit inseverability provision, as follows, requires invalidation of the entire Act:

> Section 93. Inseverability and Severability. The provisions of this amendatory Act of 2014 set forth in Sections 1-160, 8-137, 8-137.1, 8-174, 11-134.1, 11-134.3, 11-169, 11-169.1, and 11-170 of the Illinois Pension Code are mutually dependent and inseverable. If any of those provisions is held invalid other than as applied to a particular person or circumstance, then all of those provisions are invalid. The remaining provisions of this Act are severable under Section 1.31 of the State on Statutes, and are not mutually dependent upon the provisions set forth in any other Section of this Act.

Public Act 98-641, Section 93. The sections of the Act which reduce pension annuities—Sections 8-137, 8-137.1, 8-174, 11-134.1, 11-134.3, 11-169, 11-169.1, and 11-170—are all explicitly identified by the legislature as inseverable by Section 93 of the Act.

The doctrine of severability was born of the common law, and though legislatures now commonly include severability clauses, "they are regarded as little more than a formality." *In re Pension Reform Litig.*¸2015 IL 118585 at ¶ 94 (citing *Cincinnati Ins. Co. v. Chapman*, 181 Ill. 2d 65, 81 (1998)). Therefore, the existence of a severability clause in a statute "is merely viewed as reflecting a rebuttable presumption of legislative intent." *In re Pension Reform Litig.*, 2015 IL 118585 at ¶ 95 (citing *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 460 (1997)). This presumption of severability can be rebutted if the legislature would not have passed the law without the provisions that were deemed invalid, i.e. "the entire act will be declared void if, after striking the invalid provisions, the part that remains does not reflect the legislature's purpose of enacting the law." *Id.*

The four (4) purportedly "severable" sections of the Act are unrelated to achieving that purpose. The remaining four (4) sections which are deemed severable include Section 8-173 (modifying the City's required contribution and levy, specifically tying it to a multiplier of employee contributions), Section 8-173.1 (which sets out the City's funding obligation but deems the City's contribution payments as "subordinated to the payment of the principal, interest, premium, if any, and other payments on or related to any bonded debt obligation of the city…"), as well as Sections 11-179.1 and 8-174.2 (both prohibiting the funds' use of contributions "to provide a subsidy for the cost of participation in a retiree health care program.") Moreover, Section 8-173 tying the City's required contributions to employee contributions appears to be dependent on the newly increased employee contributions being upheld; the previous, lower required employee contribution rates would likely fail to meet the financial goal that was set by the legislature with increased employee contribution rates in mind.

Because the remaining purportedly "severable" statutes fail to further the purpose of Public Act 98-641, the Act must be rendered void in its entirety. *See In re Pension Reform Litig.*, 2015 IL 118585, ¶ 96 (holding parallel and nearly identical Public Act 98-599 inseverable in its entirety because "[t]he overarching purpose of the law was to shore up State finances, improve its credit rating and free up resources for other purposes by reducing, i.e. diminishing, the amount of retirement annuity benefits paid to Tier 1 members of GRS, SERS, SURS, and TRS, particularly annual annuity increases…").

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment declaring the Act unconstitutional in its entirety should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 341(c)

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of the Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is no more than 33 pages.

Dated: October 22, 2015

/s/ Clinton A. Krislov
Attorney for Johnson Plaintiffs

CERTIFICATE OF SERVICE

Clinton A. Krislov, being duly sworn, certifies that on October 22, 2015, he caused a true and correct copy of the foregoing Brief of Appellees to be filed with Clerk of the Illinois Supreme Court via electronic filing and served same on the below listed counsel via email and overnight mail on October 22, 2015.

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

Dated: October 22, 2015

/s/ Clinton A Krislov

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

MARY J. JONES, *et al.*, Plaintiffs, v. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, *et al.* Defendants,	14 CH 20027
Jeffrey Johnson, et al., Plaintiffs, v. MUNICIPAL EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO and LABORERS' & RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO, Defendants,	14 CH 20668
and CITY OF CHICAGO, Defendant-Intervenor, and STATE OF ILLINOIS, Defendant-Intervenor.	

MEMORANDUM OPINION AND ORDER

In these related cases, Plaintiffs challenge the constitutionality of Public Act 98-641 (P.A. 98-641 or Act) under the pension protection clause of the Illinois Constitution. Ill. Const. 1970,

art. XIII, § 5. Public Act 98-641 amends the Pension Code as it pertains to the Municipal Employees' Annuity and Benefit Fund of Chicago (MEABF) and Laborers Annuity and Benefit Fund of Chicago (LABF). Public Act 98-641 is also referenced as SB 1922.

Procedural History

i. Case No. 14 CH 20027 (*Jones* case)

In case no. 14 CH 20027, the plaintiffs are fourteen individual participants in the MEABF and four labor unions whose members are MEABF participants. Some of the individual plaintiffs are retired and currently receiving annuities. Some are active employees. The majority have worked or are working as clerical or support staff in City of Chicago (City) departments or in the Chicago public school system. The labor unions–American Federation of State, County and Municipal Employees Council 31 (AFSCME), Teamsters Local 700 (Teamsters), Chicago Teachers Union Local 1 (CTU), and Illinois Nursing Association (INA)–assert associational standing to represent the interests of their members.

The defendants are MEABF and its Board of Trustees. The MEABF is a statutorily-created public pension fund. It was established by Article 8 of the Illinois Pension Code and governs matters relating to retirement benefits of employees of the City and the Chicago Board of Education. 40 ILCS 5/8-101 *et seq.* (West 2013).

In a single cause of action, Plaintiffs ask for a declaratory judgment that P.A. 98-641 violates the pension protection clause and for injunctive relief preventing implementation and enforcement of the Act. Defendants and Intervenor City of Chicago have answered the complaint and included an affirmative defense entitled "Reserved Sovereign Powers." The disposition of that defense is discussed below.

ii. Case No. 14 CH 20668 (*Johnson* case)

Case no. 14 CH 20668 was brought as a class action. The named plaintiffs are one participant in the MEABF, three retiree participants in the LABF, and the "Municipal Employes Society of Chicago" [sic] (Society). The Society asserts associational standing on behalf of its members. According to the allegations, its mission is to protect the pensions of City workers and provide oversight of the pension funds.

The Defendants are MEABF, the same defendant as in the *Jones* case, and LABF. The LABF was created under Article 11 of the Pension Code for the benefit of labor-service workers and retirees. 40 ILCS 5/11-101 (West 2013). Article 11 governs matters related to retirement benefits for laborers. Collectively, the MEABF and LABF will also be referred to as the "Funds" in the discussion that follows.

On January 28, 2015, Plaintiffs were given leave to file their First Amended Complaint. In this case, too, Plaintiffs' First Amended Complaint consists of a single count seeking a declaration that P.A. 98-641 is unconstitutional and an injunction preventing its implementation and enforcement. Defendants have answered the First Amended Complaint.

iii. Proceedings involving the related cases

Both actions were filed in late December 2014, just before the provisions of P.A. 98-641 that affect benefits and employee contributions were to be implemented on January 1, 2015. The City promptly filed petitions to intervene, first in the *Jones* case and later in the *Johnson* case. The Court granted the petitions. Likewise, the State of Illinois was permitted to intervene in both cases.

In late January 2015, the Court commenced a hearing on Plaintiffs' request for preliminary injunction and took evidence over several days. The City sought to defeat the award

of a preliminary injunction by showing that the modifications to Articles 8 and 11 contained in P.A. 98-641 were permitted by the exercise of its reserved sovereign powers. Before the hearing concluded, however, the Court stayed the proceedings upon the *Jones* Plaintiffs' motion. The Supreme Court had scheduled oral argument in the case of *In re Pension Reform Litigation*, 2015 IL 118585, and the pending cases were likely to be affected by the Supreme Court's decision.

After the Supreme Court's ruling in May 2015, the parties came before the Court with a plan to present issues of law for resolution. An expedited schedule was set to finalize pleadings and to file motions for summary judgment. The motions for summary judgment address all of the issues presented by the pleadings. However, the City advised that it does not intend to pursue its "Reserved Sovereign Powers" defense. Plaintiffs have moved to strike it anyway to ensure the record is clear.

On July 9, 2015, the Court held a hearing on all motions for summary judgment. The case is currently before the Court for decision on those motions.

Background

Because Plaintiffs bring a facial challenge to P.A. 98-641, the amendments to the Pension Code contained in the Act are technically the only relevant "facts." However, to a large extent the City's and the Defendants' arguments are based on the conditions that prompted the amendments and the circumstances surrounding the passage of the legislation. Therefore, this section sets out "facts" of that nature. With respect to the Funds' financial condition, the General Assembly incorporated findings in the introductory paragraphs of the Act. There is no factual dispute that the Funds are substantially underfunded.

A. Financial Conditions of the Funds and Circumstances Preceding Enactment of P.A. 98-641

In support of its motion for summary judgment, the City introduces three affidavits. The first is the affidavit of Michael D. Schachet, a partner at Aon Hewitt and a consulting actuary in the retirement practice section. (Ex. A, City MSJ Br.). He describes the financial health of the Funds in actuarial terms, the circumstances that caused this condition, and how these amendments to the Pension Code are expected to remedy the significant underfunding of the pension funds.

The second is the affidavit of Matthew Brandon, the Secretary/Treasurer and Chief of Staff of Service Employees International Union (SEIU), Local 73. (Ex. B, City MSJ Br.). He describes a series of meetings in which unions representing members of the Funds engaged in discussions about the financial problems facing the Funds and alternatives to remedy the problems.

The third affidavit is that of Alexandra Holt. Ms. Holt is the Director of the Office of Management and Budget (OBM) for the City of Chicago. She describes the additional obligations the City takes on in funding the MEABF and LABF under P.A. 98-641. She also discusses the current financial state of the City budget in general, with emphasis on the City's structural deficit. In greater particularity, the content of the three affidavits follows.

Mr. Schachet attests that he provides actuary services to the City. He declares that City employees and retirees participate in four defined benefit pension funds, the MEABF and LABF involved in this case, the Policemen's Annuity and Benefit Fund of Chicago (PABF), and the Firemen's Annuity and Benefit Fund of Chicago (FABF). He states that all four funds are "significantly underfunded." (*Id.* at ¶ 3). Specifically, with respect to the Funds involved here, as of December 31, 2013, MEABF was 36.9 percent funded and LABF was 56.7 percent funded. Mr. Schachet indicates that based on the funds' own assumptions, the MEABF will run short of

funds by 2026 and the LABF will do so by 2029. (*Id.* at ¶¶ 3, 5 and 31). He attests that the changes to the Pension Code effected by P.A. 98-641 are designed to reach actuarial funding levels of 90 percent by 2055. (*Id.* at ¶ 6).

Mr. Schachet explains that the decline in the Funds funded status is largely attributable to two factors. First, from 2000 to 2013, the Funds underperformed. That is, their investments earned less than their assumed return. For the MEABF, this factor accounts for 41 percent of the decline in the funded status. For the LABF, the underperformance accounts for 58 percent of the decline. (*Id.* at ¶¶ 18 and 25). Second, during the same period, employee and employer contributions did not keep pace with the anticipated growth of the Funds' liabilities, i.e., the amounts required to pay participants' benefits. According to Mr. Schachet, "[t]his [result] is in part the consequence of a legal regime that did not connect the calculation of funding into a pension fund with the benefits that are accruing in that pension fund." (*Id.* at ¶¶ 20 and 26). For the MEABF, this factor accounts for 34 percent of the funded status. For the LABF, it accounts for 17 percent of the funded status. (*Id.*).

According to the affidavit of Matthew Brandon, in 2011, representatives of Mayor Emanuel's administration and members of the Chicago Federation of Labor (CFL) began a series of meetings to discuss methods to address the ailing financial condition of the Funds. The CFL is an umbrella organization for labor unions that represent workers in the City of Chicago and Cook County. The CFL's affiliate members include 31 local unions whose members are also members of the MEABF and the LABF.[1] (Ex. B, City MSJ Br. at ¶¶ 2-4). A working group was formed from representatives of the 31 unions to participate with City representatives in an effort to agree on terms of pension reform legislation. (*Id.* at ¶ 4). Mr. Brandon also worked with an

[1] SEIU Local 73's members comprise approximately 35 to 40 per cent of the MEABF. SEIU retirees also make up a large percentage of MEABF participants who receive retirement benefits. (Ex. B, City MSJ Br. at ¶ 2).

affiliated committee of SEIU retirees. (*Id.* at ¶¶ 2, 6). Over the course of two and one-half years, representatives from the City administration and the labor unions met and arrived at a proposal. (*Id.* at ¶¶ 5-8).

Mr. Brandon attests that before the proposed legislation was presented to the General Assembly, elected representative from the 31 unions whose members participate in the MEABF and the LABF met to determine whether the unions could reach a consensus to support the terms of legislation to address the funding problems. He claims that a vote was taken and that 28 of the 31 unions represented at the meeting voted in favor of the proposed legislation. (*Id.* at ¶¶ 7-8). According to Mr. Brandon, following the vote, union representatives went to Springfield to meet with legislators to confirm their participation in negotiations and their support for SB 1922. (*Id.* at ¶ 9).

Mr. Brandon goes on to explain that "union support for this bill required that the burdens of the proposed legislation be weighed against the predictable and unacceptable loss of future pensions." (*Id.* at ¶ 11). The unions assessed that the City "accepted the vast majority of the financial burden of the reforms" and that the bill included remedial measures to ensure the City's compliance with the funding requirements. (*Id.* at ¶ 10). They also considered that the City would not agree to these features without participants' own financial contributions. (*Id.*).

When this lawsuit was filed, a number of unions, including SEIU, issued a statement declaring, "[i]f successful, this lawsuit will remove [the City's] funding guarantee from state law and potentially put at risk what our members are counting on–a fully funded pension." (*Id.* at ¶ 11 and Ex. A).

Alexandra Holt's affidavit discusses broader aspects of the City's financial condition. In describing the City's increased contributions to the Funds under P.A. 98-641, Ms. Holt states that

"[i]t will be a major challenge for the City to find the increased funding required by SB 1922, and the City will not be able to fund SB 1922 by reducing expenses alone." (Ex. C City MSJ Br. at ¶ 9). She points out that the City has carried structural deficit for a decade and that it is projected to continue. She asserts that this projection is based on additional outlays required for increased salary and benefits costs. The costs have increased despite the fact that the number of City employees has declined. She states that without the changes contained in P. A. 98-641, the City would have to reduce essential services and terminate many of the employees who participate in the Funds involved here.

In response to the City's submissions, the *Jones* Plaintiffs introduce the affidavits of various union officials or employees affiliated with the labor organizations they represent, namely the Teamsters, INA, CTU and AFSCME. (Ex. 6-10 Pl. MSJ Resp.). Each of the affiants declares that he or she did not understand that the purpose of any meeting was to achieve a bargained-for agreement. Some of the affiants do not recall a vote. Some attest that they did not vote and had no authority to vote for any proposal in any event.

The *Jones* Plaintiffs also introduce documents from the General Assembly's website that show that ASCFME, the CTU, and INA opposed the adoption of SB 1922. (*Id.* Ex. 4). They offer Governor Quinn's statement of June 9, 2014, indicating the Governor's opposition to property-tax increases as a means of addressing the City's financial difficulties and noting that previous versions of the bill included that measure. (*Id.* Ex. 5). The *Jones* Plaintiffs also provide the text of an earlier version of SB 1922. It contained a provision for a "Pension Stabilization Levy" for levy years 2015 through 2020, indicating that the bill was amended before final passage and after the union representatives' vote. (*Id.* Ex. 3, at pp. 33-34 and 56-57).

B. The Pension Code and P.A. 98-641's Amendments

The MEABF and LABF are public pension funds that create defined benefit plans. Members (also called participants) of the plan receive specified annuities upon retirement. The annuities are calculated on the basis of a formula contained in the Pension Code. In general, the formula takes into account the member's salary, years of service and age at retirement. Before P.A. 98-641, the annuity also included a three-percent "automatic annual increase" (AAI). As the name indicates, the annuity increase took place automatically each year in accordance with the amount set by statute. That amount was compounded.

The MEABF and LABF are funded by employee and employer contributions. The level of contributions is set by the General Assembly in the Pension Code. Generally, the employee contribution was 8.5% of pensionable salary before the enactment of P.A. 98-641.[2] The City's contributions were established as a multiple of employee contributions. The multiplier was set at 1.25% for the MEABF and one percent for the LABF. In addition to employee-employer contributions, funds are generated by returns on investments made by the Funds' governing boards.

Public Act 98-641 makes a number of changes to Articles 8 and 11 of Pension Code. As indicated, these articles govern the MEABF and LABF, respectively. Overall, the amendments change the amount of annual increases, remove the compounding component of the annual increases, eliminate annual increases entirely in specified years, and postpone the time when an annuitant will receive the initial increase. In addition, the amendments change both the

[2] All parties agree that the employee contribution was set at 8.5%. Mr. Schachet's affidavit states, however, that the employee contribution rate varies between 8.5% to 9.125% depending on the fund. (Ex. A, City MSJ Br. ¶ 6). The pre-amendment version of the Pension Code seems to put the employee contribution rate at 6.5% of pensionable salary. 40 ILCS 5/8-174 (a) (West 2013) and 40 ILCS 5/11-170 (a) (West 2013).

employee and employer contribution levels. The amendments provide for increases in both categories.

1. Changes to Employee Benefits and Contributions

Turning to the specific provisions, prior to P.A. 98-641, members who retired before January 1, 2011 received AAIs in the amount of three percent per year, compounded annually. P.A. 98-641 § 10 (amending 40 ILCS 5/8-137); *id.* (amending 40 ILCS 5/8-137.1); *id.* (amending 40 ILCS 5/11-134.1); *id.* (amending 40 ILCS 5/11-134.3). P.A. 98-641 makes two changes to the existing scheme. First, a new formula is established for calculating AAIs. Second, AAIs are eliminated in specified years for retirees with a pension over $22,000 per year.[3]

Under P.A. 98-641, AAIs are set at the lesser of two options: three percent or half of the annual unadjusted percentage increase in the Consumer Price Index-u. AAIs will not be compounded. P.A. 98-641 § 10 (amending 40 ILCS 5/8-137 to add new subsection (b-5) (3)); *id.* (amending 40 ILCS 5/8-137.1 to add new subsection (b-5) (2)); *id.* (amending 40 ILCS 5/11-134.1 to add new subsection (b-5) (3)); *id.* (amending 40 ILCS 5/11-134.3 to add new subsection (b-5) (2)).

Public Act 98-641 eliminates the AAIs altogether for specified years. For example, participants who are already retired will receive no AAIs in 2017, 2019 and 2025. P.A. 98-641 § 10 (amending 40 ILCS 5/8-137 to add new subsection (b-5) (2)); *id.* (amending 40 ILCS 5/8-137.1 to add new subsection (b-5) (1)); *id.* (amending 40 ILCS 5/11-134.1 to add new subsection (b-5) (2)); *id.* (amending 40 ILCS 5/11-134.3 to add new subsection (b-5) (1)). Likewise, current employees who became participants in the Funds before January 1, 2011 (Tier 1 employees) will

[3] When the annuity is under $22,000 annually, the retiree will receive at least one percent in the years when the AAIs are available and one percent in the years when AAIs are suspended for retirees whose annuity exceeds $22,000 annually.

receive no AAIs for 2017, 2019 and 2025 when they retire. *Id.* Current employees who became participants in the Funds after January 1, 2011 (Tier 2 employees) will receive no AAIs in 2025 when they retire. *Id.* (amending 40 ILCS 5/1-160 (e)).

In addition, P.A. 98-641 also postpones AAIs for persons who retire after June 9, 2014, the effective date of the Act. Such retirees' AAIs will not begin until one year after the date on which they would have started under the prior version of the Pension Code. *Id.* (amending 40 ILCS 5/8-137 to add new subsection (b-5) (1)); *id.* (amending 40 ILCS 5/11-134.1 to add new subsection (b-5) (1)).

Public Act 98-641 also affects the amount of contributions members who are still employed must make to the funds. Prior to the enactment of P.A. 98-641, active members contributed 8.5% of their salary toward their pensions. Under the amendments in P.A. 98-641, active members' contributions increase by 0.5% annually from 2015 to 2019. When employee contributions reach eleven percent, they remain at that level unless the Funds reach a ninety-percent funded radio.[4] If that level is met, employee contributions are reduced to 9.75% of pensionable salary so long as the Funds remain at the ninety-percent ratio. Should the Funds fall below that mark, employee contributions will increase to eleven percent once again. *Id.* (amending 40 ILCS 5/8-174(a)); *id.* (amending 40 ILCS 5/11-170 (a)).

2. Changes to City's Funding Provisions

Prior to the enactment of P.A. 98-641, the formula for the City's contributions was not based on actuarial projections. Rather, the formula was established as a multiple of employee contribution levels for specified time periods. This formula was prescribed by the Pension Code.

[4] The eleven percent figure is taken from Mr. Schachet's affidavit and the pleadings. (Ex. A, City MSJ Br. ¶ 35; *Jones* Complaint and City Ans. at ¶45). Amended section 8-174 and amended section 11-170 (a) set the maximum contribution at nine percent and the rate for ninety-percent solvency at 7.75%. P.A. 98-641 § 10 (amending 40 ILCS 5/8-174 (a)); *id.* (amending 40 ILCS 5/11-170 (a)). *See* note 2 *supra.*

The Act adds provisions that require the City's annual contributions for "payment years" 2016 through 2055 to be calculated on the basis of achieving "the total actuarial assets of the [Funds] up to 90 percent of the total actuarial liabilities of the [Funds] by the end of 2055." P.A. 98-641, § 10 (amending 40 ILCS 5/8-173 and 40 ILCS 5/11-169 (to add subsection (a-5) (i)). In subsequent years, the ninety-percent ratio must be achieved by the end of each year. P.A. 98-641 defines the method by which actuarial calculations are made. *Id.*

Besides this addition, P.A. 98-641 prescribes an alternate payment method for the first five years, 2016 to 2020. Under these changes, the City is permitted to pay the lesser of the payments required by the actuarial-based contributions in subsection (a-5) (i) or the amount of specified multiples of employee contributions set out in subsection (a-5) (ii). *Id.* According to the City's actuary, from 2016 to 2020, the City's contributions will be made under this alternate method. (Ex. A City MSJ Br. at ¶ 36).

3. Enforcement Provisions

Public Act 98-641 contains two mechanisms to enforce the funding provisions. First, if the City does not pay the required contributions by the end of the year, upon notice to the City, the Funds may certify the delinquent amounts to the Comptroller. Starting in 2016, the Comptroller "must . . . deduct and deposit into the [Funds] the certified amounts or a portion of those amounts" specified from the grants of State funds to the City. P.A. 98-641 ¶ 10 (adding new subsection (a-10) to 40 ILCS 5/8-173 and 40 ILCS 5/11-169).

Second, P.A. 98-641 has added new provisions to Articles 8 and 11, which permit the Funds to bring a mandamus action against the City for its failure to make its required contributions. *Id.* (adding new sections 40 ILCS 5/8-173.1 (a) and 40 ILCS 5/11-169.1 (a)). According to those provisions, the Funds may, but are not required to, bring the action. In

addition, the new provisions permit the Court to order a reasonable payment plan that will not "significantly imperil the public health, safety, or welfare." *Id.* (adding new sections 40 ILCS 5/8-173.1 (b) and 40 ILCS 5/11-169.1 (b)).

Analysis

A. *In re Pension Reform Litigation*

Just months ago, in *In re Pension Reform Litigation* (*Heaton v. Quinn*), 2015 IL 118585, the Supreme Court of Illinois held that P.A. 98-599 violated the pension protection clause of the Illinois Constitution. Ill. Const. 1970 art. XIII, § 5. P.A. 98-599 amended the Illinois Pension Code relating to five State pension systems. Like the challenged provisions here, P.A. 98-599 reduced annuity benefits by changing the amount of automatic annual increases and eliminating at least one and up to five automatic annual increases depending upon the age of the member. The amendments also changed the time when employees of a certain age would start to receive their annuities, capped the maximum salary to be used in calculating a member's annuity, and changed the method of determining the base annuity. 2015 IL 118585, ¶ 27. The Supreme Court struck down the amendments because they constituted a diminishment of pension benefits in violation of article XIII, section 5.

Also, like the amendments to Articles 8 and 11 in P.A. 98-641, those before the Supreme Court authorized a mandamus action by the pension boards if the State failed to pay its required contributions and provided special directives concerning the timing and amount of payments to the pension systems. *Id.* at ¶ 25.

In addition to passing on whether the above-described changes to retirement benefits violated article XIII, section 5, the Supreme Court addressed an alternate argument. The State contended that "funding for the pension systems and State finances in general have become so

dire that the General Assembly is authorized, even compelled, to invoke the State's 'reserved sovereign powers,' i.e. its police powers, to override the rights and protections afforded by article XIII, section 5, of the Illinois Constitution in the interest of the greater public good." *Id.* at ¶ 52. This argument was based in part on the contracts clause found in article 1, section 16 of the Illinois Constitution, Ill. Const. 1970, art. I, § 16, and a comparable provision in the United States Constitution. U.S. Const. art. I, § 10, cl. 1.

The pension protection clause provides:

> 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.

Ill. Const. 1970 art. XIII, § 5.

According to the Supreme Court, the clause provides a two-prong protection. "[I]t first mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly not to impair or diminish these rights." 2015 IL 118585, ¶ 15 (quoting 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2925 (remarks of Delegate Green); *id* at ¶ 16 ("That article XIII, section 5, created an enforceable obligation on the State to pay the benefits and prohibited the benefits from subsequently being reduced was and is unquestioned.") Accordingly, "[u]nder article XIII, section 5, members of pension plans subject to its provisions have a legally enforceable right to receive the benefits they have been promised." 2015 IL 118585, ¶ 46. Those benefits "attach once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires." *Id.* It follows, then, that once the member begins work and becomes a member of a public pension system, "any subsequent changes to the Pension Code that would

diminish benefits conferred by membership in the retirement system cannot be applied to that individual." *Id.*

Having set out the restrictions imposed by the pension protection clause, the Supreme Court readily concluded that the changes to the Pension Code in P.A. 98-599, reduced "the value of retirement annuities" for members who entered the system before January 1, 2011 (Tier 1 members). *Id.* ¶ 47. Thus, reducing and eliminating the annual increases, postponing receipt of annuities, capping the base annuity and altering the method to determine the base annuity all resulted in an unconstitutional diminishment of pension benefits. *Id.* Therefore, the Supreme Court concluded: "In enacting the provisions, the General Assembly overstepped the scope of its legislative power." *Id.*

Next, in rejecting the "reserved sovereign powers" argument, the Court ruled on two separate grounds. First, it concluded that the State could not justify impairing the contract rights of the participants in the State pension funds even under traditional contracts clause analysis. Second, it determined that the history and plain language of article XIII, section 5, "left no possible basis for interpreting the provision to mean that its protections can be overridden if the General Assembly deems it appropriate . . . , as it sometimes can be under the contracts clause." *Id.* ¶ 75. Consequently, it held that "[t]he General Assembly may not legislate on a subject withdraw from its authority by the constitution . . . ." *Id.* ¶ 85.

With respect to the contracts clause argument, the Court deemed the changes to computing pension benefits to be "'obviously substantial.'" *Id.* ¶ 62 (quoting *Felt v. Board of Trustees of the Judges Retirement System*, 107 Ill. 2d 158, 166 (1985)). It considered, too, the facts that the State was a party to the affected contracts and that its interest in the change was financial. Finally, the Court analyzed whether impairing the contract was "necessary," by

examining whether the effects of the amendments were "unforeseen and unintended" at the time of the original contract and whether "less drastic measures" were available to achieve the change. 2015 IL 118585, ¶ 65.

In concluding that the changes to the Pension Code would not be permissible under the contracts clause, the Court found that "all the information [] needed to estimate the long-term costs of [the provisions of the Pension Code], including the costs of annual annuity increases" was available to the General Assembly at the time of the original enactment. Specifically, the Court relied on a long history of economic fluctuations and of legislative decisions pertaining to how the pension funds were funded to conclude that "the funding problems which developed were entirely foreseeable." *Id.* ¶ 65. In addition, it found that the State did not select the least drastic means in adopting the benefit-reducing measures. Accordingly, the Court held that the State's police powers arguments were "rejected as a matter of law." *Id.* ¶ 69.

With respect to the second basis for its decision, the Court scrutinized the history of article XIII, section 5. It determined that while the drafters included qualifiers in other constitutional provisions to guaranty legislative power to enact laws for the protection of public safety and welfare, no such qualifier appears in the pension protection clause. Furthermore, the history established that the omission was purposeful. The drafters opted for the clause's unqualified language even when other proposals were brought to their attention. *Id.* ¶ 71-74. Accordingly, the Court concluded: "[A]ccepting the State's position that reducing retirement benefits is justified by economic circumstances would require that we allow the legislature to do the very thing the pension protection clause was designed to prevent it from doing. Article XIII, section 5, would be rendered a nullity." *Id.* ¶ 75.

Then, the Court went further. It explained the very nature of the Illinois constitution as providing voice to the people, the ultimate sovereigns, with the right to grant power to, or to remove certain subjects from, the General Assembly. *Id.* ¶ 76-80. With respect to article XIII, section 5, the Court admonished that "the people of Illinois yielded none of their sovereign authority. They simply withheld an important part of it from the legislature because they believed, based on historical experience, that when it came to retirement benefits for public employees, the legislature could not be trusted with more." *Id.* ¶ 82. Consequently, when the General Assembly enacted changes to the Pension Code that reduced annuity benefits, it purported to legislate "on a subject withdrawn from its authority by the constitution." *Id.* ¶ 85. For these reasons also, the Court rejected the State's "reserved sovereign powers" defense.

B. The Parties' Arguments

Plaintiffs argue that *In re Pension Reform Litigation* resolves the issues before the Court. Public Act 98-641 diminishes the pension benefits of the members of the Funds by changing the formula for calculating AAIs for both retired and active members and by abolishing the compounding feature. It also eliminates AAIs for specified years and postpones the time when they would otherwise commence. The amendments also raise employee contributions. Plaintiffs contend that this unilateral diminishment of pension benefits runs contrary to the protections afforded by article XIII, section 5, just as the amendments to the State pension funds did in *In re Pension Reform Litigation.* Because such action exceeds the General Assembly's constitutional authority, Plaintiffs contend, the Act is void.

In light of the Supreme Court's ruling, the City advised that it would not proceed with its "reserved sovereign powers" affirmative defense. However, the City, the Funds and the State of

Illinois still maintain that P.A. 98-641 can survive a constitutional challenge for two reasons.[5]

First, the City contends, P.A. 98-641 provides a "net benefit" to the Funds' members and, therefore, does not unconstitutionally diminish their benefits. The argument proceeds in several steps. The pension protection clause "does not create any rights at all." (*Jones* Pl. MSJ Resp. at 5). Rather, the rights of membership are set out in the Pension Code. Specifically, the contractual relationship is governed by the terms of the Pension Code that existed when the member became a participant in the system. Before P.A. 98-641 was enacted, the Pension Code imposed no obligation upon the City to pay pension benefits. Rather, the Pension Code contained section 22-403, which made pensions the obligation of the Funds alone and made the Funds solely responsible for the payment of the pensions. 40 ILCS 5/22-403 (West 2013).

In enacting P.A. 98-641, the General Assembly effectively modified section 22-403 and imposed an obligation on the City to fund the MEABF and LABF and to do so in accordance with an actuarial-based formula that will prevent them from becoming insolvent. According to the argument, this change imposed a new obligation upon the City to fund pensions. More, the scheme previously in existence did not provide funding to ensure coverage of the Funds' existing liabilities. Therefore, according to the City, P.A. 98-641 "provides a massive net benefit for participants because it reverses this course of events and changes the path for MEABF and LABF from inevitable insolvency to full funding." (City MSJ RY at 4). The City concludes, then, that P.A. 98-641 cannot be found to diminish pension benefits when read as a whole.

Second, the City argues that P.A. 98-641 is the product of a bargained-for exchange for consideration. According to this argument, *In re Pension Reform Litigation*, the Supreme Court recognized that benefits may be altered when additional benefits are added. The Court, however,

[5] For ease of reference, the Court will attribute these arguments to the City, fully acknowledging that each of the Funds raised similar arguments in its briefs and that the State of Illinois adopted the City's motion for summary judgment and briefs in support in their entirety.

did not specify the method by which such a bargained-for exchange must take place. Here, the City argues, union leaders participated with the City in negotiations whereby the City assumed greater and enforceable funding obligations, to the benefit of the Funds' participants. The benefit was all the more significant because the Funds faced certain insolvency. So, in short, the increases in employee contributions and the reduction in annual increases were given in exchange for "massive net benefits," including increased and actuarial-based funding, along with statutory enforcement mechanisms. (City MSJ Br. at 32).

C. Resolution of the Issues

Both parties recognize, as they must, that this Court is bound by the Supreme Court's decision in *In re Pension Reform Litigation*. "'[I]t is fundamental to our judicial system that 'once our supreme court declares the law on any point, its decision is binding on all Illinois courts'. . . ." *Robinson v. Johnson*, 346 Ill. App. 3d 895, 907 (1st Dist. 2004) (quoting *People v. Crespo*, 118 Ill. App. 3d 815, 822 (1st Dist. 1983)(in turn quoting *People v. Jones*, 114 Ill. App. 3d 576, 585 (1st Dist. 1983)). This principle is particularly compelling where the Supreme Court's decision is so recent, deals with such closely parallel issues and provides crystal-clear direction on the proper interpretation of the law. The decision in *In re Pension Reform Litigation* controls resolution of all the issues presented.

1. The Impact of P.A. 98-641 on Members' Benefits

One of the crucial changes in P.A. 98-641 is the reduction, elimination for certain years, and postponement of the annual increases. Those changes will reduce the annuities of both active and retired members whose participation in MEABF and LABF long preceded the enactment of P.A. 98-641. They affect those who entered the system before January 1, 2011 (Tier 1 members) and those who entered into the system after January 1, 2011 and who are

entitled to more modest annuities (Tier 2 members). The AAIs are determined by a rate that lowers the annual increases from what they would have been without the Act's amendments, at least in those years when one-half of the Consumer Price Index-u falls below three percent. For Tier 1 members, their annuities receive no increase at all in three separate years. For Tier 2 members, the same is true in one year. Current retirees, like some of the Plaintiffs, are also deprived of any annual increase in three separate years. Also, annual increases are postponed for one year after they normally would have been available under the pre-amendment version of the Pension Code. Thus, the members will be deprived of an increase to their annuity for an additional year. The postponed benefit has greater ramifications when accompanied by the elimination of the compounded annual increases.

The elimination of compounded annual increases ensures that the "value of the retirement annuities" will be further reduced over time. 2015 IL 118585, ¶ 47. Eliminating the compounding feature affects the amount of a member's annuity throughout the life of the pension because compounding results in accumulation of the increases. Where the amendments abolish the AAIs in certain years and delay their application to the base annuity, the reduction in the amount of the annuity will occur not only in the first year that the amendment applies but will have an impact in future years as the new and non-compounded increase is applied to the base annuity.

The changes to members' annuities found in P.A. 98-641 are the same type of changes that the Supreme Court invalidated in *In re Pension Reform Litigation.* Here, as in that case, the individual Plaintiffs became members of MEABF and LABF before the Act's effective date. Similarly, here, as there, the changes reduce the amount of the annuity that the Plaintiffs were promised under the Pension Code when they joined the pension systems. It follows then that

here, as in the case before the Supreme Court, "there is simply no way that the annuity reduction provisions . . . can be reconciled with the rights and protections established by the people of Illinois when they ratified the Illinois Constitution of 1970 and its pension protection clause."[6] 2015 IL 118585, ¶ 47.

2. The "Net Benefit" Argument

As stated previously, the City argues that despite the changes to the annuity side of the equation, when read as a whole, P.A. 98-641 provides a "net benefit" to the Plaintiffs. According to the argument, the General Assembly not only changed the "funding schedule" that previously existed, but also imposed on the City a "funding obligation" that did not previously exist. (City MSJ RY, at 11).

Prior to the Act, the City was not obliged to pay pension benefits. Rather, that obligation belonged solely to the Funds under section 22-403 of the Pension Code. 40 ILCS 5/22-403 (West 2013). Because section 22-403 was part of the Pension Code, it was incorporated into the

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[6] Plaintiffs also challenge the constitutionality of the increased employee contributions. Because the Court concludes that changes to the annual increases violate the pension protection clause and that those provisions are not severable, there is no need to resolve the question whether increases in employee contributions constitute a separate diminishment in benefits. *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 131 (1994) (cautioning against addressing "constitutional issues that are unnecessary for the disposition of the case under review"); *Lyons v. Ryan*, 324 Ill. App. 3d 1094, 1101 n.5 (1st Dist. 2001) ("A court generally should avoid constitutional issues, unless addressing them is necessary to the disposition of a case."). Doing so would not be prudent here in any event.

The parties devote very little attention to this issue. Plaintiffs cite to a proposal, which failed to pass during the constitutional convention, that would have allowed changes to the rate of employee contributions and minimum service requirements. From this history, they conclude that "eligibility for an annuity based on a particular contribution level is a constitutionally protected 'benefit . . . .'" (*Jones* Pl. MSJ Br. at 7 (quoting *Kanerva v. Weems*, 2014 IL 115811, ¶ 38)). On the other hand, the City cites *Kraus v. Board of Trustees*, 72 Ill. App. 3d 833, 849 (1st Dist. 1979), wherein the Appellate Court noted without deciding that "an increase in the contribution rates of some employees to equalize their contributions with those of others would not be prohibited." Constitutional questions should not be resolved on the basis of such undeveloped arguments. *See Orton Crane & Shovel Co. v. Federal Reserve Bank*, 409 Ill. 285, 289 (1951) ("Where a statute is charged to be unconstitutional, the objection must be specific and complete in order to fully present the matter to the trial court.") To the extent the City justifies the increase in employee contributions as part of a bargained-for exchange, the argument is addressed in a separate portion of this decision.

"contractual relationship" when Plaintiffs became members of the Funds. They had no right to look to the City to obtain pension benefits.

With the Act, the City argues, it takes on a number of new obligations. It is now obliged to make contributions and those contributions are based on an actuarial formula targeted to achieve ninety percent funding. The City's obligation to make contributions is subject to enforcement mechanisms if the City fails to pay or if funding falls below the prescribed limits. According to the City, then, the Act can survive constitutional scrutiny because it replaces an illusory set of promises with enforceable obligations. Consequently, although the Fund participants will experience modest changes to their annuities and contribution levels under the Act, in the end, they will receive the substantial benefit of a solvent pension system based on an actuarial formula that will guaranty that their benefits will be paid.

At several levels, the "net benefit" theory does not survive scrutiny. It is based on several premises that are wholly inconsistent with constitutional teachings. First, it rests on a misapprehension of the scope of the protections in the pension protection clause. Second, it disregards the settled distinction between pension benefits, which are constitutionally protected, and funding choices, which are not. Finally, it fails to account for the fact that each of the "benefits" that are "netted" against the constitutionally protected right to pension benefits are subject to change at any time.

Turning to each point, the analysis begins with the Supreme Court's latest instruction. In *In re Pension Reform Litigation*, the Supreme Court succinctly summarized the scope of protections contained in article XIII, section 5.

> The solution proposed by the drafters and ultimately approved by the people of Illinois was to protect the benefits of membership in public pension systems not by dictating specific funding levels, but by safeguarding the benefits themselves. As we discussed in *Kaverva v. Weems*, 2014 IL 115811, ¶¶ 46-47,

> Delegate Green explained that the pension protection clause does this in two ways: "[i]t first mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly not to impair or diminish these rights." 4 Record of Proceedings 2925 (statements of Delegate Green). * * * *
>
> The purpose of the clause and its dual features have never been in dispute. As we noted in *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 228-29 (1998), the clause "served to eliminate any uncertainty as to whether state and local governments were obligated to pay pension benefits to the employees," and its "plain language" not only "makes participation in a public pension plan an enforceable contractual relationship," but also "demands that the 'benefits' of the relationship 'shall not be diminished or impaired.'" *The "politically sensitive area" of how the benefits would be financed was a matter left to the other branches of government to work out.*"

2015 IL 118585, ¶¶ 15-16 (emphasis added).

As the Supreme Court has made clear, a participant in a public pension fund that falls within the protection of article XIII, section 5, has a "legally enforceable right to receive the benefits that have been promised." *Id.* at ¶ 46; *see also id.* (and cases cited therein). That clause also affords the participant protection against diminishment of "the benefits conferred by membership" even if the General Assembly makes subsequent changes to the Pension Code. *Id.*

The City's argument, premised on the notion that participants have no right *vis a vis* their employer to expect payment of their pension benefits, is fundamentally at odds with the Supreme Court's teachings. When the Supreme Court defined the rights guaranteed by the pension protection clause, it did so with reference to mandating "a contractual relationship between the employer and the employee," 2015 IL 118585, ¶ 15, and "creat[ing] an enforceable obligation . . . to pay the benefits . . . ." *Id* at ¶ 16. Thus, contrary to the City's argument, it is not the Pension Code that creates the contractual relationship. Rather, if the State or municipal employer creates a pension system, the contractual relationship that is mandated derives from the constitution, and so does the "enforceable obligation" to pay the benefits. *Id.; see also McNamee v. State*, 173 Ill.

2d 433, 444 (1996). The existence of a statute that would purport to subtract from this obligation is not consistent with the rights established by the pension protection clause.

Furthermore, the argument mistakenly assumes that all provisions of the Pension Code become part of the contractual relationship. This is not so. It is true, as the City argues, that the cases have stated that the contractual relationship is governed by the terms of the Pension Code at the time the employee becomes a member of the pension system and that those provisions become part of the contractual relationship. *See, e.g., DiFalco v. Board of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection District No. One*, 122 Ill. 2d 22, 26 (1988); *Kerner v. State Employees' Retirement System*, 72 Ill. 2d 507 (1978). Those cases, however, are concerned with defining the member's benefits. So, if the Pension Code contained a provision limiting pension benefits, then it was viewed as part of the rights that existed at the time of membership, just as enlarged benefits under an earlier version of the Code would have been enforced even in the face of subsequent legislation. See, e.g., *Kraus v. Board of Trustees*, 72 Ill. App. 3d 833 (1st Dist. 1979). These cases do not stand for the proposition that every provision of the Pension Code becomes part of the contractual relationship.

In fact, as pertains to the "net" benefit theory, a significant set of Pension Code provisions are expressly *not* incorporated into the contractual relationship, specifically the funding provisions. This concept has deep and firm roots. From the Supreme Court's latest pronouncement in *In re Pension Litigation* to its early statements shortly after ratification of the 1970 Illinois Constitution in *People ex rel. Federation of Teachers v. Lindberg*, 50 Ill. 2d 266 (1975), the decisions have been uniform. Funding choices remain in the hands of the political branches and are not "benefits" within the meaning of the pension protection clause.

For example, in *People ex rel. Sklodowski*, 182 Ill. 2d at 231, the plaintiffs argued that the General Assembly may establish statutory contributions levels that then become vested rights of pension fund participants, which distinguished the legislative action from that in *Lindberg*. The Court rejected the argument, stating: "Plaintiffs present no cogent argument for why this pension funding provision creates a vested right where the one at issue in *Lindberg* did not. There is no vested right in the mere continuance of the law." *Id.* at 232.

Likewise, in *McNamee*, 173 Ill. 2d 433, certain municipal pension funds and participant police officers challenged an amendment to the Pension Code that changed the method of funding police pensions, including by lowering the employer contribution levels. The plaintiffs claimed that the changes made the funds less secure and that the prior funding scheme constituted a benefit protected under article XIII, section 5. Specifically, they argued that "the 'benefits' that are protected by the constitution include the full benefits of a contractual relationship under the Pension Code." *Id.* at 439. Consequently, they claimed that the amendment "violated their constitutionally protected right to the 'benefit' of a more secure fund created by the prior funding method." *Id.*

As in *Lindberg* and later in *Sklodowski*, the Supreme Court rejected the claim. "The framers of our constitution simply did not intend that section 5 of article XIII control the manner in which state and local governments fund their pension obligations." *Id.* at 446. The Court emphasized once again that the clause "creates an enforceable contractual relationship that protects only the right to receive benefits." *Id.*

When examined against the Supreme Court's teachings, the City's "net benefit" argument cannot prevail. At its core, it rests on the notion that the General Assembly is authorized to trade Plaintiffs' constitutional rights to receive pension benefits for funding and enforcement

mechanisms, the longevity of which remains entirely in the hands of the legislature. The trade-off is not consistent with the purpose of the pension protection clause. No "net" benefit can result where the loss of guaranteed rights are exchanged for legislative funding choices, which remain outside of the protections of article XIII, section 5. Therefore, the General Assembly is not free to diminish benefits even if offering increased financial stability. *See In re Pension Reform Litigation,* 2015 IL 118585, at ¶ 75 (justifying "reducing retirement benefits . . . by economic circumstances would require that we allow the legislature to do the very thing the pension protection clause was designed to prevent it from doing"). Quite simply, the constitution removed diminishing benefits as a means of attaining pension stability.

The "net benefit" theory also overlooks another core concept in article XIII, section 5, protection. The clause limits legislative power. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 85. This is so because in ratifying the 1970 Illinois Constitution, the people, "based on historical experience" withheld from the legislature the authority to diminish "retirement benefits for public employees." *Id.*

Each of the benefits supposedly offered in exchange for the diminishment of pension benefits are aspects of the statute that are themselves subject to revocation, modification, or repeal as the General Assembly chooses. *Sklodowski*, 182 Ill. 2d at 232 ("There is no vested right in the mere continuance of a law."). Specifically, actuarial-based funding, the promise of full funding by 2055, and the enforcement mechanisms are based in the Pension Code, not the constitution.[7] As the *Jones* Plaintiffs have observed, "One cannot 'net' such ephemeral *statutory* 'benefits' against an absolute *constitutional* guarantee." (*Jones* Pl. MSJ Br. 12).

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[7] The City provided a transcript of the House Personnel and Pensions Committee to the Reply in Support of its Motion for Summary Judgment, in which the following exchange took place.

> Representative Morrison: "[T]he City of Chicago is a locally-run pension system. Why are they coming to the General Assembly then?"

The City's argument that once the obligation to fund the systems becomes part of the Pension Code, it is then transformed into part of a member's pension benefits has no merit. The same argument was advanced in *People ex rel. Sklodowski*, 182 Ill. 2d at 231. The Supreme Court rejected it. *Id.* at 232.

Accordingly, the City's "net benefit" argument can find no footing in art. XIII, section 5, of the constitution. Pension benefits cannot be "netted" against funding schemes regardless of any salutary outcomes they may have. To do so would render the rights guaranteed by the pension protection clause illusory. Such a result is contrary to the pension protection clause, its purpose, and the Supreme Court's interpretations of it.

3. The "Bargained-For-Exchange" Argument

In *In re Pension Reform Litigation*, in a footnote, the Supreme Court made the following observation:

> Additional benefits may always be added, of course . . . , and the State may require additional employee contributions or other consideration in exchange . . . . However, once the additional benefits are in place and the employee continues to work, remains a member of a covered retirement system, and complies with any qualifications imposed when the additional benefits were first offered, the additional benefits cannot be unilaterally diminished or eliminated.

2015 IL 118585, ¶ 46 n. 12.

The City draws from this passage that the contractual relationship established by participation in a public pension system may be modified like any other contractual relationship. Specifically, the City argues that P.A. 98-641 does not offend the pension protection clause because it was the result of arms-length negotiations between various unions and the City rather than unilateral action by the General Assembly. According to the argument, twenty-eights of

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Speaker Madigan: [The four City pension systems] "derive their authority to function, to take collections and to make disbursements pursuant to state law, so that's why they're here today asking for a change in the state law."
(Ex. F City MSJ RY, Tr. 13-14).

thirty-one unions voted in favor of the proposed legislation after they independently verified the financial condition of the funds. The twenty-eight unions, then, opted for reduced benefits in exchange for pension systems with enforceable provisions and the assurance that there would be adequate funds to pay the benefits of their members and retirees.

Plaintiffs respond that the argument has been forfeited. The City did not file an affirmative defense on this issue. Plus, at the time briefing was set on the motions for summary judgment, the Corporation Counsel represented that the City would advance the "net benefit" argument only. That argument had been presented in the City's briefs during the preliminary injunction proceedings. The bargained-for-exchange argument had not.

Although Plaintiffs are correct that the bargained-for-exchange argument was presented for the first time in the City's motion for summary judgment, all parties have had sufficient time and opportunity to thoroughly brief the issue. Accordingly, the Court chooses to address it.

On the merits, the argument cannot prevail. The City has presented no authority for such an expansive interpretation of a "bargained-for-exchange" under the pension protection clause. Further, the contention that labor unions, undisputedly acting outside the sphere of collective bargaining, may bind all members of the Funds ignores the individual constitutional rights protected by article XIII, section 5.

The Supreme Court's comment in footnote 12—that benefits may be added in exchange for additional employee contributions or other consideration—by its own terms, is confined to statutory changes, not events that take place outside the legislative process. This interpretation is reinforced by the context of the comment. The footnote in which it appears accompanies a list of cases in which courts invalidated statutes because they diminished pension benefits. The Supreme Court was simply qualifying the major point that it had just made in the text: Changes

in benefit subsequent to a party becoming a member of a pension system could not apply to him if the change reduced the member's benefits. The second sentence of footnote 12 further qualifies the statement by addressing the situation in which a member continues in service and complies with additional requirements to obtain additional benefits. In that case, the member can expect to receive the additional benefits. The entire context, though, pertains to *legislation* that modifies pension benefits but offers some additional benefit in exchange.

The City contends, however, that the Supreme Court did not limit the exchange of consideration to legislation and that New York courts have authorized unions to negotiate changes to benefits in exchange for other consideration. The City relies on two cases, *Ballentine v. Koch*, 674 N.E. 2d 292 (N.Y. Ct. Ap. 1996), and *Schacht v. City of New York*, 346 N.E. 2d 519 (N.Y. Ct. App. 1976). In both cases, the circumstances were far different from the negotiations that took place in this case. Specifically, any changes were rooted in collective bargaining agreements in which the unions acted as the true agents of the employees.

In *Ballentine*, the Court dismissed a claim that New York's pension impairment clause was violated by amendments to a statute that created a special supplemental fund for the benefit of police officers. The legislation creating the fund declared that it was not a pension or retirement system. That legislation itself was the result of collective bargaining negotiations. In dismissing the claims, the Court examined the statute and its history and concluded that the fund was not a pension fund and, therefore, did not qualify for constitutional protection. As an alternative, the Court concluded that the plaintiffs, individual retired police officers, waived their right to challenge the statute. They had designated the Police Benevolent Association as their collective bargaining representative and the evidence established that part of the agreement included the declaration that the special fund was not to be part of a pension system.

In *Schacht*, the Court squarely held that the plaintiff's claim for increased benefits under a prior salary plan "had been effectively waived by an agreement made by her collective bargaining representative and her own actions." 346 N.E. 2d at 32. In that case, as in *Ballentine*, there was no question that the union was acting as the agent of the employee and that the agreement arose out of the collective bargaining process.

Whether the bargained-for-exchange comment in footnote 12 will be extended to a collective bargaining situation is an issue that need not be resolved in this case. Similarly, there is no need to address the other issue raised in the briefs concerning whether unions may validly represent both active and retired members when engaged in collective bargaining. Neither of these situations is presented in this case.

The facts contained in the affidavits establish that the unions involved in the negotiations were not acting as agents in the collective bargaining process. There is no evidence that, in reaching an agreement with the City, the union officials followed union rules and bylaws in such a way as to bind their members as true agents. Nor is there evidence that the membership voted on the agreement. Mr. Brandon's affidavit explains the process of meeting and of taking a vote on whether to support SB 1922. His affidavit, along with the affidavits submitted by the *Jones* Plaintiffs, indicate that the vote was not unanimous and that the unions joined as plaintiffs in the *Jones* case did not support the bill.

Additionally, there is no showing that the unions could have acted as agents of retired members while at the same time acting as representatives of active employees. In fact, Mr. Brandon's affidavit makes no such claim. It refers to "an affiliated committee comprised of and established for the benefit of SEIU retirees." (Ex. B, City MSJ Br. at ¶ 2). He further states that he apprised the retiree committee members of the "status and progress of the negotiations"

between the City and the unions. (*Id.* at ¶ 6). He "personally informed" the committee of the "final terms" of the bill. (*Id.* at ¶ 8). So, even by his own affidavit, the retirees of SEIU did not vote on the proposed bill. Mary Jones' testimony, which the City cites in its reply brief, was similar. (City MSJ Ry at 27). She participated in a retiree group of AFSCME and was kept informed of the legislation. No evidence shows how the other unions involved retirees in the process.

It is undisputed that union representatives were engaged in talks with the City and that later they appeared before the General Assembly to state their positions on the proposed legislation. A large group of unions either agreed with, or took no position on, SB 1922. Yet, from the facts presented, these negotiations were no different in concept than legislative advocacy on behalf of any interest group supporting collective interests to a lawmaking body. They did not act as agents in a collective bargaining process and held no other special status by which they could bind their members. Regardless of the number of supporters or the merits of the efforts, these factors are simply not *constitutionally* relevant.[8] Any bargaining that took place was not the type of bargaining contemplated by the Supreme Court in footnote 12. For this reason alone, the City's bargained-for-exchange argument cannot prevail.

More fundamentally, the argument does not account for the personal nature of the rights guaranteed by the pension protection clause. As numerous cases illustrate, an individual is entitled to challenge statutes that result in a reduction of benefits as a violation the pension protection clause when applied to his or her own pension. *See, e.g.*, *DiFalco*, 122 Ill. 2d 22; *Buddell v. Board of Trustees*, 118 Ill. 2d 99 (1987); *Felt*, 107 Ill. 2d 158; *Kerner*, 72 Ill. 2d 507;

[8]Significantly, P.A. 98-599, the statute involved in *In re Pension Reform Litigation*, was also presented as a comprehensive bi-partisan measure designed to "shore up the long-term fiscal stability of both the State and its retirement systems." 2015 IL 118585, ¶ 24; *see also id.* at ¶ 28.

Kraus, 72 Ill. App. 3d 833. In this case, the individual plaintiffs have done just that. Nothing in the process that led to the enactment of P.A. 98-641 bars them from asserting their rights or operates as a waiver of them. For this reason also, the City cannot succeed on its bargained-for-exchange argument.

D. Severability

Whether the unconstitutional provisions may be severed from the remaining provisions of P.A. 98-641 is a question of legislative intent. *In re Pension Reform Litigation*, 2015 IL 118585, ¶ 91. Ascertaining the intent of the legislature begins by looking to the Act's own severability provision. *Id.* Such a provision creates a rebuttable presumption of legislative intent. *Id.* at ¶ 95. A court must then "determine whether the legislature would have passed the law without the invalid parts . . . ." *Id.* at ¶ 95. If the elimination of the invalid provisions would defeat the purpose of the statute, the entire statute should be held void. *Id.*

The Act's severability provision specifies sections of the Act that are declared "mutually dependent and inseverable." P.A. 98-641, § 93. The specified sections include provisions pertaining to the annual increases and employee contributions, sections 1-160 (postponement and elimination of AAIs in 2025 for Tier 2 members); 8-137, 8-137.1, 11-134.1, 11-134.3 (reduction, postponement and three-year elimination of AAIs for Tier 1 members); and 8-174 and 11-170 (employee contributions). *Id.* They also include provisions pertaining to the City's financing obligations and the enforcement mechanisms, sections 8-173 and 11-169 (defining the formula for the City's contributions and allowing offsets of State grants) and sections 8-173.1 and 11-169.1 (allowing mandamus actions). *Id.* With respect to these sections, the severability clause states: "If any of those provisions is held invalid other than as applied to a particular person or circumstance, then all of those provisions are invalid." *Id.*

This clear expression of legislative intent is confirmed by the General Assembly's findings in the introduction of the Act. There, the General Assembly found that "a balanced increase in funding, both from the City and from its employees, combined with a modification of annual adjustments for both current and future retirees, is necessary to stabilize and fund the pension funds." *Id.* § 1 (1). It also found that "increased funding alone, without modifying employee contribution rates and annual adjustments for current and future retirees" would be insufficient to meet "the crisis confronting the City and its Funds." *Id.* § 1 (4).

The affidavit of Matthew Brandon, describing the pre-enactment discussions, is also consistent with this intent, and so are the representations of Speaker Madigan to the House Personnel and Pensions Committee and those of Senator Raoul to the Senate. (Ex. F. City MSJ RY Tr. 3-8; Ex. D, City MSJ Br. Senate Tr. at 82). That is, the legislation intended to tie the reductions in employee benefits to the funding and enforcement mechanisms in the Act as part of a unified package.

Applying these factors to the standards for ascertaining the intent of the legislature, no doubt remains that the General Assembly would not have enacted P.A. 98-641 without the invalid provisions. Accordingly, those provisions are not severable. The entire Act is void.

CONCLUSION

Having found the P.A. 98-641 contains provisions that diminish the individual Plaintiffs pension benefits and those of the members of the associational Plaintiffs in violation of section XIII, section 5, of the 1970 Illinois Constitution, and having found that the unconstitutional provisions cannot be severed from the remainder of the Act, the Court declares P.A. 98-641 unconstitutional and void.

IT IS THEREFORE ORDERED:

1. In Case No. 14 CH 20027 (*Jones* case):

   a. Plaintiffs' Motion for Summary Judgment is granted;
   b. Plaintiffs' Motion to Strike the Affirmative Defense of Intervenor, City of Chicago, is granted;
   c. Defendants' Motion for Summary Judgment is denied;
   d. Intervenors' Motion for Summary Judgment is denied.

2. In Case No. 14 CH 20668 (*Johnson* case):

   a. Plaintiffs' Motion for Summary Judgment is granted;
   b. Defendants' Motion for Summary Judgment is denied;
   c. Intervenors' Motion for Summary Judgment is denied.

3. Pursuant to 735 ILCS 5/2-701 (West 2013), the Court declares that Public Act 98-641 is unconstitutional and void in its entirety because it diminishes pension benefits in violation of article XIII, section 5, of the 1970 Illinois Constitution.

4. Defendants and Intervenors are permanently enjoined from enforcing or implementing any provision of Public Act 98-641.

5. Plaintiffs are entitled to recoupment of the benefits that would have been paid since January 1, 2015 but for Public Act 98-641.

ENTERED:

JUDGE RITA M. NOVAK

JUL 24 2015

Circuit Court-1741

Date

Rita M. Novak
Judge Presiding

APPENDIX TO MEMORANDUM OPINION AND ORDER

FINDINGS UNDER ILLINOIS SUPREME COURT RULE 18

In the Memorandum Opinion and Order attached to this Appendix, the Court declared Public Act 98-641, a State statute, unconstitutional in violation of article XIII, section 5, of the 1970 Illinois Constitution. In accordance with Illinois Supreme Court Rule 18, the Court makes the following findings:

1. Public Act 98-641 was declared unconstitutional in violation of article XIII, section 5, of the 1970 Illinois Constitution and void in its entirety.
2. Public Act 98-641 was declared unconstitutional on its face.
3. The statute cannot be construed so as to preserve its validity, and a finding has been made that the unconstitutional provisions cannot be severed from the remainder of the statute.
4. Plaintiffs challenged Public Act 98-641 on its face, and the judgment and decision cannot rest on any alternate ground.
5. The State of Illinois and the City of Chicago were notified of the action and have intervened and participated in the proceedings from the outset.

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