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

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

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[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.