NO. 127239

IN THE
SUPREME COURT OF ILLINOIS

MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate, Plaintiffs-Cross Appellants/Appellees, v. SUSANA MENDOZA, in her official capacity as Comptroller of the State of Illinois, Defendant-Cross Appellee/Appellant.	On Direct Appeal to the Supreme Court from the Circuit Court of Cook County, County Department, Chancery Division No. 2017 CH 07762 Honorable FRANKLIN U. VALDERRAMA, And ALLEN P. WALKER Judges Presiding

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES AND BRIEF OF PLAINTIFFS/CROSS-APPELLANTS

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NATURE OF THE ACTION

The Illinois Constitution prohibits the legislature from making any mid-term changes to legislative salary. On appeal, the Comptroller does not dispute that this constitutional mandate prohibits both mid-term increases and decreases to legislative salary. Beginning in 2009, the General Assembly passed what became a series of laws over the years intended to reduce legislative salaries mid-term by requiring mandatory furlough days and suspending the legislature's vested cost-of-living increases. A number of these laws were enacted as a part of budget bills that could be hundreds of pages in length. Co-Plaintiffs-Appellees/Cross-Appellants Michael Noland ("Noland") and James Clayborne, Jr. ("Clayborne") were state senators during these years who voted in favor of the budget bills containing the salary reductions.

Noland and Clayborne filed a lawsuit in the Circuit Court seeking a declaration that these laws violated the Legislative Salary Clause[1] contained in the Illinois Constitution. The Circuit Court ruled that the Salary Reduction Laws were facially unconstitutional and thus void *ab initio*. The Comptroller then moved for leave to assert affirmative defenses to Plaintiffs' remaining claims for mandamus relief. The Circuit Court denied her leave to file the defenses of laches and waiver, finding them unavailable as a matter of law as defenses to a mandamus claim for payment of constitutionally protected legislative salary. The Circuit Court granted leave to the Comptroller to file the affirmative defense of the statute of limitations. After the parties filed cross-motions for summary judgment on the mandamus counts, the Circuit Court ruled that Plaintiffs' claims for mandamus relief did

[1] Plaintiffs adopt in their brief the defined terms that the Comptroller uses in her brief.

not accrue until the lower court declared the laws unconstitutional, and therefore were timely filed. The Circuit Court also denied Plaintiffs' request as relief that payment be ordered for all of the legislators whose salary was unconstitutionally withheld. Both sides appealed.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court correctly held that the statutes changing Plaintiffs' legislative salaries mid-term are facially unconstitutional and void *ab initio*.

2. Whether the circuit court correctly held that the Comptroller's proposed laches defense was unavailable as a matter of law.

3. Whether the circuit court correctly held that the Comptroller's proposed waiver defense was unavailable as a matter of law.

4. Whether the circuit court correctly held that the Comptroller's statute of limitations defense failed because Plaintiffs' claims for mandamus did not accrue until that court first declared the challenged laws unconstitutional and were therefore timely.

STATEMENT OF FACTS[2]

The first of the COLA elimination laws ("COLA Statutes"), which had an effective date of July 1, 2010, states in relevant part:

> Sec. 5.6. FY10 COLA's prohibited. . . . members of the General Assembly . . . are prohibited from receiving and shall not receive any increase in compensation that would otherwise apply based on a cost of living adjustment, as authorized by Senate Joint Resolution 192 of the 86th General Assembly, for or during the fiscal year beginning July 1, 2009. That cost of living adjustment shall apply again in the fiscal year beginning July 1, 2010 and thereafter.

(C 590; *see also* 25 ILCS 120/5.6.) In each of the following years through 2019, the General Assembly passed materially similar laws, eliminating COLA increases for its members. (C 374-75; C 589-92; C 881.)

The first of the laws mandating that legislators take furlough days ("Furlough Day Statutes"), which had an effective date of July 1, 2010, states in relevant part:

> During the fiscal year beginning on July 1, 2009, every member of the General Assembly is required to forfeit 12 days of compensation. The State Comptroller shall deduct the equivalent of 1/261 of the annual compensation of each member from the compensation of that member in each month of the fiscal year.

(C 596; *see also* 25 ILCS 115/1.5.)

Certain of the COLA Statutes and Furlough Day States were not stand-alone bills, but instead were part of larger budget bills. *See, e.g.,* https://www.ilga.gov/legislation/publicacts/96/PDF/096-0800.pdf, last visited on March 7, 2022; https://www.ilga.gov/legislation/publicacts/96/PDF/096-0958.pdf, last visited on

[2] Plaintiffs assert these facts in supplement to the Comptroller's Statement of Facts, which Plaintiffs adopt.

March 7, 2002; https://www.ilga.gov/legislation/publicacts/99/PDF/099-0523.pdf, last visited on March 7, 2022.

Public Act 100-0587, which eliminated the members' COLA increases for fiscal year 2019 was over 700 pages in length. *See* https://www.ilga.gov/legislation/publicacts/100/PDF/100-0587.pdf, last visited on March 7, 2022.

ARGUMENT

I. Summary of the Argument.

The Circuit Court's judgment in Plaintiffs' favor should be affirmed. The sole argument that the Comptroller asserted in the lower court was that the Legislative Salary Clause only prohibits mid-term increases in salary, but does not bar mid-term decreases in salary. The Circuit Court disagreed and held that the constitutional provision bars any mid-term change in salary, including salary reductions. On appeal, the Comptroller has dropped that position and concedes that the Salary Reduction Laws violate the Legislative Salary Clause. The Comptroller now argues instead that the Circuit Court erred in holding that the Salary Reduction Laws were *facially* unconstitutional and void *ab initio*, but are only unconstitutional *as applied*. (Appellant's Br. 15-21.) The Comptroller's position on appeal is that because the Salary Reduction Laws had effective dates beginning on the July 1 start of the respective fiscal year, and applied for the entirety of the fiscal year, the laws could be validly applied to the subset of new legislative terms beginning the following January, six months after the laws became effective.

The Comptrollers' "as applied" argument is flawed because it ignores what the text of Salary Reduction Laws actually provide. All of the statutes are mandatory and prohibit the Comptroller from making *any* COLA payments or *any* Furlough Day salary payments

to *any* of the members of the General Assembly during *any* on the months of the fiscal year. Under the express terms of the Salary Reduction Laws, the Comptroller has no discretion that would allow her pick and choose which members to pay and when, and which members to withhold payments from. Because of this, there is no set of circumstances where the Comptroller could comply with the statutes without violating the Constitution. For the statutes to pass constitutional muster, this Court would have to re-write every one of them to conform to the constitutional mandate, which courts do not do because it would be a usurpation of the legislative function. The Circuit Court therefore did not err in finding the statutes are facially unconstitutional.

The Circuit Court also correctly held that the Comptroller's proposed affirmative defenses of laches and waiver were unavailable as a matter of law. The most important fact in this regard is that this case involves the salary of *public* officers, not *private* employees or any *private* rights. Long-standing Illinois law holds that where a public officer's salary is fixed by law, the defenses of waiver and estoppel are unavailable as defenses to a claim to recover salary withheld in violation of the law. The principal behind this is that a public officer holder's right to compensation is not based on any personal or contract rights but instead attaches to the office. Because Plaintiffs' right to the legislative salary is not an individual right but attaches to the office, they individually have no ability to forfeit, waive or gift away this right either by affirmative actions or by delay in seeking payment. The doctrines of laches and waiver simply do not apply here.

On this basis, the Comptroller's affirmative defense of the statute of limitations is also unavailable. The legislature cannot avoid the constitutional mandate, either directly or indirectly. Permitting the legislature to enact a legislative public policy, as expressed by

the statute of limitations, that is at odds with the supreme public policy of the state in the form of a constitutional mandate in the Salary Reduction Laws would improperly elevate legislative policy over the will of the People of Illinois.

Alternatively, even if the statute of limitations were to be applied, the Circuit Court correctly held that Plaintiffs claims are timely. Plaintiffs' mandamus claims require as an element of the cause of action that Plaintiffs have a clear and affirmative right to relief. Plaintiffs had no such right until after the Circuit Court declared the Salary Reduction Laws unconstitutional. Because of this, Plaintiffs' mandamus claims did not accrue the Circuit Court made its ruling. The Circuit Court did not err in so holding.

II. Legal Standard for a Facial Challenge to the Constitutional Validity of a Statute.

A determination of facial invalidity "'is manifestly strong medicine"' which should be doled out "sparingly and only as a last resort." *Pooh-Bah Enterprises v. County of Cook*, 232 Ill. 463, 473 (2009) (quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). However, "[i]f a statute is unconstitutional, courts are obligated to declare it invalid." *Maddux v. Blagojevich*, 233 Ill. 2d 508, 528 (2009). A finding of facial unconstitutionality or, alternatively, of a violation of a constitutional guaranty, would mean that the statutes are unconstitutional in all of their applications. *See, e.g., In re Pension Reform Litig*., 2015 IL 118585, ¶ 40 (affirming trial court's ruling that statutes reducing pensions were unconstitutional in their entirety and permanently enjoining their enforcement); *People v. Carrera*, 203 Ill.2d 1, 14-15 (2002) (noting that the void ab initio doctrine applies to statutes that "violate substantive constitutional guarantees.").

In *People v. Burns*, 2015 IL 117387, ¶ 27, 79 N.E.3d 159, 165, this Court explained that "the proper analysis for facial challenges" was described by the United States Supreme Court in *Los Angeles, Calif. v. Patel*:

> "Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all of its applications.' *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 [128 S.Ct. 1184, 170 L.Ed.2d 151] (2008). But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. For instance, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 [112 S.Ct. 2791, 120 L.Ed.2d 674] (1992), the Court struck down a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: The '[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects .... The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.' *Id*., at 894 [112 S.Ct. 2791]."

Los Angeles, Calif. v. Patel, 576 U.S. 409, 418-19 (noting that "the constitutional 'applications' that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute").

Under this standard, even though it is exacting, the Circuit Court was obligated to – and correctly did – declare the Salary Reduction Laws facially unconstitutional.

III. The is No Set of Circumstance Where the Comptroller Could Comply with COLA Statutes Without Violating the Legislative Pay Clause of the Illinois Constitution.

Absent from Appellant's brief is any quotation from, or substantive discussion of, the actual text of the Salary Reduction Laws. This is because, as written and enacted, none of the laws can be constitutionally applied. All of the COLA statutes are essentially the same as the first such statute, which states in relevant part:

> Sec. 5.6. FY10 COLA's prohibited. . . . ***members of the General Assembly*** . . . are prohibited from receiving and ***shall not receive any increase in compensation*** that would otherwise apply based on a cost of living adjustment, as authorized by Senate Joint Resolution 192 of the 86th General Assembly, for or during the fiscal year beginning July 1, 2009. That cost of living adjustment shall apply again in the fiscal year beginning July 1, 2010 and thereafter.

(C 590; *see also* 25 ILCS 120/5.6) (emphasis added). By its express terms, this statute is expressly directed at all "members of General Assembly," not at some members but not others. The act statutorily proscribed for all members is equally clear and unambiguous. Under a standard canon of construction, the legislature's coupling in a statute of the term "shall" with the "negative 'not'" renders the action proscribed mandatory, not merely permissive. *People v. Youngbey*, 82 Ill. 2d 556, 562 (1980). Here, the act mandatorily proscribed is "any" increase in compensation. The plain meaning of "any" means not even one. *Caterpillar, Inc. v. Aetna Cas. & Sur. Co*., 282 Ill. App. 3d 1065, 1073 (1st Dist. 1996) (relying on the definition of "any" in Black's Law Dictionary 86 (5th ed. 1979) as: "Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity.").

Under the plain meaning of the statutes, the legislature intended to impose an immediate mid-term cut in salary for all members of the General Assembly. The Comptroller is thus proscribed from paying any COLA increase at all to any of the legislators. There is no language in the statute that would permit the Comptroller: (i) to pay COLAs to legislative members for whom the change applies mid-term, and (ii) withhold COLAs for an unspecified minority of members whose term would start half way through the fiscal year. In addition, there is nothing in the terms of the Salary Reduction Laws which would permit the Comptroller essentially to ignore the laws as unconstitutional for the entire first six months following their effective dates, then selectively enforce the laws

for the following six months of the fiscal year with regard to a subset of the members to which the statutes apply. However, this is what the Comptroller would have to do under her "as applied" position on appeal.

In order for the Comptroller to have the discretion to selectively enforce the statute, as her "as applied" argument would require, the statute would have to be re-written to say something along the lines of: "For any member of the General Assembly for whom such a salary reduction would not constitute a mid-year salary reduction . . ." This re-writing would be contrary to the intent of the legislature, as expressed in the statute, that the COLA elimination would apply across the board to all members. Furthermore, courts are precluded from re-rewriting statutes in this manner by the separation of powers doctrine of Article 2, § 1 of the Illinois Constitution. Ill. Const. 1970, art. II, sec. I. *See also In re M.M.*, 156 Ill. 2d 53, 69 (1993) ("We have no authority either to amend or to annex a statute. (citation omitted) Any alteration to the statute, regardless of any perceived benefit or danger, must necessarily be sought from the legislature."); *People v. One 1988 GMC*, 2011 IL 110236, ¶ 13 ("[r]ule of construing a statute so as to uphold its constitutionality when reasonably possible is not a license to rewrite legislation" citing *In re Branning*, 285 Ill. App. 3d 405, 410 (4th Dist. 1996)).

The case *People v. Burns*, 2015 IL 117387, is instructive. In *Burns*, this Court addressed the constitutionality of sections (a)(1) and (a)(3)(A) of the Aggravated Unlawful Use of Weapons statute, which by its express terms set forth a complete ban on carrying ready-to-use guns outside the home. *Burns*, 2015 IL 117387, ¶ 24. The State argued that the statute was not facially invalid, but only unconstitutional as applied, because it could be enforced against felons without violating the Second Amendment to the United States

Constitution. This Court agrees that the legislature can prohibit felons from possessing guns and has in fact done so. *Id.* at ¶ 29. Nevertheless, this Court held that because the terms of the statute were not limited to a particular subset of persons, such as felons, the statute was "facially unconstitutional, without limitation" because it "constitutes a flat ban on carrying ready-to-use guns outside the home." *Id.* at ¶ 25. This is because an unconstitutional statute "does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." *Id*. at ¶ 29. This Court explained that if it held the statute constitutional, it would in essence be "rewrit[ing] state law to conform it to constitutional requirements" and "substitut[ing] the judicial for the legislative department of the government." *Id*.

The circumstances here are the same as in *Burns*. The legislature could have enacted a statute that reduced COLA that was effective the next legislative term. However, that is not what the legislature enacted in any of the COLA statutes. As a result, they are facially unconstitutional and are not enforceable against anyone. *Id*.

IV. There is No Set of Circumstance Where the Comptroller Could Comply with the Furlough Statutes Without Violating the Legislative Pay Clause of the Illinois Constitution.

The terms of the Furlough Day statutes are also mandatory and do not allow the Comptroller any discretion to enforce the statutes against some, but not all, members of the General Assembly. Every one of the Furlough Day statutes dictates that the Comptroller must deduct 12 days of salary for every member of the General Assembly during the relevant fiscal year. The precise terms of the Furlough Day statutes vary slightly, and can be broken down into two different types. The first directs the Comptroller to deduct a portion of the salary every month:

> During the fiscal year beginning on July 1, 2009, every member of the General Assembly is required to forfeit 12 days of compensation. The State Comptroller shall deduct the equivalent of 1/261 of the annual compensation of each member from the compensation of that member in each month of the fiscal year.

(C 596; *see also* 25 ILCS 115/1.5.)

The second type of Furlough Day statute also requires the Comptroller to deduct a portion of the legislators' salary every month during the fiscal year, bur breaks it down by the first six months of the fiscal year and the second six months:

> During the first 6 months of the fiscal year beginning July 1, 2012, every member of the 97th General Assembly is mandatorily required to forfeit one day of compensation. The State Comptroller shall deduct the equivalent of 1/261st of the annual salary of each member of the 97th General Assembly from the compensation of that member in each of the first 6 months of the fiscal year. During the second 6 months of the fiscal year beginning July 1, 2012, every member of the 98th General Assembly is mandatorily required to forfeit one day of compensation.

(C 57-58; C 598-99; *see also* 25 ILCS 115/1.8.)

Although the precise terms of the statutes vary in this manner, they are all mandatory. The Comptroller must deduct a percentage of the salary of "every member" during "each" month of the fiscal year. The terms of the statutes brook no exceptions and provide the Comptroller no discretion to selectively apply the statutes to fewer than all on the members of the General Assembly. As with the COLA Statutes, in order for the Comptroller to have the discretion to selectively enforce the statute, as her "as applied" argument would require, the statute would have to be re-written, which Courts will not do. The Furlough Day Statutes are thus all facially unconstitutional.

V. The Circuit Court Correctly Held that the Defense of Laches Was Unavailable to the Comptroller.

The salient fact relevant to assessing the viability of the Comptroller's proposed affirmative defenses of laches and waiver is that this case involves the salary of *public*

officers, not *private* employees. Long-standing Illinois law holds that where a public officer's salary is fixed by law, the defenses of waiver and estoppel are unavailable as defenses to a claim to recover salary withheld in violation of the law. The bedrock principle underlying the holdings in the relevant cases is the precept that "public offices are created in the interest and for the benefit of the public." *People ex. rel. Sartison v. Schmidt*, 281 Ill. 211, 215 (1917). Because of this, the "public office holder's right to compensation is not based on any personal or contract rights but attaches to the office." *People ex rel. Barrett v. Bd. Comm'rs of Cook County*, 11 Ill. App. 3d 666, 668 (1st Dist. 1973); *see also Bardens v. Bd. of Trustees of Judges Ret. Sys*., 22 Ill. 2d 56, 62 (1961); ("strong considerations of public policy underlie the holdings of this court and others that a public officer can not agree to accept for his services any compensation less than that fixed by law"); *Pitsch v. Continental and Commercial National Bank*, 305 Ill. 265, 271 (1922) (the "compensation of a public official for the performance of his official duties is not a matter for traffic or trade"). Plaintiffs therefore individually have no ability to forfeit, waive or gift this right either by affirmative actions or by delay in seeking to enforce it. The Circuit Court thus did not err in denying the Comptroller leave to assert the defenses of laches and waiver.

In reaching this conclusion, the Circuit Court relied on the Appellate Court's decision in *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941). That case is directly on point. In *Northrup*, twenty-three former Chicago aldermen, or their estates, sought the issuance of a writ of mandamus to compel the City of Chicago to pay salary amounts that were withheld between 1932 and 1935 because of salary reduction ordinances enacted by the City Council. *Id*. at 285. The plaintiffs argued that the ordinances resulted in mid-term salary reductions that violated Section 11 of

Article IX of the Illinois Constitution.[3] *Id*. at 285. Twenty-one of the twenty-three plaintiffs had voted in favor of the ordinances. *Id*. at 286. Furthermore, each of the plaintiffs accepted the reduced salary payments in monthly installments during the entire period from 1932 to 1935. *Id*. at 286-87.

In *Northrup*, the City asserted as defenses estoppel, laches, the statute of limitations and that the withheld salaries were a gift by the plaintiffs to the City. *Id*. at 286. Even though most plaintiffs voted in favor of the salary reduction ordinances, accepted the reduced salary and waited many years after the first ordinance was passed to file suit, the Court rejected the City's defenses as unavailable. Specifically, the Court in *Northrup* held:

> The so–called defenses by the city officers, namely, the statute of limitations, laches and gifts, are all contrary to the Constitution and public policy of the State, and cannot be sustained. Such defenses, as we have shown, if sustained, would create a situation equivalent to avoiding the constitutional mandate.

Id. at 296.

In reaching this holding, the *Northrup* Court relied on a number of Illinois Supreme Court cases, including *Galpin v. City of Chicago*, 269 Ill. 27 (1915) and *Pitsch v. Continental and Commercial National Bank*, 305 Ill. 265 (1922. As these cases make clear, a public official's salary is for the benefit of the public at large rather than solely for the private benefit of the individuals receiving the salary. *Galpin* involved the State's Attorney of Cook County, who made a campaign promise, which he kept after election, to pay certain

[3] Section 11 of Article IX of the Illinois Constitution of 1870 provided: "The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term." *Northrup*, 308 Ill. App. at 287.

of the money due to him back to the County. After he died, his estate sued to recover the amount ceded to the County. This Court in *Galpin* rejected an estoppel defense, holding:

> The fees or salary of an officer, having been fixed by law, become an incident to the office, and it is contrary to public policy for candidates to attempt to attain such office by promises made to the electors to perform the duties of the office for any other or different compensation than that fixed by law. Such promises being illegal, they cannot be enforced.

269 Ill. at 41.

The Court in *Pitsch* addressed a similar situation, where a public officer, whose salary was set by statute, agreed to accept less than the statutory amount. The *Pitsch* Court rejected waiver and estoppel defenses, stating:

> The compensation of a public official for the performance of his official duties is not a matter for traffic or trade, for bargaining or for favoritism. Every person for whom such services are rendered is entitled to receive them at the same price. Official morality and public policy alike prohibit the undermining of the public service by permitting officers to make merchandise of their official services.

305 Ill. 265, 271; *see also Bardens v. Bd. of Trustees of Judges Ret. Sys.,* 22 Ill. 2d 56, 62 (1961 ("strong considerations of public policy underlie the holdings of this court and others that a public officer can not agree to accept for his services any compensation less than that fixed by law"); *People ex rel. Barrett v. Bd. Comm'rs of Cook County*, 11 Ill. App. 3d 666, 668 (1st Dist. 1973 ("The public officer holder's right to compensation is not based on any personal or contract rights but attaches to the office.").

The Comptroller tries to distinguish *Northrup* by arguing that although this Court has not overruled *Northrup*, it has purportedly "rejected the appellate court's rational that allowing a statute of limitations defense would be 'equivalent to avoiding the constitutional mandate.'" (Appellant's Br. 22.) The Comptroller can only make this argument by ignoring that a public officer's salary is not an individual right, but instead inheres to the

office. In fact, Illinois case law that long predates the *Northrup* decision holds that "[a]nyone may *waive his own personal, individual right* to question the constitutionality of a statute or may be estopped to assert such right." *Mills v. People's Gaslight & Coke Co*., 327 Ill. 508, 533 (1927) (emphasis added), citing *McCarthy v. Lavasche*, 89 Ill. 270 (1878). This case – like *Northrup* – does not involve a personal, individual right. Because Plaintiffs' right to the legislative salary is not based on any personal or contract rights but attaches to the office, they individually have no ability to forfeit, waive or gift this right either by affirmative actions or by delay in seeking to enforce it.

All of the cases cited by Defendant involve the failure to timely assert private personal rights that do not have the same public policy concerns as a public officer's salary, and which therefore can be subject to defenses such as laches, waiver, and the statute of limitations. For example, the Comptroller points to this Court's decision in *Langendorf v. City of Urbana*, 197 Ill. 2d 100 (2001), which involved a constitutional challenge to annexation and rezoning agreements that two private landowners entered into with a city. *Langendorf* concerned a private, individual right and given this it is unsurprising that the court held that the statute of limitations (which the Comptroller analogizes to laches) could apply to the constitutional challenge. However, *Langendorf* did not involve a public officer's constitutionally protected salary, which is not a private right but instead inheres to the office, and thus is not instructive here.

The other cases cited by the Comptroller also involve private rights and do not address, much less answer, the question presented in this appeal. *See, e.g., Horn v. City of Chicago*, 403 Ill. 549 (1949) (a claim that construction of a viaduct was a taking and damaged private property without payment of just compensation). *Tillman v. Pritzker*,

2021 IL 126387 (a suit by a taxpayer, who was granted individual standing to sue under 735 ILCS 5/11-301, to enjoin state officials from disbursing funds for two general obligation bonds). The issue in *Tully v. State*, 143 Ill. 2d 425 429 (1991), another case cited by the Comptroller, was a judicial candidate's challenge to the incumbent judge's candidacy for retention. However, the right to run for office is a private right belonging to the candidate, not a public right. *See Akin v. Smith*, 2013 IL App (1st) 130441 at ¶ 13 (2013) (referring to "private rights of candidates"). *Tully* and the other cases cited by the Comptroller are therefore not instructive.

Also unavailing for the Comptroller is her citation to a Utah Supreme Court case, *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, where the court made a distinction between a governmental power to act outside of constitutional bounds and a litigant's forfeiture of a right to complain about the ultra vires act. (Appellant's Br. 24.) The Comptroller's reliance on this case is misplaced for two reasons. First, *Horne* applied laches in a case involving a private right under the First Amendment, and not the type of public right at issue here. Second, as *Northrup* makes clear, under the Illinois Constitution the reduction of a legislator's salary in any way is against public policy and void, and cannot be avoided either directly or indirectly through application of doctrines such as laches or estoppel.

The Comptroller's final argument for ignoring the *Northrup* holding and applying laches in this case also fails – namely, the Comptroller's assertion that laches should be applied because this case involves the expenditure of public funds. (Appellant's Br. 26.) This argument ignores long-standing Illinois case law holding that the state government's fiscal concerns do not trump this type of constitutional mandate. This principle was

strongly set forth by this Court in *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 304 (2004), which stated: "any departure from the law is impermissible unless justification for that departure is found within the law itself. Exigent circumstances are not enough. 'Neither the legislature nor any executive or judicial officer may disregard the provisions of the constitution even in case of a great emergency." *See also Northrup* 308 Ill. App. 3d at 288-89 (fiscal emergency cannot be used as a means of construction of a constitutional provision that makes no reference to any emergency).

In sum, the Circuit Court correctly held that laches was not available as a matter of law as a defense to Plaintiffs' mandamus claims seeking payment of the legislative salaries that were not private contractual rights, but instead incident to their legislative offices.

VI. The Circuit Court Correctly Held that the Defense of Waiver Was Unavailable to the Comptroller.

Waiver is unavailable as defense to payment of the legislative salaries for the same reasons (set forth the above) that laches is unavailable. In arguing otherwise, the Comptroller makes the curious claim that because the legislature purportedly has the "ultimate control" over their own salaries, "it can hardly be said that public policy must prevent them from accepting less than the amount they themselves have determined." (Appellant's. Br. 30.) The supreme policy of the State is expressed by the People of Illinois in the Illinois Constitution. Here, the People of Illinois have expressly constrained the legislature, through article IV, § 11, from making any mid-term increases or decreases to legislative salaries. The Comptroller is therefore wrong in asserting that the legislators have "ultimate control" over their salaries – any salary changes must be made within the constructional bounds, which was not done with the COLA Statutes and the Furlough Day

Statutes. The Comptroller's attempt to shrug off the violations of public policy of these unconstitutional laws should be disregarded.

The Comptroller also tries to manufacture a distinction, unsupported by the case law or logic, between a public official who agrees *in advance* to accept a lower salary than constitutionally mandated, and a public official who agrees to accept less *after* taking office. (Appellant's Br. 30-31.)

The Comptroller erroneously argues that in the latter situation, the dangers meant to be proscribed by the Legislative Salary Clause are purportedly "minimal, if not entirely absent." *Id*. This Court recognized in *Pitsch* that the compensation of a public official for the performance of his official duties "is not a matter for traffic or trade, for bargaining or for favoritism." 305 Ill. at 271. The improper traffic or trade that the constitutional provision is meant to proscribe can take place either before or after election to office. As another court aptly stated in analogous circumstances:

> If a candidate for public office is permitted to obtain appointment or election by a promise to serve for less than the amount fixed by the Legislature, or if, after having obtained appointment or election, he is permitted to more securely entrench himself in office by such a promise and thus bring about his reappointment or re-election, such practice will ultimately result in the virtual auctioning off of official positions to the lowest bidder, and the obtaining of the least efficient employees to fill the positions.

Ballangee v. Bd. of Cty. Comm'rs of Fremont Cty., 66 Wyo. 390, 402–04, 212 P.2d 71, 75 (1949). Even after election, a legislator's promise to accept less than the constitutionally mandated salary is the type of traffic and trade in the public office that the Legislative Salary Clause proscribes. *Pitsch,* 305 Ill. at 271.

The Comptroller's attempt to disregard the supreme policy of the State, as expressed in the constitution and recognized by this Court in the *Pitsch* and *Galpin* is thus

without merit. The Court should therefore affirm the Circuit Court's ruling that the Comptroller's waiver defense was unavailable as a matter of law.

VII. The Circuit Court Correctly Held that the Defense of the Statute of Limitations Was Unavailable to the Comptroller.

After the Circuit Court entered its order declaring the statutes unconstitutional, the Circuit Court permitted the Comptroller to assert a statute of limitations defense to the remaining mandamus counts. In moving for summary judgment on the mandamus counts, Plaintiffs argued that: (i) judicial dictum in *Northrup* and the rational of numerous Illinois cases established that the statute of limitations is not a viable defense to a claim to compel payment of a public officers' salary; and (ii) the mandamus claims did not accrue until the Circuit Court entered the declaration that the statutes were unconstitutional, in accord with *Kelly v. Chicago Park Dist*., 409 Ill. 91 (1951). (C 1050-51.) The Circuit Court did not reach Plaintiffs' first argument, instead basing its ruling in Plaintiffs' favor on the second argument – namely, under this Court's ruling in *Kelly*, the mandamus claims did not accrue until the Circuit Court issued on July 2, 2019 its Memorandum Opinion and Order declaring the statutes unconstitutional (which the Circuit Court subsequently amended on July 8, 2019). (C 1217-18.)

Both of the grounds Plaintiffs argued below provide a basis for this Court to affirm the Circuit Court's rejection of the statute of litigations defense. *See Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998) (a "trial court may be affirmed on any basis that appears in the record without regard to whether the trial court relied upon such ground or whether the trial court's rationale was correct"). For both of these independent reasons, the Circuit Court's ruling should be affirmed.

A. Under the Public Policy of the State, The Statute of Limitations Does Not Apply to Plaintiffs' Mandamus Claims.

Where a plaintiff has a clear right to receive wrongfully withheld salaries or portions thereof, an order of mandamus is appropriate to ensure that public officials fulfill their duty to pay. In *Northrup*, the First District Appellate Court upheld the issuance of a writ of mandamus compelling the City of Chicago to pay former aldermen or their estates salary amounts that were withheld between 1932 and 1935 due to unconstitutional mid-term salary reductions enacted by the City Council, which most of the plaintiff aldermen had voted for. 308 Ill. App. at 285-88. In affirming the writ, the First District rejected the defendant's estoppel, laches, *and statute of limitations* defenses as contrary to "public policy" and "the constitutional mandate" to pay public officials the full salary tied to their term of office. *Id*. at 294-96.

The holding in *Northrup* is consistent with the Illinois cases holding that the defenses of laches, waiver, estoppel or a gift do not apply in the context of public officers' right to receive their full salary. *See, e.g., Galpin* and *Pitsch*. As set forth above, these cases stand for legal principle, long recognized in Illinois, that a public officer's right to his salary is not an individual right but rather a public right that belongs to the People of Illinois as a whole. *See e.g., People ex rel. Barrett v. Bd. Comm'rs of Cook County*, 11 Ill. App. 3d 666, 668 (1st Dist. 1973) ("The public officer holder's right to compensation is not based on any personal or contract rights but attaches to the office.") (citing *Kelly*, supra) (emphasis added). Therefore, public policy (and in this case a constitutional mandate as observed in *Northrup*) dictates that public officers cannot by any action or inaction do anything to destroy, abandon, relinquish, give away or otherwise repudiate their public right to receive a full salary.

In contrast to this case law, research has uncovered no Illinois case where a public officer was, by any action or inaction, deemed to have relinquished, abandoned, or lost their right to receive their full salary, regardless of the passage of time. In sum, there is no principled reason to explain why under the case law: (1) Plaintiffs cannot by delay lose their right to their full salary under a laches theory, and cannot give up this right by any affirmative action such as a contractual agreement, express waiver or even a voluntary gift; but (2) can lose this right by delay under a statute of limitations theory.

Because the reduction "in any way" of a public official's constitutionally protected salary "is against public policy and void," the taking of an action "which would accomplish indirectly the same result, is rendered nugatory by the constitutional provision." *Northrup*, 308 Ill. App. at 296. The legislature is thus without power to place any limitations, direct or indirect – including a statute of limitations – on a legislator's right to receive their full salary pursuant to Art. IV, § 11 of the Illinois Constitution. Application of the five year statute of limitations in 735 ILCS 5/13-205 to bar a legislator from receiving their salary would therefore be void as against public policy. *See Rock v. Burris* 139 Ill. 2d 494, 499-500 (1990) ("What the constitution requires, both within the legislative article and elsewhere, is that the salary for the various constitutional offices within State and local government *be carved in stone* when the public officials take office and that the salary structure so set not be changed to take effect during that term.") (emphasis added) .

This conclusion is buttressed by the precept that "[j]ust as the legislature is presumed to act with full knowledge of all prior legislation, the drafters of a constitutional provision are presumed to know about existing laws and constitutional provisions and to have drafted their provision accordingly." *In re Pension Reform Litig*., 2015 IL 118585, ¶

70. The drafters of the Legislative Salary Provision are therefore presumed to have known about *Northrup's* inclusion of the statute of limitations among the defenses that are unavailable against the constitutional salary mandate. *See Northrup*, 308 Ill. App. at 296. Despite this, the drafters of the constitutional provision did nothing to change this existing law. Just as a judicial interpretation of a statute is considered part of the statute itself (until changed by the legislature) so too is the *Northrup* decision with respect to the Illinois Constitution's various Salary Protection Clauses, unless the drafters included language to depart from *Northrup*. They included no such language. This further underscores that the statute of limitations defense is not available to the Comptroller.[4] .

In addition, it is axiomatic that the Illinois Constitution is the "supreme law" of this state. *See Chicago Bar Ass'n v. Illinois State Board of Elections*, 161 Ill.2d 502, 508 (1994). As this Court has recognized, the "people of Illinois give voice to their sovereign authority through the Illinois Constitution [and it] is through the Illinois Constitution that the people have decreed how their sovereign power may be exercised, by whom and under what conditions or restrictions. *In re Pension Reform Litig*., 2015 IL 118585, ¶ 79. Importantly, the Constitution of this state is a limitation upon the power of the legislature. *Peabody v. Russel*, 301 Ill. 439, 442 (1922). Because of this, the "General Assembly may not legislate on a subject withdrawn from its authority by the constitution." *In re Pension Reform Litig*., 2015 IL 118585, ¶ 85.

[4] Although *Northrup* was interpreted the 1870 Illinois Constitution's legislative salary clause, that provision was essentially the same as the one formulated by the drafters of the 1970 Illinois Constitution. Furthermore, this court has relied on decisions regarding the 1870 Illinois Constitution's legislative salary clause in interpreting the current salary clause. *See Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 303 (2004, relying on *People ex rel. Lyle v. City of Chicago*, 360 Ill. 25 (1935) .

Here, Article IV, § 11 of the Illinois Constitution is clear, explicit, and unambiguous. It states in mandatory terms that a "member shall receive a salary and allowances as provided by law, but changes in the salary of a member shall not take effect during the term for which he has been elected." Ill. Const. 1970, art. IV, § 11 (emphasis added). This constitutional language is absolute, and contains no limitation or exception of any kind. The people of Illinois have, in an exercise of their sovereign authority, removed from the legislature the ability to place any limitation on a legislator's right to receive their full salary. This includes a time limitation in the form of a statute of limitations. Such a measure would be an impermissible effort to circumvent by indirect means the constitutional mandate.

Any attempt to apply the five year statute of limitations in 735 ILCS 5/13-205 to bar Plaintiffs from receiving their full salary would therefore be void as against public policy. The Illinois Constitution is the supreme expression of the public policy of the state. In contrast to a constitutional mandate, a legislative act is but "the will of the legislature, in a derivative and subordinate capacity." *In re Pension Reform Litig*., 2015 IL 118585, ¶ 80 (quotation omitted). Relevant here, statutes of limitation are "measures of public policy" as determined by the legislature. *Peregrine Fin. Grp., Inc. v. Futronix Trading, Ltd*., 401 Ill. App. 3d 659, 661 (2010). However, the legislature is without the authority to enact a public policy that is at odds with the supreme public policy of the State in the form of a constitutional mandate. The relevant doctrine is well established under Illinois law:

> Whether an act of the Legislature is void because it contravenes the public policy of the state depends upon whether the public policy upon the particular subject has been established by statute, or is a part of the common law, or has been declared by some provision of the state Constitution. If it exists merely by virtue of some statute or the common law, it may be changed by the Legislature at will. If the Constitution has declared the

> public policy of the state with reference to the particular subject the Legislature is powerless to change it.

State Pub. Utilities Comm'n v. Romberg, 275 Ill. 432, 439 (1916). Permitting the legislature to place a limitation on the constitutional mandate in Article IV, § 11 would allow legislature to overrule the will of the people of Illinois as expressed by the constitution. Any attempt to apply the five year statute of limitations in 735 ILCS 5/13-205 to bar Plaintiffs' claims, even in part, would therefore be void as against public policy.

This conclusion is supported by an analogous line of case law, applying the doctrine "nullum tempus occurrit regi", which holds that no statute of limitations can run against the government. *See, e.g., City of Shelbyville v. Shelbyville Restorium, Inc.,* 96 Ill. 2d 457, 461 (1983); *City of Chicago ex rel. Scachitti v. Prudential Sec., Inc*., 332 Ill. App. 3d 353, 361 (2002). This doctrine is designed – as is the legislative salary protection – to protect public interests. *See Shelbyville*, 96 Ill. 2d at 461 (the basis of this doctrine is the "policy judgment that the public should not suffer because of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public"). The "nullum tempus" doctrine is not statutory, but instead a common law recognition of the manner in which the interests of the people of Illinois can trump a legislatively enacted statute of limitations.

Furthermore, any other result would mean that legislators could for political or personal self-interest pass a salary increase or decrease, coupled with an exceedingly short statute of limitations, and not challenge it in court, thereby indirectly avoiding the constitutional mandate via the statute of limitations. This would result in the very harm that article IV, § 11 of the Illinois Constitution is designed to prevent. The statute of limitations thus is not a viable defense to Plaintiffs' mandamus claims.

B. Alternatively, Plaintiffs' Mandamus Claims Accrued When The Circuit Court Declared the Statutes Unconstitutional.

Should this Court determine that the five year statute of limitations in 735 ILCS 5/13-205 does apply, the mandamus claims did not accrue until the Circuit Court issued on July 2, 2019 its Memorandum Opinion and Order declaring the statutes unconstitutional, and the claims are therefore timely. It is axiomatic that a "cause of action must have existence before it can be barred" by the statute of limitations. *Aetna Life & Cas. Co. v. Sal E. Lobianco & Son Co*., 43 Ill. App. 3d 765, 767 (2d Dist. 1976), quoting *Schweickhardt v. Jokers*, 250 Ill. App. 77, 81 (3d Dist. 1928). A mandamus claim does not exist "[i]f the right of the petitioner must first be fixed or the duty of the officer sought to be coerced must first be determined." *Hooper v. Snow*, 325 Ill. 53, 56 (1927). Because of this, Courts will dismiss mandamus claims as premature where a party's right or the officer's duty has not been judicially determined. *See Foss, Schuman & Drake v. Vacin*, 57 Ill. App. 3d 660, 661-62 (1st Dist. 1978) (affirming dismissal of mandamus claim against the mayor of Berwyn as premature because a law firm's claim for legal fees had not been reduced to judgment).

Here, Plaintiffs' mandamus claims were premature until this Court's determination on July 2, 2019 that the relevant statutes are unconstitutional. Prior to that, the mandamus claims were not ripe. The Circuit Court correctly held that the five year statute of limitations is thus no bar to Plaintiffs' mandamus claims.

Contrary to what Defendant argues, *Kelly v. Chicago Park Dist*., 409 Ill. 91 (1951) is directly on point. *Kelly* stands for the proposition that where the right to a salary is a "condition precedent" to suing for payment of the salary, an action to compel payment does not accrue for statute of limitations purposes until that right has been established by the

court. *Id*. at 95-96. In *Kelly*, the condition precedent that first had to be established was the right to hold the employment position, which would establish the right to the salary. *Id*. In this case, the condition precedent that needed establishment was that the statutes at issue were unconstitutional, which established the legislators' right to the salary. Prior to the establishment of these conditions precedent, mandamus did not lie in either *Kelly* or this case.

The Comptroller admits – as she must – that in a number of circumstances a cause of action does not accrue when the wrongful act was committed, but afterwards when the right to sue arises. (Appellant's Br. 40, citing cases.) The Comptroller argues that this principal only applies when an element of the cause of action, often damages, needs to be established in a prior action, which the Comptroller argues is not the case here. The Comptroller is wrong. The elements of a claim of mandamus are a showing by a plaintiff "that (1) he or she has a clear and affirmative right to relief, (2) the public official has a clear duty to act, and (3) the public official has clear authority to comply with the writ." *Gassman v. Clerk of the Cir. Ct*., 2017 IL App (1st) 151738, ¶ 13. Plaintiffs needed first to prevail on their declaratory judgment cause of action before the "clear and affirmative right to relief" element for mandamus relief could be met. The statutes were lawfully enacted, were unambiguous in reducing Plaintiffs' salaries, and – as the Comptroller argues in her brief – had a presumption of constitutionality. Plaintiffs thus had no right to mandamus relief until after the Circuit Court's ruling declaring the statutes unconstitutional.

This conclusion is not changed by the fact that, as the Comptroller points out, Plaintiff brought the claims for declaratory judgment and mandamus relief in the same lawsuit. (Appellant's Br. 36.) As Plaintiffs explained to the Circuit Court judge, the

mandamus counts were brought as a "placeholders . . . in the event [Plaintiffs] prevailed on the unconstitutional claims." (R 88.) Including the mandamus claims was simply a matter of economy for the litigants and the court. That does not alter the fact that Plaintiffs declaratory judgment claims had to be litigated first and reduced to a successful judgment before Plaintiffs' mandamus claims were ripe for adjudication.

The Comptroller's reliance on *Sundance Homes, Inc. v. Cty. of DuPage*, 195 Ill. 2d 257 (2001) is misplaced. The *Sundance Homes* decision was limited to the date a claim accrues in one narrow area of the law – *i.e*., tax and fee refunds. In *Sundance Homes*, the Court began its analysis by expressly making it clear that it was "focusing specifically on refund litigation." *Id*. at 265. The court then proceeded to spend numerous pages analyzing the "purposes of statutes of limitations *in the tax context*," including federal decisions "*in the area of tax litigation*." *Id*. at 267-68 (emphasis added). In was only in that context that the Court determined that a tax or fee refund claim accrues when the payment is made. Because its analysis was thus limited, the Court in *Sundance Holmes* did not overrule *Kelly*. Instead, the Court only rejected the argument "that *Kelly* controls *in the context of fee or tax refund litigation*." *Id*. at 276 (emphasis added). *Kelly* therefore remains good law and the *Kelly* salary case controls in the context of this salary case.

The Comptroller ends her brief making a dire warning that affirming the Circuit Court's holding would "create a roadmap" for litigants to frustrate the policy behind a statute of limitations by coupling a claim for coercive relief with a claim for a declaratory judgment. (Appellant's Br. 42.) The Comptrollers stated concerns are misplaced. The areas where a right to relief must be established before a cause of action accrues are very limited. *Kelly* was decided over 70 years ago and no such onslaught of cases attempting to frustrate

the policy of a statute of limitations arose in its wake. The Comptroller's concerns should be disregarded.

The Circuit Court's ruling that mandamus claims did not accrue for the purpose of the statute of limitations until the Circuit Court ruled on the constitutionality of the statutes should be affirmed.

CONCLUSION

For the foregoing reasons, the Circuit Courts judgment in Plaintiffs' favor should be affirmed.

BRIEF OF THE CROSS-APPELLANTS

CROSS-APPEAL NATURE OF THE ACTION

Plaintiffs brought this lawsuit to compel the Comptroller to pay their unconstitutionally withheld legislative salaries, and also to pay all of the other similarly situated members of the General Assembly who had their salaries reduced in violation of the Illinois Constitution. Plaintiffs argued in the Circuit Court that they could seek as relief payment for the other non-party members because legislative salaries are not a private contractual right, but instead are a pubic right that is inherent in the legislative office. Because they were seeking to enforce a public right, Plaintiffs argued that they had standing to compel the Comptroller to make all of the payments. The Circuit court held that the Salary Reduction Laws were facially unconstitutional and entered final judgment specifying how much the Comptroller was ordered to pay Plaintiffs. However, the Circuit Court ruled that Plaintiffs had no standing to seek payment for the other members of the General Assembly. Plaintiffs are cross-appealing this issue.

CROSS-APPELLANTS' ISSUE PRESENTED FOR APPEAL

Whether the Circuit Court erred in holding that its final judgment declaring the Salary Reduction Laws facially unconstitutional could not be applied to all members of the General Assembly and as a result denied Plaintiffs' request for entry of an order directing the Comptroller to pay all members of the General Assembly their withheld salaries.

JURISDICTION

The Comptroller's direct appeal to this Court is brought under Supreme Court Rule 302(a) from the circuit court's May 6, 2021 judgment. (C 1231–37.) That judgment included findings under Supreme Court Rule 18 regarding the constitutionality of the laws challenged by Plaintiffs in this action. (C 1231.) The Comptroller timely filed her notice of appeal on May 7, 2021. (C 1233–37.) See Ill. Sup. Ct. R. 303(a)(1). Plaintiffs filed a notice of cross-appeal on May 28, 2021, which was timely because it was filed within 30 days of the circuit court's judgment. (C 1242–46.) See Ill. Sup. Ct. R. 303(a)(3). This Court has jurisdiction over this appeal under Ill. Sup. Ct. R. 301.

CONSTITUTIONAL PROVISION INVOLVED

The Legislative Salary Clause of the Illinois Constitution (art. IV, § 11) provides: "A member shall receive a salary and allowances as provided by law, but changes in the salary of a member shall not take effect during the term for which he has been elected."

CROSS-APPEAL STATEMENT OF FACTS

Plaintiff Michael Noland ("Noland") was a member of the Illinois Senate from 2007 to 2017. (C 585.) Plaintiff James Clayborne, Jr. ("Clayborne") was a member of the Illinois Senate from 1995 to January 2019. (C 586; C 609.)

Noland brought this action seeking a declaration that the Salary Reduction Laws were unconstitutional. (C 21-35.) Noland sued both individually and in his "official capacity as a former member of the Illinois Senate" and sought as relief payment of the withheld salaries both for himself and for the other non-party members of the General Assembly. (C 21–22, 32–35.) He named the Illinois Comptroller, Susana Mendoza, as the defendant. (C 21–23.)

The Comptroller moved to dismiss the action, asserting that Noland lacked standing to seek relief in his "official capacity" as a former Senator. (C 109–10, 124.) The circuit court agreed, stating: "Plaintiff, in our case, cannot bring this case in his official capacity. He no longer is a member of the Illinois Senate. And as such, he cannot sue as a public official or represent the Senate." (C 345.)

With leave of court, Noland filed an amended complaint in which he sued in his individual capacity, and added as a plaintiff Clayborne — who was still serving in the Senate but had announced that he would not seek reelection — both in his individual capacity and in his "official capacity as a member of the Illinois Senate." (C 347, 348–72.) Counts I to IV of their amended complaint sought a declaratory judgment that the Salary Reduction Laws suspending COLAs and imposing furlough days for Noland and Clayborne violated the Legislative Salary Clause, were facially unconstitutional, and void ab initio. (C 361–66.) Counts V and VI sought mandamus relief requiring the Comptroller

to pay the withheld salaries to Plaintiffs and all other members of the General Assembly affected by the Salary Reduction Laws. (C 366-69.)

Plaintiffs moved for partial summary judgment on their claims for declaratory relief (Counts I to IV). (C 619–34.) The Comptroller filed a cross-motion for summary judgment on all claims. (C 763–80.) After briefing, the circuit court granted Plaintiffs' motion for partial summary judgment on Counts I to IV, holding that the Salary Reduction Laws violated the Legislative Salary Clause of the Illinois constitution. (C 835–46, 871–77, 898–915.) The circuit court granted the Comptroller's motion only to the extent that it challenged Clayborne's standing to sue in his official capacity, (C 898-915.)

The parties filed cross-motions for summary judgment on Plaintiffs' mandamus claims (Counts V and VI). (C 1046–61, 1113–15, 1167–79.) After administrative reassignment to another judge (C 1209–10), the circuit court entered partial summary judgment for Plaintiffs on those counts, ruling that they were entitled to mandamus relief against the Comptroller on their claims seeking payment of the salary excluded by the Salary Reduction Laws (C 1213– 19). However, the court also held that Plaintiffs were entitled to relief for themselves, but had no standing to seek to have the Comptroller pay the other members of the General Assembly. (C 1217.) Specifically, the Court held:

> Plaintiffs argue the right they seek to establish is public in nature, as a public office is a public agency created for the benefit of the State. Plaintiffs contend that because they seek to compel Defendant to perform a public right, the requested relief can be granted to all legislators affected by the relevant statutes at issue. However, in the July 2, 2019 Order, this Court found that Plaintiffs did not have standing to bring suit in their official capacities, because Clayborne and Noland are no longer members of the General Assembly. Therefore, they cannot now allege a distinct and palpable injury that would be redressed by the requested relief. Moreover, the [First Amended Complaint] does not name any other members of the Illinois General Assembly. As such, the Court finds that since Plaintiffs seek redress in their individual capacities and therefore do not have standing

> to assert the constitutional rights of others not before this Court, this Court cannot enter an Order directing Defendant to pay all members of the General Assembly.

(C 1217) (emphasis in original). Plaintiffs cross-appealing this aspect of the court's ruling denying payment for the other members of the General Assembly. (C 1242-46.)

ARGUMENT

I. Because Plaintiffs Sue to Establish a Public Right, This Court Can Compel the Comptroller to Comply with the Constitutional Legislative Salary Mandate For All Affected Members.

Plaintiffs, as former members of the General Assembly, are former public officers suing to establish a *public right*. *See Kreitz v. Behrensmeyer*, 149 Ill. 496, 503 (1894) (a public office is a "public agency created for the benefit of the state" and "the salary or emoluments annexed to a public office are incident to the right to the office"); *see also Galpin v. City of Chicago*, 269 Ill. 27, 41 (1915). Because they are seeking to enforce a public right, Plaintiffs have standing to seek as an element of relief that the Comptroller comply with the Illinois Constitution and pay all members of the General Assembly who had their salaries withheld. This Court long ago stated the relevant doctrine that gives Plaintiffs entitlement to seek this relief:

> Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced, must become the relator . . . *But where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result*. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.

Pike Cty. Comm'rs v. People ex rel. Metz, 11 Ill. 202, 208 (1849) (emphasis added) (County diverted some of the money appropriated for public works to the general fund, and relator who had no individual interest in the fund could bring the mandamus action to compel

compliance with the appropriation because it was a matter was of public concern).[5] This principal has been acknowledged many times over the years. *See e.g., People ex rel. Faulkner v. Harris*, 203 Ill. 272 (1903); *Retail Liquor Dealers Protective Ass'n of Illinois v. Schreiber*, 382 Ill. 454, 459 (1943); *Hill v. Butler*, 107 Ill. App. 3d 721 (4th Dist. 1982).[6]

Based on this: (i) Plaintiffs have an interest in, and standing to, compel the Comptroller through a mandamus action to pay them their unconstitutionally withheld salaries; and (ii) Plaintiffs also have standing to compel through a mandamus action the other relief they seek in their Complaint, which is the enforcement of a public right – namely, the protection of the public interest in having the Comptroller follow the constitutional mandates of the Legislative Salary Clause. A legislator's salary is a matter of great public interest, as shown by the fact that it has been constitutionally protected dating back to the 1870 Illinois Constitution[7].

There is no question that under Illinois law legislative salary is a public, not a private, right. As this Court stated in *Pitsch v. Continental and Commercial National Bank*,

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[5] In *Union Pacific R.R. v. Hall et al.*, 91 U.S. 343, 355 (1875), the United States Supreme Court cited, among other cases, this Court's decision in *Pike*, and stated that "[t]here is . . . a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty. . . ." Notably, the United States Supreme Court did not indicate that there was any standing issue with this doctrine, either under Article III or state law.

[6] The fact that as postured Plaintiffs are not expressly bringing this lawsuit as relators does not alter the fact that their mandamus claims assert a pubic right. *See Voss v. Prentiss*, 154 Ill. App. 609, 615 (1st Dist. 1910) (when a mandamus petition seeks to enforce a public right, the "usual and best approved practice" is to file the lawsuit in the name of the People of Illinois, but it is "unnecessary" to do so and the lawsuit may be filed in the name of the individual petitioners).

[7] Section 11 of Article IX of the Illinois Constitution of 1870 provided: "The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term." *Northrup*, 308 Ill. App. at 287.

305 Ill. 265 (1922), the "compensation of a public official for the performance of his official duties is not a matter for traffic or trade, for bargaining or for favoritism." As the Illinois Appellate Court put it more recently, "[t]he public office holder's right to compensation is not based on any personal or contract rights but attaches to the office." *People ex rel. Barrett v. Bd. of Comrs of Cook County*, 11 Ill. App. 3d 666, 668 (1st Dist. 1973) (emphasis added). Because of this, "[o]fficial morality and public policy alike prohibit the undermining of the public service by permitting officers to make merchandise of their official services." *Pitsch*, 305 Ill. at 271. *See also People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284, 286 (1st Dist. 1941) ("The so–called defenses by the city officers, namely, the statute of limitations, laches and gifts, are all contrary to the Constitution and public policy of the State, and cannot be sustained. Such defenses, as we have shown, if sustained, would create a situation equivalent to avoiding the constitutional mandate.").

When the Circuit Court ruled against Plaintiffs on this issue, the Circuit Court did not substantively address this argument. Instead, The Circuit Court reasoned that because it previously determined that Plaintiffs had no standing to sue in their official capacities as former legislator's, they could not obtain relief on the behalf of non-party legislators. (C 1217.) The Circuit Court's reasoning is flawed, which resulted in the error that Plaintiffs seek to correct through this appeal. Because Plaintiffs are suing to enforce a public right, not a personal right, it is irrelevant whether they are current legislators, former legislators, or members of the public. *Retail Liquor Dealers Protective Ass'n of Illinois v. Schreiber*, 382 Ill. 454, 459 (1943)("[w]hen the object [of a mandamus claim] is the enforcement of a public right, the people are regarded as the real party" and the plaintiff therefore "need not

show that he has any legal interest in the result"). Plaintiffs are suing to compel the Comptroller to perform a public right and fulfill her public duty, and the relief that can be granted is therefore not limited to paying Plaintiffs, but also compelling the Comptroller to fulfill her legal duty in the entirety, not just in part. The Circuit Court therefore erred in holding that Plaintiffs could not seek as relief to have the other legislator's paid their withheld salaries.

Also off the mark was the Comptroller's argument below – i.e., that the other legislators are the "real parties on interest" for any claims relating to their withheld salary. (C 1118.) The Comptroller's argument wrongly treats a public officers salary as the same as any private individual's salary. This argument cannot be squared with the long line of cases holding that legislative salary is not a personal right, but instead inheres to the public office. *See e.g., People ex rel. Barrett v. Bd. of Comrs of Cook County*, 11 Ill. App. 3d 666, 668 (1st Dist. 1973). For this reason, the cases the Comptroller cited below that set forth general standing principles are not relevant in these particular circumstances.

Furthermore, any argument by the Comptroller that the Circuit Court had no power to compel the payment of the withheld salaries to anyone other than Noland and Clayborne without class action allegations is also flawed.[8] As one court observed in the injunction context, courts "have regularly held that a plaintiff may seek an injunction applicable to all similarly-situated individuals harmed by the same unconstitutional practice, without the necessity of seeking class-action treatment." *Caspar v. Snyder*, 77 F. Supp. 3d 616, 642

[8] As the Comptroller notes in her brief, Plaintiffs' lawyers filed as a precautionary matter a class action asserting the same claims for other members of the General Assembly. (*Fortner v. Pritzker,* Cook County Circuit Court Case No. 2021 CH 2663). That matter has been stayed through an Agreed Order pending resolution by the Court of this appeal.

(E.D. Mich. 2015) (collecting case); *see also Drumright v. Padzieski*, 436 F. Supp. 310, 325 (E.D. Mich. 1977) ("[A]bsent some unusual factors[,] suits for determination of the constitutionality of a federal statute or regulation should not be treated as a class action . . . Any relief that plaintiff may be able to prove himself entitled to will inure to the benefit of all those on whose behalf plaintiff asserts an interest." (quotation marks and internal citation omitted)).[9] Here, Plaintiffs in their Amended Complaint specifically sought as relief payment for the other legislators. Plaintiffs did not have to bring this lawsuit as a class action in order for this Court to have the authority – if the statutes were deemed to be facially unconstitutional – to order the Comptroller to pay all legislators their unconstitutionally withheld salaries.

Should this Court affirm the Circuit Court's holding that the relevant statutes are void *ab initio* by being facially unconstitutional or, alternatively, for violating a constitutional guaranty, that would mean that the statutes are unconstitutional in all of their applications. *People v. Carrera*, 203 Ill. 2d 1, 14-15 (2002) (noting that the void ab initio doctrine applies to statutes that "violate substantive constitutional guarantees.");*Russell v. Blagojevich*, 367 Ill. App. 3d 530, 534 (4th Dist. 2006) (in light of the constitution's prohibition on diminishment of judicial salaries, there are no judges in Illinois to whom section 5.5 could be validly applied). This Court can therefore order as part of the relief in the mandamus counts that Defendant is to perform her duty not just as to Plaintiffs, but also as to all affected legislators. It is important to note that this would not require the Circuit Court to order any parties not before the Circuit Court to take or nor take any action.

[9] Although these were federal cases and thus involved Article III standing, "Illinois courts may interpret the federal standing criteria less restrictively than federal courts do." *Soto v. Great Am. LLC*, 2020 IL App (2d) 180911, ¶ 21 (2d Dist. 2020)

Rather, the requested relief would simply enjoin the Comptroller from continuing to enforce the unconstitutional Salary Reduction Laws at issue and order the Comptroller to make the constitutionally required payments. Indeed, both Plaintiffs' original and amended complaints sought injunctive relief to bar the Comptroller from continuing to enforce these unconstitutional statutes. (C 31-35; C 362-69.) Thus, there is no issue about the Circuit Court having to act outside of its authority or jurisdiction in awarding this relief to Plaintiffs.

It is axiomatic that "[i]n fashioning a remedy, courts have broad discretion to grant the relief that equity requires." *Tully v. Edgar*, 286 Ill. App. 3d 838, 847 (1997). Relevant considerations include both what is fair and what is workable. *In re Marriage of Rogers*, 283 Ill. App. 3d 719, 723 (3d Dist. 1996). Here, it would be both fair and workable for the circuit court to award this relief. Any other result would mean either: (i) the Comptroller would continue to enforce laws that were adjudicated to be unconstitutional; or (ii) a class action would need to be prosecuted, wasting resources on an issue that had already been decided.

Alternatively, this Court, of course, may itself fashion such relief directly pursuant to Illinois Supreme Rule 366. Under Rule 366, this Court retains "the right to 'make any order that ought to have been given or made, and make any other and further orders and grant any relief . . . that the case may require.'" *Granberg v. Didrickson*, 279 Ill. App. 3d 886, (1st Dist. 1996) (quoting Illinois Supreme Court Rule 366(a)(5)). Accordingly, Plaintiffs request that this Court enjoin the Comptroller from continuing to enforce the unconstitutional Salary Reduction Laws and order the Comptroller to make the constitutionally required payments all members of the General Assembly.

CONCLUSION

For the foregoing reasons, the Circuit Court erred by holding that its final judgment declaring the Salary Reduction Laws facially unconstitutional could not be applied to all members of the General Assembly. Plaintiffs respectfully request that this Court enjoin the Comptroller from continuing to enforce these unconstitutional Laws and order the Comptroller to pay Plaintiffs and all members of the General Assembly their withheld salaries. In the alternative, Plaintiffs respectfully request that this matter be remanded on this issue with direction to the Circuit Court to enter an order enjoining the Comptroller from continuing to enforce the unconstitutional Salary Reduction Laws and directing the Comptroller to pay all members of the General Assembly their withheld salaries.

Date: March 8, 2022

Respectfully submitted,

Michael Noland & James Clayborne Jr.

By: /s/ *Michael J. Scotti III*

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the rule 341(c) certificate of compliance, the certificate of service, and the matters to be appended to the brief under Rule 342(a), is 38 pages.

/s/ Michael J. Scotti III

APPENDIX

Table of Contents to Cross-Appeal Appendix

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

MICHAEL NOLAND, IN HIS OFFICIAL CAPACITY AS A FORMER MEMBER OF THE ILLINOIS SENATE, Plaintiff, v. SUSANA A. MENDOZA, IN HER CAPACITY AS COMPTROLLER OF THE STATE OF ILLINOIS, Defendant.	Case No. 2017 CH 07762 Calendar 03 Honorable Franklin U. Valderrama

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendant, Susana A. Mendoza, the Comptroller of the State of Illinois' Section 2-619.1 Motion to Dismiss Plaintiff's Complaint. For the reasons that follow, the motion is granted.

BACKGROUND

Michael Noland ("Plaintiff") was a member of the Illinois Senate representing the 22nd District from 2007 to 2017. He was elected to three successive terms: a four-year term from January 2007 to January 2011, a two-year term from January 2011 to January 2013, and a four-year term from January 2013 to January 2017. His final term of office ended in January 2017. He is no longer in the Illinois Senate.

As a member of the Illinois Senate and pursuant to Senate Joint Resolution 192, Plaintiff, along with all other members of the General Assembly, was entitled to a Cost-of-Living Adjustments ("COLA") payment as part of his salary. Between 2009 and 2016, acknowledging the decade-long budget crisis the State of Illinois had been suffering, the Illinois General Assembly passed eight different bills that changed Plaintiff's and the salary of every member of the General Assembly by eliminating mid-term Plaintiff's COLA payment. The Illinois General Assembly also passed five different bills between 2009 and 2016 changing Plaintiff's salary by imposing mid-term furlough days that reduced his pay. Plaintiff consistently voted in support of these legislations. As a result of these bills, Plaintiff, as well as all the other legislators, received no COLA payments since 2009.

Presently before the Court is Plaintiff's Complaint ("Complaint") for Declaratory Judgment and Issuance of a Writ of Mandamus against the Comptroller of the State of Illinois ("Defendant") alleging that the bills changing the salary and COLA mid-term violated the Illinois Constitution. Counts I and II seek declarations that the bills imposing furlough days and eliminating COLAs mid-term violate the Illinois Constitution; Count III seeks an order enjoining Defendant from enforcing these unconstitutional bills; and Count IV asks for issuance of a writ of mandamus ordering Defendant to remedy those constitutional violations by paying Plaintiff

and other impacted individuals.

Defendant, in turn, filed a motion to dismiss Plaintiff's Complaint pursuant to section 2-619.1 of the Illinois Code of Civil Procedure. Section 2-619.1 allows a party to bring a combined motion to dismiss pursuant to section 2-615 and 2-619 of the Code. *Lavite v. Dunstan*, 2016 IL App (5th) 150401, ¶ 20. A combined motion to dismiss allows a party to combine a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses. *Illinois Non-Profit Risk Mgmt. Ass'n v. Human Serv. Ctr.*, 378 Ill. App. 3d 713, 719 (4th Dist. 2008). Defendant moves for dismissal pursuant to Section 2-619(a)(9) and 2-615. Defendant's fully-briefed motion is presently before the Court.

SECTION 2-619 AND 2-615 MOTION TO DISMISS STANDARD

Section 2-619 allows for disposal of issues of law or easily provided issues of fact. *Williams v. Bd. of Ed. of the City of Chicago*, 222 Ill. App. 3d 559, 562 (1st Dist. 1991). A section 2-619 motion admits all well-pleaded facts in the complaint but does not admit conclusions of law or conclusions of fact unsupported by specific allegations. *Melko v. Dionisio*, 219 Ill. App. 3d 1048, 1057 (2d Dist. 1991). A 2-619 motion admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matter that appears on the face of the complaint or is established by external submissions that act to defeat the plaintiff's claim. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 18. In reviewing a section 2-619 motion to dismiss, the court must construe all documents presented in the light most favorable to the non-moving party and if no disputed issue of material fact is found, the court should grant the motion. *Id.* However, if it cannot be determined with reasonable certainty that the defense exists, the motion to dismiss should be denied. *Saxon Mortg. Inc. v. United Fin. Mortg. Corp.*, 312 Ill. App. 3d 1098, 1104 (1st Dist. 2000). A motion brought under section 2-619 must satisfy a rigorous standard, and can be granted only where "no set of facts can be proven that would support the plaintiff's cause of action." *Nosbaum ex rel. Harding v. Martini*, 312 Ill. App. 3d 108, 113 (1st Dist. 2000).

There are nine enumerated bases for dismissal under section 2-619. Defendant moves for dismissal pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure. Section 2-619(a)(9) permits involuntary dismissal where the claim asserted is barred by an affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2014). The movant has the burden of proving the affirmative matter relied upon in his, her or its motion to dismiss under section 2-619. *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 12 (1st Dist. 1989).

Defendant also moves for dismissal under section 2-615. A Section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). The motion does not raise affirmative factual defenses, but rather alleges only defects on the face of the complaint. *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be

granted. *Id.* This determination requires an examination of the complaint as a whole, not its distinct parts. *Lloyd v. County of Du Page*, 303 Ill. App. 3d 544, 552 (2d Dist. 1999). In reviewing the sufficiency of a complaint, a court must accept all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Burger King Corp.*, 222 Ill. 2d at 429. A complaint is deficient when it fails to allege facts necessary for recovery. *Chandler v. Ill. Cent. R.R.*, 207 Ill. 2d 331, 348 (2003). A court should not dismiss a cause of action unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Redelman v. Sprayway, Inc.*, 375 Ill. App. 3d 912, 917 (1st Dist. 2007).

DISCUSSION

Defendant argues that Plaintiff has no standing to sue in his official capacity because at the time he filed the Complaint, Plaintiff had already left the General Assembly and was no longer authorized to speak as a member of and on behalf of the General assembly, citing *Rodriguez v. Ill. Prisoner Review Bd.*, 376 Ill. App. 3d 429, 433-34 (5th Dist. 2007); *see also Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Defendant brings this argument under the Section 2-615 portion of her motion.

As an initial matter, Plaintiff retorts that Defendant improperly seeks dismissal based on lack of standing pursuant to Section 2-615. A challenge to standing, asserts Plaintiff, is properly brought pursuant to Section 2-619(a)(9). On this basis alone, asserts Plaintiff, the Court should deny the motion.

On a more substantive basis, Plaintiff counters that he has standing to sue in his official capacity as a former legislator because his injury is one he suffered in his official capacity, not as a private citizen. Plaintiff contends that the salary of a legislator or any public official for that matter is incidental to the title of office for that person, citing among other cases, *People ex rel. Douglas v. Barrett*, 370 Ill. 464, 470 (1939); and *People ex rel. Dinneen v. Bradford*, 267 Ill. 486, 490 (1915); As such, Plaintiff reasons, Plaintiff has standing to sue in his official capacity to obtain his full salary or compensation, citing *People ex rel. Northrup v. Council of the City of Chicago*, 308 Ill. App. 284, 291-94 (1st Dist. 1941); and *Maisano v. Spano*, 774 N.Y.S.2d 169 (2d Dep't 2004). Further, Plaintiff states that the Attorney General's Office agrees with Plaintiff because it has consented to the appointment of a Special Assistant Attorney General to represent Plaintiff in this matter. Lastly, Plaintiff maintains that Defendant's position is illogical because legislative immunity, a privilege similar to salary, is not lost even after individuals cease to be legislators, citing *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983); *Thillens, Inc. v. Cmty. Currency Exchange Ass'n of Illinois*, 729 F.2d 1128, 1129-30 (7th Cir. 1984); and *Empress Casino Joliet Corp. v. Johnston*, U.S. District Court for the Northern District of Illinois, Case No. 09-cv-03585, Dckt. No. 200, (Memorandum of Law in Support of Non-Parties Illinois General Assembly Members' Motion to Quash Defendants' Subpoena, at 1-5). Plaintiff responds, in a footnote, that the *Rodriguez* case cited by Defendant is not an "official capacity" lawsuit, does not address a standing issue and therefore, is irrelevant to Defendant's argument. Plaintiff adds that Defendant cites only to federal cases that are either irrelevant

because the cases are brought against state officials in their official capacity or address federal and state sovereignty issues not applicable in this case.

Defendant concedes in her reply that she improperly asserted the standing argument under Section 2-615 portion of her motion. No matter, argues Defendant, the Court should look to the substance of the motion rather than its label to determine what the motion is, citing *Betts v. City of Chicago*, 2013 IL App (1st) 123653, ¶ 12. Defendant admits that Plaintiff may bring this lawsuit in his individual capacity but not in his official capacity because Plaintiff is no longer a member of the Illinois Senate. Defendant counters Plaintiff's argument that legislative salary is comparable to legislative immunity because being afforded immunity protections, which are based on public policy, is different from initiating a lawsuit in official capacity after leaving the office, citing *Stephens v. Cozadd*, 159 Ill. App. 3d 452, 456 (3d Dist. 1987). Defendant adds that *Maisano*, a foreign jurisdiction case cited by Plaintiff, is not controlling precedent on this court.

The Court agrees with Plaintiff that Defendant's argument that Plaintiff lacks standing is improperly brought under Section 2-615. A Section 2-619 of the Code "provides a means of obtaining [ ] a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact." *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). Subsection (a)(9) of that statute allows dismissal where the claim asserted against the defendant is barred by affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619 (a)(9) (West 2014). In Illinois, standing is an affirmative matter properly brought under section 2-619(a)(9) of the Illinois Code of Civil Procedure. *Id*; *Greer v. Illinois Housing Dev. Auth.*, 122 Ill. 2d 462, 494 (1988).

Standing is a basic constitutional inquiry, essential to the justiciability requirement which enables the circuit court to adjudicate a case or controversy. *See In re Estate of Burgeson*, 125 Ill. 2d 477, 485-486 (1988). Standing is determined on a case-by-case basis. *Id.* at 485. The Illinois Supreme Court has defined standing as requiring that a plaintiff have "some injury in fact to a legally recognized interest." *Glazewski v. Coronet Insurance Co.*, 108 Ill. 2d 243, 254 (1985). The purpose of the doctrine is "to insure that issues are raised and argued only by those parties with a real interest in the outcome of the controversy." *People v. M.I.*, 2011 IL App (1st) 100865, ¶ 86. Furthermore, the doctrine is meant to ensure that a plaintiff "assert his own legal rights and interests, instead of basing his claim for relief upon the rights of third parties." *Amtech Sys. Corp. v. Illinois State Toll Highway Auth.*, 264 Ill. App. 3d 1095, 1103 (1st Dist. 1994).

Meticulous practice dictates that motions should be properly designated. *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 2; *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 724 (1st Dist. 1997). However, misdesignation does not necessarily preclude the movant's right to prevail. *Id.* at 724. Courts examine the motion's substance to determine the applicable section of the Code of Civil Procedure, if doing so presents no prejudice to the non-movant *Id.*

The Court finds that although Defendant advances the standing argument under the improper section of the Illinois Code of Civil Procedure, considering the argument as though presented pursuant to Section 2-619 would not prejudice the Plaintiff, as Defendant does not rely

on affidavits or other evidentiary material which would prejudice Plaintiff. Moreover, Plaintiff addressed this argument thoroughly in his response.

The crux of Defendant's argument is that because Plaintiff is a former state legislator, Plaintiff lacks standing to sue in his official capacity. While Defendant cites *Rodriguez v. Illinois Prisoner Review Bd.* in support of that proposition, as Plaintiff points out, that case does not support Defendant's argument. In *Rodriguez*, the court addressed whether an inmate was deprived of procedural due process when the Prisoner Review Board revoked inmate's good time credits. The *Rodriguez* court did not address a standing issue. Defendant also cites to *Kentucky v. Graham*, a § 1983 lawsuit, in which the U.S. Supreme Court decided that because the action was initially brought against a government official in his personal capacity, plaintiff could not now impose fee liability on a governmental entity. 473 U.S. at 161–63. The Court finds that *Graham* does not support Defendant's argument. The *Graham* court concluded that lawsuits against defendants in official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent," but that is inapplicable since, in our case, Plaintiff is suing in his official capacity. *Id.* at 165 (Internal citation omitted).

While Plaintiff cites to a few cases in support of his proposition that a salary is incidental to his title of office, the Court finds that none of the cases support that proposition. Moreover, even if his salary is incidental to his office, the Court finds that legislative immunity is not comparable to legislative salary. On this point, the Court, again, finds the cases cited by Plaintiff inapplicable. The Court, therefore, agrees with Defendant that legislative immunity is distinct from an ability to initiate a lawsuit to obtain one's legislative salary. Legislative or public officials' immunity "is grounded on the belief that officials ought to be shielded from personal liability for decisions made and actions taken in the performance of their employment. If a public official is haunted by the possibility of facing devastating personal liability for each employment decision and action which may inadvertently cause harm to another, employee performance will most certainly be hampered[,]" and may result in chilling effect on current or prospective public officials. *Stephens*, 159 Ill. App. 3d at 426. As such, legislative immunity that is grounded on such compelling public policies cannot be compared with an official's ability to bring a lawsuit to obtain his salary obtained during his term.

In support of his proposition that a former state legislator has standing to sue to recover his salary, Plaintiff cites two cases, *Maisano v. Spano* and *People ex rel. Northrup v. Council of the City of Chicago*. The Court, however, finds that both cases do not stand for the proposition advanced by Plaintiff. As to *Maisano*, the case is not binding on this Court because, as Defendant asserts, it is a foreign jurisdiction case. Moreover, in *Maisano*, plaintiffs sued in both official and personal capacities and the court did not address the issue of standing with respect to the distinction of the two different capacities. 774 N.Y.S.2d at 170-71. As to *People ex rel. Northrup v. Council of the City of Chicago*, the Court finds that the case does not support Plaintiff's contention that he has standing to sue in his official capacity. In *Northrup*, plaintiffs who were former aldermen of the City of Chicago sought a writ of mandamus compelling the City of Chicago to pay them additional compensation for services rendered during their terms served as members of city counsel. 308 Ill. App. at 285. Defendants raised four defenses—

estoppel, laches, statute of limitations and gift—but the court ultimately ordered the issuance of mandamus since it was unconstitutional to change the salary of a duly elected officer during his or her term. *Id.* at 287, 296. While the facts of *Northrup* are strikingly similar to the case at bar, standing was neither raised as an issue nor had any bearing on the ultimate decision of the case. As such, the Court finds that *Northrup* is not instructive on whether a former legislator has standing to sue in his official capacity to recover portions of his salary that should allegedly have been obtained while serving his term.

None of the cases cited by the parties give useful guidance to this Court on the issue of standing. Nonetheless, while not cited by either party, the Court finds *Karcher v. May,* 484 U.S. 72 (1987), similar to this case. In *Karcher*, the New Jersey General Assembly passed a statute requiring public school children to observe a minute of silent at the beginning of school day. *Id.* at 74. The New Jersey attorney general and the named defendants announced that they would not defend the constitutionality of the statute. *Id.* at 75. The then-presiding Speaker of the New Jersey Assembly and the President of the State Senate intervened in their official capacities and defended the lawsuit. *Id.* The district court found the statute unconstitutional and the Court of Appeals affirmed. *Id.* at 76. By the time the case was appealed to the Supreme Court, both the then-presiding Speaker and the President were no longer in the office. *Id.* at 76. Though, because the new legislative officers declined to participate in the appeal before the Court, the two former legislative officers asked to continue to defend the lawsuit. *Id.* The Supreme Court ultimately found that former legislative officers could not participate in their personal capacities because they had intervened only in their official capacities prior to the appeal. *Id.* at 77. The Supreme Court further explained that they could not participate the appeal in their official capacities since they no longer hold those offices and the authority to pursue the case on behalf of the legislature belongs to the successors. *Id.*

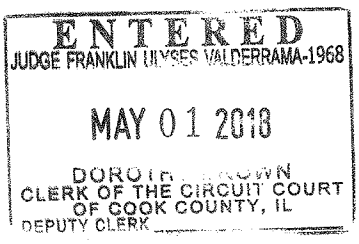
While the Court acknowledges that *Karcher* is factually distinct from our case, the Court still finds the underlying reasoning of *Karcher* persuasive. Like the former legislative officers in *Karcher* who were restricted from participating in the lawsuit in their official capacities after leaving their office, the Court finds that Plaintiff, in our case, cannot bring this case in his official capacity. He no longer is a member of the Illinois Senate. And as such, he cannot sue as a public official or represent the Senate. The Court also notes that the fact that Plaintiff is represented by the Attorney General does not change the conclusion.

The Court, therefore, finds that Plaintiff has no standing to bring this action in his official capacity. Having found that Plaintiff has no standing to bring this action in his official capacity, the Court declines to address the remainder of the Defendant's arguments.

CONCLUSION

Based on the foregoing reasons, Defendant' motion to dismiss pursuant to section 2-619 is granted.

ENTERED:



Franklin U. Valderrama
Judge Presiding

DATED: May 1, 2018

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

MICHAEL NOLAND, AN INDIVIDUAL, AND JAMES CLAYBORNE, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ILLINOIS SENATE, Plaintiffs, v. SUSANA A. MENDOZA, IN HER CAPACITY AS COMPTROLLER OF THE STATE OF ILLINOIS, Defendant.	Case No. 2017 CH 07762 Calendar 03 Honorable Franklin U. Valderrama

AMENDED[1] MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiffs, Michael Noland and James Clayborne's Motion for Partial Summary Judgement on Counts I through IV of their First Amended Complaint and Defendant, Susana A. Mendoza, in her capacity as the Comptroller of the State of Illinois' Cross-Motion for Summary Judgment on all counts of Plaintiffs' Amended Complaint. For the reasons that follow, Plaintiffs' motion is granted and Defendant's motion is granted in part and denied in part.

INTRODUCTION

In 2009, the State of Illinois was in the midst of a budget crisis.[2] That year, the General Assembly passed a statute that eliminated the Cost of Living Adjustments for members of the General Assembly and a statute that required each member of the General Assembly to forfeit twelve days of compensation beginning in 2009. This case presents a challenge to the constitutionality of the statutes.

BACKGROUND

Plaintiff, Michael Noland ("Noland") was a member of the Illinois Senate from 2007 to 2017. Plaintiff, James Clayborne Jr. ("Clayborne") was a member of the Illinois Senate from

[1] This Amended Memorandum Opinion and Order supersedes the Court's Memorandum Opinion and Order of July 2, 2019. The Amended Memorandum does not change the July 2, 2019 Order substantively, but clarifies certain portions of the factual background contained therein as alleged in the First Amended Complaint and admitted by the Defendant in its Answer.

[2] Pursuant to Rule 201 of the Illinois Rules of Evidence, the Court may, *sua sponte*, take judicial notice of the fiscal conditions of the State of Illinois in 2009. See Ill. R. Evid. 201(b)(1), (c) (eff. Jan. 1, 2011) (a court, in its discretion, may take judicial notice of adjudicative facts when the judicially noticed fact is generally known within the territorial jurisdiction of the trial court).

1995 to January 2019. Defendant, Susana A. Mendoza ("Mendoza") is the Comptroller of the State of Illinois. As Comptroller, among other responsibilities, Mendoza is responsible for payment of compensation due to members of the General Assembly.

On July 13, 1990, the 86th General Assembly adopted Senate Joint Resolution 192 ("Joint Resolution 192"). That resolution approved, *inter alia,* making Cost-of-Living Adjustments ("COLA") on July 1 of each year to the salaries of public officials, including members of the General Assembly. Noland, as member of the General Assembly, was entitled to the COLA payment as part of his salary for the duration of his service. Noland, however, only received the COLA salary payment that he was entitled to from July 2007 through June 2009.

In 2009, the General Assembly enacted Public Act 96-800,[3] which eliminated the COLA to which Noland and other members of the General Assembly were entitled for the fiscal year running from July 1, 2009 to June 30, 2010. Public Act 96-800 took effect immediately.

As provided by Joint Resolution 192, Clayborne was also entitled to the COLA payment as part of his salary as a member of the General Assembly for the duration of his service. Clayborne did not receive the COLA salary payment from July 2009 through June 2018.

Every year from 2010 through 2016, the General Assembly passed a bill eliminating the COLA salary payment for a one-year period for each successive fiscal year. These bills were essentially the same as Public Act 96-800, except for changing the fiscal year for which the COLA elimination would apply.

The COLA eliminations for fiscal years 2010, 2012, 2014, 2015 and 2016 fell entirely within one term for which Noland was elected.[4] The COLA elimination for fiscal year 2017 only affected Noland for his last six months in office, from July 2016 to January 2017.

As provided by Senate Joint Resolution 192, Clayborne was entitled to a COLA payment as part of his salary as a member of the legislature for the entire duration of his service. Clayborne did not receive a COLA from July 2009 through June 2018.

The COLA eliminations for fiscal years 2010, 2011, 2012, 2014, 2016, 2017 and 2018 fell entirely within one term for which Clayborne was elected.[5] The COLA elimination for fiscal years 2013 and 2015 only affected Clayborne mid-term for six months out of the fiscal year.

In 2009, the General Assembly enacted Public Act 96-45,[6] which mandated that Noland, Clayborne, and every other member of the General Assembly were required to forfeit twelve (12) days of compensation for the fiscal year July 1, 2009 to June 30, 2010. Pursuant to Public

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[3] Codified in relevant part at 25 ILCS 120/5.6.
[4] Pls. First Am. Compl., ¶ 31, and admitted in Defendant's Answer therein.
[5] Pls. First Am. Compl., ¶ 38, and admitted in Defendant's Answer therein.
[6] Codified in relevant part at 25 ILCS 115/1.5.

Act 96-45, the Comptroller reduced Plaintiffs' salary for fiscal year 2010 by twelve (12) days of compensation.

Every year from 2009 through 2013, the Illinois General Assembly passed a bill mandating either six (6) or twelve (12) furlough days for Noland and every member of the Illinois General Assembly for a one-year period for each successive fiscal year.

The mandated furlough days for fiscal years 2010 through 2014 fell entirely within one term for which Noland and Clayborne were elected.[7]

On June 1, 2017, Noland filed a Complaint for Declaratory Judgment and Issuance of a Writ of Mandamus (the "Complaint") against Mendoza in her capacity as the Comptroller of the State of Illinois (hereinafter "Defendant"), alleging that the bills changing the salary and COLA mid-term violated the Illinois Constitution. Counts I and II sought declarations that the bills imposing furlough days and eliminating COLAs mid-term violate the Illinois Constitution; Count III sought an order enjoining Defendant from enforcing these unconstitutional bills; and Count IV sought a writ of mandamus ordering Defendant to remedy those constitutional violations by paying Noland and other impacted individuals.

Defendant moved to dismiss the Complaint pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure. In its 2-619 motion, Defendant argued that Noland lacked standing to bring the claim since he was no longer a member of the General Assembly at the time he filed his Complaint. The Court agreed and granted the motion. Noland asked for leave to file an amended complaint to substitute in a new party. Defendant did not object to this request. Without any objection, the Court granted the motion.

On May 8, 2018, Noland and Clayborne (collectively, "Plaintiffs") filed a ten-count First Amended Complaint for Declaratory Judgment and a Writ of Mandamus, adding James Clayborne as a Plaintiff. Count I brought by Noland seeks a declaration that the Illinois statutes eliminating COLA payments were unconstitutional and that Defendant's action in withholding Noland's COLA salary adjustments for the period from July 2009 to January 2017 changed Noland's salary in violation of the Illinois Constitution. Count II brought by Clayborne makes the same allegations as Count I. Count III brought by Noland seeks a declaration that the bills imposing furlough days and eliminating COLAs mid-term violate the Illinois Constitution. Count IV brought by Clayborne makes the same allegations as Count III. Count V brought by Noland and Clayborne seeks a writ of mandamus compelling Defendant to make payments to Plaintiffs and other members of the General Assembly that include the COLAs. Count VI brought by Noland and Clayborne seeks a writ of mandamus compelling Defendant to make payments to Plaintiffs and other members of the General Assembly for the furlough days. Counts VII through X are re-pled by Noland as former member of the Illinois Senate to preserve for appeal the Court's dismissal of Counts I, II, III and IV of his original Complaint.

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[7] Pls. First Am. Compl., ¶¶ 48, 54, and admitted in Defendant's Answer therein.

Defendant filed an Answer to Plaintiffs' First Amended Complaint denying the material allegations, and asserted the affirmative defense of lack of standing. Specifically, Defendant contends that Noland, as per the Court's Order of May 1, 2018, lacks standing to sue in his official capacity as a former member of the Illinois Senate, and that Clayborne also lacks standing since his current term of office expires in January 2019 and he did not seek re-election in 2018.

Plaintiffs subsequently filed a motion for partial summary judgment on Counts I through IV of their First Amended Complaint. Defendant, in turn, filed a cross-motion for summary judgment on all counts of Plaintiffs' First Amended Complaint. The fully briefed motions are before the Court

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). That is, summary judgment is appropriate when there is no dispute as to any material fact but only as to the legal effect of the facts. *Dockery ex rel. Dockery v. Ortiz*, 185 Ill. App. 3d 296, 304 (2d Dist. 1989). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of City of Chicago*, 202 Ill. 2d 414, 421 (2002). Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Performance Food Grp. Co., LLC v. ARBA Care Ctr. of Bloomington, LLC*, 2017 IL App (3d) 160348, ¶ 14. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Id.*

A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 689 (4th Dist. 2000). The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his or her case in response to a motion for summary judgment, he or she must present a factual basis that would arguably entitle him or her to judgment under the applicable law. If the party moving for summary judgment supplies facts that, if left uncontroverted, would entitle him or her to judgment, the party opposing the motion may not rely on her pleadings alone to raise issues of material fact. *Safeway Ins. Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1st Dist. 1999).

In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion for summary judgment and liberally construe all evidentiary material submitted in opposition. *Kolakowski v. Voris*, 83 Ill. 2d 388 (1980). In deciding a motion for summary judgment, the court may draw inferences from undisputed facts to determine whether a genuine issue of material fact exists. *Mills v. McDuffa*,

393 Ill. App. 3d 940, 948 (2d Dist. 2009). However, where reasonable persons could draw divergent inferences from undisputed facts, the issue should be decided by a trier of fact and the motion for summary judgment should be denied; the trial court does not have any discretion in deciding the matter on summary judgment. *Loyola*, 146 Ill. 2d at 272.

The denial of summary judgment is not tantamount to a finding that the opponent is entitled to summary judgment. Rather, the denial of summary judgment reflects the court's judgment that one or more material facts are in dispute or that the facts relied on in the motion do not entitle the movant to judgment as a matter of law. See *Hotel 71 Mezz Lender LLC v. National Retirement Fund*, 778 F.3d 593, 602 (7th Cir. 2015).

Where cross-motions for summary judgment are filed, the parties acknowledge that only a question of law is at issue and invite the court to decide the issues based on the record. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). However, even where parties file cross-motions for summary judgment, the court is not obligated to grant summary judgment. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 949 (2d Dist. 2009). It is possible that neither party alleged facts, even if undisputed, that were sufficient to warrant judgment as a matter of law. *Id.* It is also possible that, despite the parties' invitation to the court to decide the issues as questions of law, a genuine issue of material fact may remain. *Id.*

DISCUSSION

Whether Clayborne Has Standing

At the conclusion of Defendant's cross-motion for summary judgment on Plaintiffs' First Amended Complaint, Defendant argues that there is no genuine issue of fact that both Plaintiffs lack standing in their official capacity and thus cannot assert any claims on behalf of the Illinois General Assembly.[8] Defendant contends that Clayborne does not have standing because he resigned from office on December 31, 2018, and thus is no longer a member of the Senate.

Plaintiffs retort that Clayborne still has standing in his official capacity. Plaintiffs note that at the time the First Amended Complaint was filed, Clayborne brought his claims both individually and in his official capacity as a member of the Illinois Senate. Plaintiffs contend that "the jurisdiction of a court over a cause depends on the state of facts at the time the action is brought; [and] that after jurisdiction has...vested it cannot be divested by subsequent events," citing *Fiore v. City of Highland Park*, 93 Ill. App. 2d 24, 31 (2d Dist. 1968).

Defendant replies that Clayborne no longer has standing to bring any claims in his official capacity since he retired as a State Senator at the end of 2018. While Clayborne was a member of the Illinois Senate at the time he filed the First Amended Complaint, argues

[8] Defendant notes that the Court previously held that Noland lacked standing to sue in his official capacity as former member of the Illinois Senate. Noland has re-pled those claims in the First Amended Complaint for purposes of preserving his appeal.

Defendant, he must maintain his standing throughout the course of the litigation, citing *Keep Chicago Livable v. City of Chicago*, 913 F.3d 618 (7th Cir. 2019). Defendant also contends that *Karcher v. May*, 484 U.S. 72 (1987), a case cited by the Court upon ruling on the Defendant's previous motion to dismiss, is dispositive of this issue.

Standing is a basic constitutional inquiry, essential to the justiciability requirement which enables the circuit court to adjudicate a case or controversy. See *In re Estate of Burgeson*, 125 Ill. 2d 477, 485-86 (1988). Thus, the Court must first consider whether Clayborne has standing to assert any claims in his official capacity prior to the resolution of the other issues raised by the parties.

The Court notes that the First Amended Complaint names Clayborne both individually and in his official capacity as a member of the Illinois Senate. However, none of the counts specific to Clayborne identify whether they are brought in either his individual or official capacity, or both. The Court thus construes each count as being brought in both Clayborne's individual and official capacities.[9]

Standing is determined on a case-by-case basis. *Id.* at 485. The Illinois Supreme Court has defined standing as requiring that a plaintiff have "some injury in fact to a legally recognized interest." *Glazewski v. Coronet Insurance Co.*, 108 Ill. 2d 243, 254 (1985). The purpose of the doctrine is "to insure that issues are raised and argued only by those parties with a real interest in the outcome of the controversy." *People v. M.I.*, 2011 IL App (1st) 100865, ¶ 86. Furthermore, the doctrine is meant to ensure that a plaintiff "assert his own legal rights and interests, instead of basing his claim for relief upon the rights of third parties." *Amtech Sys. Corp. v. Illinois State Toll Highway Auth.*, 264 Ill. App. 3d 1095, 1103 (1st Dist. 1994).

The Court finds that Plaintiffs' response to Defendant's standing argument conflates the doctrine of standing with jurisdiction. The two, however, are distinct legal concepts. Standing requires that a plaintiff sustain or be in imminent danger of sustaining a direct injury, and the injury must be: "(1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Duncan v. FedEx Office and Print Services, Inc.*, 2019 IL App (1st) 180857, ¶ 22. "Jurisdiction," on the other hand, can refer to subject matter jurisdiction, *i.e.* a court's authority to hear a particular case, or personal jurisdiction, *i.e.* a court's authority to litigate in reference to a particular individual. See *Belleville Toyota v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325, 334 (2002); *In re Possession & Control of Commissioner of Banks*, 327 Ill. App. 3d 441, 463 (1st Dist. 2001). Under Article VI, Section 9 of the Illinois Constitution, the circuit court has original jurisdiction of all justiciable matters.

Therefore, the issue before the Court is one of standing, not one of jurisdiction.

[9] The briefs were not helpful to the Court in the resolution of this issue, as Defendant does not reference a particular count, and in Plaintiffs' response, they do not address whether each count is asserted by Clayborne in his individual or official capacity.

Defendant argues that it is undisputed that Clayborne is no longer a member of the General Assembly. As such, reasons Defendant, Clayborne lacks standing to bring any claims in his official capacity as a State Senator. The Court agrees with Defendant that Clayborne does not have standing in his official capacity. The Court also finds that Defendant's cited case, *Karcher v. May*, 484 U.S. 72 (1987), is instructive on this issue.[10]

In *Karcher*, two state legislators intervened in a federal lawsuit when it became apparent that neither the state attorney general nor any other named government defendant would defend the challenged statute. The challenged legislation was a recently enacted New Jersey statute that required primary and secondary public schools to observe a minute of silence at the start of each school day. The plaintiffs alleged that the statute violated the establishment clause of the First Amendment under the Federal Constitution. The federal trial court ruled against the public officials. They appealed the decision, and lost on appeal. *Id.* at 76.

Prior to appealing the decision to the United States Supreme Court, the plaintiff intervenors lost their positions as the presiding officers of the state legislature, and the new presiding officers chose not to proceed with the appeal. *Id.* The court held that while the new Speaker of the House and President of the Senate could continue the litigation in place of their predecessors, their predecessors no longer had standing to litigate as presiding officers on behalf of the legislative bodies. *Id.* at 78.

Here, as in *Karcher*, the named legislator, Clayborne, is no longer a member of the Illinois Senate pursuant to his resignation of December 31, 2018. Therefore, Clayborne does not satisfy the requirements for standing to bring a claim in his official capacity as he cannot, as a former member of the Illinois Senate, allege a distinct and palpable injury that would be redressed by his requested relief. Further, the First Amended Complaint does not name any other plaintiffs who are current members of the Illinois General Assembly.

The Court also finds the only case cited by Plaintiffs, *Fiore v. City of Highland Park*, 93 Ill. App. 2d 24 (2d Dist. 1968), distinguishable. In *Fiore*, a plaintiff property owner seeking to build an apartment building brought a regulatory takings claim against a municipality. *Id.* at 26. The plaintiff claimed that a restrictive "Office and Research" zoning ordinance served no public purpose and deprived the land of considerable value. *Id.* at 27. The trial court ordered the city to

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[10] The Court observes that *Karcher* is a United States Supreme Court case reviewing a federal district court case. Illinois courts approach the standing doctrine differently from federal courts. *In re Estate of Burgeson*, 125 Ill. 2d at 484 (noting that while federal courts are courts of limited jurisdiction, Illinois courts have original jurisdiction over all justiciable matters); see also *Greer v. Illinois Housing Dev. Auth*, 122 Ill. 2d 462, 491 (1988) (noting that Illinois courts are not bound to follow federal law on issues of justiciability and standing). The practical difference in the difference between Illinois and federal courts regarding the issue of standing evidences itself in Illinois' courts "greater liberality [of the standing doctrine]; state courts are generally more willing than federal courts to recognize standing on the part of any plaintiff who shows that he is in fact aggrieved[.]" *Greer*, 122 Ill. 2d at 491. As such, in Illinois, a plaintiff is not required to allege facts to establish that he or she has standing to sue; "it is the defendants' burden to plead and prove lack of standing." *Chicago Teachers Union, Local 1 v. Board of Educ. of Chicago*, 189 Ill. 2d 200, 206-07 (2000).

permit the plaintiff to build multiple-family dwellings. *Id.* However, during the appeal process, the city passed legislation changing the zoning to allow single-family dwellings only and denied the plaintiff's multiple-family zoning request. *Id.* at 29. The court ruled that even though the city subsequently addressed the issue with legislation, the court maintained its jurisdiction over the parties and the litigation, and thus the ruling was valid. *Id.* Consequently, *Fiore* is distinguishable from the instant case because the Court's jurisdiction over the subject matter and parties to this litigation is not at issue.

Accordingly, the Court finds that Defendant has met its burden of establishing that there is no genuine issue of fact that Clayborne does not have standing to bring this litigation in his official capacity. Thus, Defendant is entitled to summary judgment on all counts asserted by Clayborne to the extent that such counts are brought in his official capacity.

Whether the Statutes Eliminating the COLA Payments are Unconstitutional (Counts I through IV)

In Counts I and II, Plaintiffs seek a declaratory judgment that the statutes eliminating their COLA payments are unconstitutional and void *ab initio*. In Counts III and IV, Plaintiffs seek a declaratory judgement that the statutes imposing mandatory furlough days are unconstitutional and void *ab initio*.

Plaintiffs argue that they are entitled to partial summary judgment[11] on Counts I through IV of Plaintiffs' First Amended Complaint because there is no genuine issue of material fact that the challenged statutes are facially invalid and thus void *ab initio*.

Plaintiffs assert that the Illinois Constitution does not grant the legislature the power to change legislative salaries mid-term, citing Article IV, Section 11 of the 1970 Constitution. Article IV, Section 11, according to Plaintiffs, is clear and unambiguous and states in mandatory terms that a "member shall receive a salary and allowances as provided by law, but changes in the salary of a member shall not take effect during the term for which he has been elected." Ill. Const. 1970, art. IV, § 11.

There is no dispute, insist Plaintiffs, that each of the relevant statutes, all of which had an effective date mid-year of the year in which the public act was passed, reduced Plaintiffs' salaries mid-term. As such, reason Plaintiffs, the statutes unconstitutionally changed the salary mid-term of every one of the then sitting members of the General Assembly. Therefore, conclude Plaintiffs, each of the statutes is facially unconstitutional and thus void *ab initio*, citing *Jorgensen,* 211 Ill. 2d 286 (2004) in support.

It is further undisputed, argue Plaintiffs, that COLA payments and furlough days are components of a legislator's "salary" as defined in Article IV, Section 11 of the Illinois

[11] In support of their motion, Plaintiffs submit the following exhibits: (1) First Amended Complaint, Exhibit A; (2) Defendant's Answer to the First Amended Complaint and Affirmative Defense, Exhibit B; (3) 25 ILCS 120/6.6, Exhibit C; and (4) the Memorandum Opinion and Order in *Cullerton v. Quinn*, 2013 WL 5366345, Exhibit D.

Constitution, citing *Jorgensen v. Blagojevich,* 211 Ill. 2d 286 (2004). The imposition of furlough days, contend Plaintiffs, also implicates the legislative "salary" provision of the Illinois Constitution. The furlough statutes, note Plaintiffs, direct the Comptroller to "deduct" amounts from the "annual compensation" or "annual salary" of each member.

Plaintiffs maintain that under the plain meaning of the term "changes" in Article IV, Section 11, both mid-term increase and decreases in legislator's salaries are prohibited. The term "change," note Plaintiffs, is defined by Black's Law Dictionary as "an alteration; modification or addition, substitution of one thing for another." Pls. Mot., p. 7. The New Oxford American Dictionary, observe Plaintiffs, defines "change" as "to make or become different" and "the act or instance of making or becoming different." Pls. Mot., p. 7. The voters who ratified this provision, contend Plaintiffs, would have understood the term "changes" in accordance with this common definition, to wit: any alteration.

Article IV, Section 11, insist Plaintiffs, is clear, explicit, and unambiguous. Plaintiffs maintain that Section 11 states, in mandatory terms, that no salary changes may take effect during the term for which the member is elected. This provision, according to Plaintiffs, is absolute and contains no limitations. Therefore, reason Plaintiffs, it must be enforced in accordance with its express terms. As such, any change in salary, posit Plaintiffs, whether an increase or decrease, is prohibited. Plaintiffs cite to an, admittedly non-binding, Circuit Court of Cook County opinion, *Cullerton v. Quinn,* No. 13 CH 17921 (Cir. Ct. Cook County, September 26, 2013), in support of the proposition that Article IV, Section 11 prohibits any changes, not just increases in the salaries of members of the General Assembly.

Plaintiffs further posit that if the framers of the Illinois Constitution intended to limit Article IV, section 11 only to prohibit salary increases, they would have done so. By analogy, Plaintiffs point to other salary provisions in the Illinois Constitution which prohibits mid-term reductions in salary, citing Article VI, Section 14 and Article VIII, Section 3(a). A comparison of the various constitutional salary provisions, submit Plaintiffs, further supports the conclusion that the prohibition on "changes" to legislative pay precludes both increases and decreases, citing *Foreman v. People*, 209 Ill. 567 (1904).

Alternatively, argue Plaintiffs, the statutes are unconstitutional as applied to Plaintiffs. There is no dispute, according to Plaintiffs that the relevant statutes effected mid-term changes in Plaintiffs' salary. Therefore, submit Plaintiffs, should this Court refrain from declaring the relevant statutes facially invalid, they should be declared unconstitutional as applied to Plaintiffs.

Last, Plaintiffs assert that they are entitled to an order directing the Defendant to pay their COLAs and withheld furlough day compensation. In addition, note Plaintiffs, after Clayborne became a plaintiff in this matter, 25 ILCS 120/6.6 went into effect, which eliminated Clayborne's COLA for the first half of the fiscal year beginning on July 1, 2018. While not specifically requested in the First Amended Complaint, note Plaintiffs, this statute should also be declared unconstitutional and that Defendant should be ordered to pay Clayborne the COLA eliminated by 25 ILCS 120/6.6.

Defendant[12] counters that the motion should be denied as the challenged statutes are constitutional, and that the Court should grant Defendant's own motion for summary judgment. Defendant argues that, contrary to Plaintiffs' assertion, the term "changes" in Article IV, Section 11 is ambiguous. The constitutionality of a statute, Defendant posits, is a question of law and all statutes enjoy a strong presumption of constitutionality, citing *People by Foxx v. Agpawa*, 2018 IL App (1st) 171976, and *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64 (2002).

Here, it is not clear, according to Defendant, if the constitutional provision applies to increases in salaries, decreases in salaries, or both. Because the term "changes" is ambiguous, reasons Defendant, it should be construed in light of the framers' concern with the possibility that legislators would increase their salaries for the term while they were in office. The purpose of this constitutional prohibition, suggests Defendant, is to curtail any corruption or fraud by denying public officials the ability to increase their salaries, citing *People ex. rel. McDavid v. Barrett*, 370 Ill. 478 (1939). As such, contends Defendant, the concerns that animate the purpose of the statutes are not present in this situation.

Continuing with its contention that Article IV, Section 11 is ambiguous, Defendant maintains that it is proper to consider constitutional language in light of the history and condition of the times, and the particular problem which the convention sought to address, citing *Kanerva v. Weems*, 2014 IL 115811. The debates at the Illinois Constitutional Convention, according to the Defendant, revealed that the particular problem which the convention sought to address was to allow legislators to increase their salaries and to provide protections to the public against abuse of that power. The delegates, according to the Defendant, were not concerned with the possibility that a General Assembly may vote to decrease members' salaries. Taking the history and constitutional debates into consideration, posits Defendant, it is clear that the framers were concerned with the legislators increasing their salaries mid-term after they were elected. The same concern, insists Defendant, is not present where the General Assembly takes action to decrease their own salaries. Defendant submits that *Rock v. Burris*, 139 Ill. 2d 494 (1990), is instructive on this issue.

Next, Defendant asserts that if the framers of the Illinois Constitution intended for Article IV, Section 11 to prohibit legislators from either increasing or decreasing their salaries mid-term, they could have used the identical language contained in Article VII, Section 9(b) which provides that "an increase or decrease in the salary of an elected officer of any unit of local government shall not take effect during the term for which that officer is elected." Instead, observes Defendant, the framers specifically used the ambiguous term "changes."

Defendant maintains that Plaintiffs' interpretation of Article IV, Section 11 is unfounded. Defendant reasons that if the statutes in question do in fact constitute an unconstitutional mid-

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[12] In support of Defendant's response and cross-motion, Defendant submits: (1) Defendant's Answer and Affirmative Defense to Plaintiffs' First Amended Complaint, Ex. 1; (2) a copy of Senator James F. Clayborne's Letter of Resignation to the Office of the Illinois Comptroller, dated January 2, 2019, Ex. 2; and (3) a copy of the Report of Proceedings before the Court on October 31, 2018, Ex. 3.

term salary change, then logically, the annual COLA payments Plaintiffs seek to recover would equally be deemed an unconstitutional mid-term salary change.

Defendant also posits that the challenged statutes are constitutional because they do not implicate a separation of powers concern, citing *Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004) and *Russell v. Blagojevich*, 367 Ill. App. 3d 530 (4th Dist. 2006) as instructive. As for Plaintiffs' reliance on *Cullerton*, Defendant submits that *Cullerton* is of no import because it is not binding and is factually distinguishable. As to the former argument, Defendant points out that *Cullerton* is a circuit court case and not an appellate court decision. As to the latter, Defendant notes that in *Cullerton*, unlike this case, the executive branch decreased the salaries of another branch of government, the legislative branch, and thus implicated a separation of powers concern.

In their reply,[13] Plaintiffs counter that there is no ambiguity in Article IV, Section 11. The term "changes," according to Plaintiffs, is not restricted to a salary increase, but rather encompasses both an increase and a decrease. The common understanding of the term "changes," in Article IV, Section 11, posit Plaintiffs, prohibits any mid-term alteration or modification in a legislator's salary. Illinois courts, Plaintiffs assert, that have interpreted the 1870 Illinois Constitution have consistently found that the term "change," as used in a legislative salary provision, prohibits mid-term salary increases and decreases, citing *Foreman v. People*, 209 Ill. 567 (1904) and *Peabody v. Russel*, 301 Ill. 439 (1922).

Turning to Defendant's argument that the COLA payments that Plaintiffs seek to recover would constitute an unconstitutional mid-term salary change, Plaintiffs retort that changes in compensation generated under a fixed formula are not increases or decreases so long as they are not the result of a mid-term change in the law, citing *Brissenden v. Howlett*, 30 Ill. 2d 247 (1964), and an Illinois Attorney General opinion, 1978 Ill. Att'y Gen. Op. S-1366 (1978).

Next, Plaintiffs also contend that Defendant incorrectly argues that the legislative salary provision is ambiguous because the term "changes" can purportedly refer to the frequency of payments, timeliness of payments, or the types of currency used. Pls. Resp., p. 6. Article IV, Section 11, note Plaintiffs, is entitled "Compensation and Allowances." This provision, conclude Plaintiffs, addresses changes to a legislator's salary. As the constitutional prohibition is clear, reason Plaintiffs, no further inquiry by the Court is necessary. However, posit Plaintiffs, should the Court look to the Illinois Constitutional Convention for the intent of the framers, those proceedings support Plaintiffs' interpretation.

Last, Plaintiffs take aim at Defendant's contention that the constitutional bar on changes to legislative salaries only applies where there is a separation of powers concern. Defendant's

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[13] In support of their reply, Plaintiffs submit: (1) a copy of an Illinois Attorney General opinion, 1978 Ill. Att'y Gen. Op. S-1366 (1978), Ex. A; (2) a Record of Proceedings for the Sixth Illinois Constitutional Convention, Ex. B; (3) a copy of the Sixth Illinois Constitutional Convention's Style, Drafting and Submission Committee Proposal Number 15, Ex. C; (4) a Record of Proceedings for the Sixth Illinois Constitutional Convention, Committee Proposals and Member Proposals, Ex. D; and (5) a Record of Proceedings for the Sixth Illinois Constitutional Convention, Committee Proposals and Member Proposals, Ex. E.

cited authority, according to Plaintiffs, is irrelevant to determining whether Article IV, Section 11 is unconstitutional. In *Jorgenson*, Plaintiffs note, the Illinois Supreme Court construed Article VI, Section 14, a different provision of the Illinois Constitution, and did not address the scope of the legislative pay concern at issue here. In *Russell*, Plaintiffs continue, the court held that the office of the state's attorney was not protected by any constitutional provision that prohibited decreases in salary. Last, in *Cullerton*, Plaintiffs maintain that the court did not consider separation of powers issues because the court held that the Governor was acting in a legislative, rather than executive, capacity at the time of the Governor's line-item veto.

In its reply in support of its cross-motion, Defendant maintains that the challenged statutes are valid and that the term "changes" is ambiguous, citing *Quinn v. Bd. of Educ. of City of Chicago*, 2018 IL App (1st) 170834. Defendant reiterates that the term "decrease" is absent from the dictionary definition of "changes," and that because of this ambiguity, the Court may consider extrinsic evidence in its construction of Article VI, Section 11, citing *Walker v. McGuire*, 2015 IL 117138.

According to Defendant, Plaintiffs primarily rely on statements by Delegate Gierach at the Constitutional Convention in support of their contention that "changes" prohibits both mid-term salary increases and decreases. However, notes Defendant, these comments are irrelevant as they were made at the time that the delegates were discussing and contemplating the executive salary provision, not the legislative salary provision. Other delegates, according to Defendant, expressed concerns that interpretations of Article IV, Section 11, similar to the Plaintiffs' here, would strip the General Assembly of the ability to adapt to changing economic conditions, which would be inconsistent with the framers' intent and purpose.

Further, Defendant reiterates, none of the challenged statutes impermissibly increased the legislators' salaries during the term in which they were in office; rather, they were only decreased. Defendant further distinguishes Plaintiffs' reliance on *Foreman* and *Russell*, as neither case involved legislation seeking to decrease the salaries of the members of the General Assembly. Last, Defendants conclude that Plaintiffs' reliance on *Brissenden v. Howlett* and a 1978 Illinois Attorney General Opinion is also unpersuasive.

The threshold issue before the Court is whether Plaintiffs' challenge to Public Acts 96-800 and 96-45 constitutes a facial or as-applied challenge. Plaintiffs maintain that Public Acts 96-800 and 96-45 are facially unconstitutional, or alternatively, as applied to Plaintiffs, because the statutes violate Article IV, Section 11 of the Illinois Constitution. Defendant, on its cross-motion, insists that both public acts are constitutional.

A facial challenge requires a showing that the statute is unconstitutional under any set of facts, *i.e.,* the specific facts related to the challenging party are irrelevant. *People v. Rizzo*, 2016 IL 118599, ¶ 24. A facial challenge to a legislative act is the most difficult to mount successfully because the challenger must establish that under no set of facts would the challenged act be valid. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 33. The fact that the statute might operate unconstitutionally under some set of conceivable circumstances is insufficient to render it wholly invalid. *Id.* The burden on the challenger is particularly heavy when a

constitutional challenge is presented. *Bartlow v. Costigan*, 2014 IL 115152, ¶ 18. So long as there exists a situation in which the statute could be validly applied, a facial challenge must fail. *People v. Davis*, 2014 IL 115595, ¶ 25.

An as-applied challenge, by contrast, requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. *People ex. rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 31. Thus, an as-applied challenge, by definition, "is reliant on the application of the law to the specific facts and circumstances alleged by the challenger." *Id.* "[Without] an evidentiary hearing and sufficient factual findings, a court cannot properly conclude that a statute is unconstitutional as applied. *Id.*, ¶ 32. Here, the Court has not held an evidentiary hearing. Therefore, Plaintiffs' challenge as to the constitutionality of the statutes can only be facial and not as-applied.

The Court begins with the constitutional provision at issue, specifically Article IV, Section 11. Article IV, Section 11 provides that "a member shall receive a salary and allowances as provided by law, but *changes* in the salary of a member shall not take effect during the term for which he has been elected." Ill. Const. 1970, art. IV, § 11 (Emphasis added).

The interpretation of constitutional provisions is governed by the same general principles that govern construction of statutes. *Blanchard v. Berrios*, 2016 IL 120315, ¶ 16. When construing a constitutional provision, the court's primary goal is to ascertain and give effect to the common understanding of the citizens who adopted the provision, and courts first look to the plain and generally understood meaning of the words used. *Kanerva v. Weems*, 2014 IL 115811, ¶ 36. To determine the common understanding, courts look to the common meaning of the word used. *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 13 (1996). Where the language of a constitutional provision is unambiguous, it will be given effect without resort to other aids of construction. *Kanerva*, ¶ 36. If doubt as to the meaning of the provision exists after the language has been considered, it is appropriate to consult the drafting history of the provision, including the debates of the delegates to the constitutional convention. *Id.*

Public Act 96-800 states, in relevant part:

> Notwithstanding any former or current provision of this Act, any other law, any report of the Compensation Review Board, or any resolution of the General Assembly to the contrary, members of the General Assembly, State's attorneys, other than the county supplement, the elected constitutional officers of State government, and certain appointed officers of State government, including members of State departments, agencies, boards, and commissions whose annual compensation was recommended or determined by the Compensation Review Board, *are prohibited from receiving and shall not receive any increase in compensation that would otherwise apply based on a cost of living adjustment*, as authorized by Senate Joint Resolution 192 of the 86th General Assembly, for or during the fiscal year beginning July 1, 2009.

25 ILCS 120/5.6 (West 2016) (Emphasis added).

Public Act 96-45 states in relevant part:

> During the fiscal year beginning on July 1, 2009, every member of the General Assembly is required to forfeit 12 days of compensation. The State Comptroller shall deduct the equivalent of 1/261 of the annual compensation of each member from the compensation of that member in each month of the fiscal year. For purposes of this Section, annual compensation includes compensation paid to each member by the State for one year of service pursuant to Section 1 [25 ILCS 115/1], except any payments made for mileage and allowances for travel and meals. The forfeiture required by this Section is not considered a change in salary and shall not impact pension or other benefits provided to members of the General Assembly.

25 ILCS 115/1.5 (West 2016).

Statutes are presumed to be constitutional, and the party challenging the validity of a statute bears the burden of rebutting this presumption. *Hope Clinic for Women, Ltd v. Flores*, 2013 IL 112673, ¶ 33. When assessing the constitutional validity of a statute, courts must begin with the presumption of its constitutionality. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 351 (1999).

Plaintiffs argue that the statutes are unconstitutional because the statutes changed their salaries during their term in office in violation of Article IV, Section 11. Defendant, on the other hand, contends that the term "changes" refers only to increases and not reductions in salaries, and therefore, the statutes do not violate of Article IV, Section 11. The Court's resolution of this issue turns on the meaning of the term "changes."

The term "changes" is not defined in the Illinois Constitution. In construing a constitutional provision, a court relies on the common understanding of the voters who ratified the provision. *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 13 (1996). To determine that common understanding, a court looks to the common meaning of the words used. *Id.* In determining the plain, ordinary, and popularly understood meaning of a term, courts may look to a dictionary to give meaning to the term. *LeCompte v. Zoning Board of Appeals*, 2011 IL App (1st) 100423, ¶ 29. Turning to the dictionary, the Court notes that Webster's Dictionary defines "change" as "to make different." *Change*, *Webster's Dictionary* (11th ed. 2003). Black's Law Dictionary defines "change" as "alter." *Change*, *Black's Law Dictionary* (10th ed. 2014). Thus, the plain meaning of the term "change" is to make different or alter. As such, Article IV, Section 11 prohibits the alteration of the salaries of the members of the General Assembly during the term for which the member has been elected.

The next issue is whether the statutes altered the Plaintiffs' salaries during the term for which they were elected. Defendant does not deny that the effect of the statutes was to decrease

the salaries of the members of the General Assembly. Rather, Defendant insists that the term "changes" is ambiguous and that Article IV, Section 11 only prohibits an increase, not a decrease in salaries. The Court disagrees.

It is undisputed that the effect of the statutes was to alter or change the salaries of the members of the General Assembly during their term of office. The fact that the Public Acts did not "increase" the salaries is of no import. Defendant argues that had the drafters intended to prohibit decreases in salary of the members of the General Assembly, they knew how to do so based on the plain language of other constitutional provisions, specifically Article VII, Section 9(b) of the Illinois Constitution. While that may be true, the use of the term "changes" in Article IV, Section 11 evinces an intent to encompass a broader prohibition on any alterations, modifications, or substitutions to salary changes.

To be clear, Article VI, Section 11 of the Illinois Constitution does *not* prohibit legislators from increasing, or decreasing for that matter, their own salaries. What Article VI, Section 11 does prohibit is the alteration of the legislators' salary structure which would take effect during the same term in which the changes were approved. See *Rock v. Burris*, 139 Ill. 2d 494 (1990).

While not binding, the Court also finds *Cullerton v. Quinn,* No. 13 CH 17921, 2013 WL 5366345 (Cir. Ct. Cook County, September 26, 2013), persuasive on this issue. In *Cullerton*, members of the General Assembly brought suit against then Governor Quinn after Governor Quinn exercised his line-item veto power on an appropriations bill in an attempt to eliminate General Assembly members' salaries. *Cullerton*, No. 13 CH 17921, 2013 WL 5366345, at *1 (Cir. Ct. Cook County, September 26, 2013). The plaintiffs alleged, among other things, that the Governor's actions violated Article IV, Section 11. *Id.*, at *1. The parties filed cross-motions for summary judgment. *Id.*, at *2. The plaintiffs argued that the line-item veto violated Article IV, Section 11 as it constituted a "change" in the legislator's salaries during their term of office. *Id.*, at *4. Governor Quinn, on the other hand, maintained that the term "changes" refers only to increases in salaries and therefore, his line-item veto did not violate Article IV, Section 11. *Id.*, at *4.

The trial court disagreed with the governor. *Id.*, at *5. The court began by noting that in construing a constitutional provision, it was required to ascertain the common understanding of the voters who ratified the provision. *Id.*, at *4. To that end, the court turned to the dictionary for the common understanding of the term "change." *Id.*, at *5. The dictionary, noted the court, defined "change" as "to make or become different" and "the act or instance of making or becoming different." *Id.*, at *5. Applying that definition to "changes," the court found that Article IV, Section 11 prohibits any alteration, be it an increase or decrease, of a General Assembly member's salary during the term for which he or she is elected. *Id.*, at *5. Having found the term "changes" unambiguous, the court declined the governor's invitation to consider the debates during the constitutional convention to ascertain the meaning of "changes." *Id.*, at *5.

Defendant maintains that *Cullerton*, in addition to not being binding on this Court, is distinguishable. The distinction, according to Defendant, is that in *Cullerton*, the executive

branch sought to unilaterally decrease the salaries of members of another branch of government, the legislative branch. In this case, unlike *Cullerton*, insists Defendant, the members of the General Assembly enacted legislation that decreased their own salaries.

However, the Court finds that this is a distinction without a difference. Article IV, Section 11's prohibition is not based on which branch of government seeks to change the salary, but rather prohibits *any* change to a legislator's salary. As to the authority cited by the Defendant, the Court agrees with Plaintiffs that those cases are distinguishable.

In *Russell v. Blagojevich*, 367 Ill. App. 3d 530 (4th Dist. 2006), the General Assembly passed Public Act 92-607, which prohibited a cost-of-living adjustment to various government officials, including State's Attorneys. The plaintiff, the elected State's Attorney of Boone County, filed a lawsuit against the Governor, alleging that Public Act 92-607 was unconstitutional as applied to a State's Attorney's salary. *Id.* at 532. The Illinois Supreme Court affirmed the trial court's dismissal of the plaintiff's complaint. *Id.* at 535-36. The Court found no constitutional provision prohibiting the legislature from diminishing the salary of a State's Attorney. *Id.* at 536. On the other hand, observed the court, the Illinois Constitution did prohibit changes to the salary of a legislator during the term for which he had been elected. *Id.* at 535-36. The court noted that "when the drafters intended for a particular salary not to be subject to change mid-term, that intent appears in the Article creating the provision." *Id.* at 535.

Jorgensen v. Blagojevich, 211 Ill. 2d 286 (2004), is also distinguishable. *Jorgensen* was a class-action lawsuit filed by Illinois judges against former Governor Blagojevich and the Illinois Comptroller in their official capacities, seeking a declaration that the Governor's use of the veto to block judicial pay raises was unconstitutional. *Id.* at 293-94. At issue was whether the General Assembly and Governor violated the Illinois Constitution when they attempted to eliminate the COLAs to judicial salaries provided by law for the 2003 and 2004 fiscal years. *Id.* at 287. The court held Public Act 92-607, which suspended the 2003 COLA, constitutionally invalid and void *ab initio*. *Id.* at 309. The court found that both the statute prohibiting cost-of-living increases for judicial salaries and the Governor's reduction veto, which removed funding for a cost-of-living increases, violated the constitutional provision prohibiting the diminishment of judicial salaries because the cost of living increases has already vested. *Id.* at 315-17. The court held that it would not violate the separation of powers, and it had authority to order payment and compel the Comptroller to pay, despite the lack of a specific legislative appropriation, "pursuant to the inherent right of the court to order payment of judicial salaries within the state as required by the [Illinois] Constitution." *Id.* at 315.

The Court further observes that much of Defendant's argument rests on the contention that because, according to the Defendant, the term "change" is ambiguous, the Court should consider the history and legislative intent in enacting Article IV, Section 11, through examination of various excerpts of the floor debates prior to the enactment of the relevant provision. However, no such examination is necessary when "the words of the constitution are clear, explicit, and unambiguous." See *Maddux v. Blagojevich*, 233 Ill. 2d 508, 523 (2009). While the debates and legislative history of the relevant provision are certainly useful for construing an *ambiguous* provision, such statements will not have an effect on transforming

unambiguous constitutional language into something it is not. See *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d at 13. Accordingly, having found that Article IV, Section 11 is unambiguous, the Court need not consider any extrinsic evidence to ascertain the meaning of the term "changes."

Accordingly, the Court finds that Plaintiffs have met their burden on their motion as to Counts I through IV of the First Amended Complaint in establishing that there is no genuine issue of material fact that the statutes are facially unconstitutional. Accordingly, Plaintiffs' motion is granted, and Defendant's cross-motion is denied.

Whether Mandamus Relief is Improper (Counts V-VI)

In Counts V and VI, Plaintiffs request that the Court issue an order of mandamus ordering the Defendant to pay Plaintiffs the amounts which were allegedly wrongfully withheld as a result of the unconstitutional legislation.

Defendant contends that it is entitled to summary judgment on Counts V and VI of Plaintiffs' First Amended Complaint because mandamus is not a remedy that may be used to direct a public official or officer to exercise its discretion in a particular manner. The Comptroller, notes Defendant, is charged with the constitutional and statutory mandate to maintain the State's fiscal accounts and order payments into and out funds held by the State Treasurer. This mandate, according to Defendant, requires the exercise of discretion. As such, reasons Defendant, mandamus, which cannot be used to direct a public official to exercise its discretion in a particular manner, is inappropriate. In addition, argues Defendant, Plaintiffs are not entitled to mandamus as said counts are premised on the unconstitutionality of the statutes.

Assuming the Court grants Plaintiffs' motion for summary judgment as to Counts I through IV, posits Defendant, the Comptroller should have the opportunity to comply with the court order. Mandamus, insists Defendant, would only be proper if the Comptroller refuses to comply with the court order. Plaintiffs, in their response, fail to address Defendant's cross-motion on Counts V and VI. Defendant, in its reply, does not address Plaintiffs' failure to address the issue of mandamus.

Mandamus is an extraordinary remedy used to compel a public officer to perform official nondiscretionary duties when plaintiff has demonstrated a clear right to this relief. *People ex. rel. Senko v. Meersman*, 2012 IL 114163, ¶ 39. In order to obtain a mandamus remedy, the plaintiff must establish a clear right, a clear duty of the public officer to act, and clear authority of the public officer to comply with the order. *McFatridge v. Madigan*, 2013 IL 113676, ¶ 36.

In support of the proposition that the Comptroller has general discretionary authority, Defendant cites to Article V, Section 17 of the Illinois Constitution and the State Comptroller Act. Article V, Section 17 of the Illinois Constitution provides: "The Comptroller, in accordance with law, shall maintain the State's central fiscal accounts, and order payments into and out of the funds held by the Treasurer." Ill. Const. 1970, art. V, § 17.

This constitutional provision, however, does nothing to advance Defendant's contention that the Comptroller has discretion regarding payment of General Assembly members' salaries. Nor does the State Comptroller Act fare any better. To begin with, Defendant does not direct the Court to any specific provision of the State Comptroller Act that lends support to Defendant's claim. Nor does Defendant cite any case law that supports this interpretation. Rather, Defendant only cites the State Comptroller Act generally, and not any specific provision thereof, to support its argument that mandamus cannot be used to direct a public official to exercise its discretion in a particular manner.

Defendant, as the movant on Counts V and VI, has the burden of establishing that it is entitled to judgment as a matter of law. The Court finds that Defendant has failed to meet its burden in establishing that the remedy of mandamus is improper because payment of the salaries of the members of the General Assembly by the Comptroller is a discretionary act.

Further, while Defendant argues that a mandamus action would only be proper if the Comptroller refuses to draw warrants after the statutes in question are declared unconstitutional, Defendant cites no authority for the proposition that the Court cannot issue an order declaring a statute unconstitutional and a writ of mandamus simultaneously. As Defendant has failed to meet its burden on summary judgment, Defendant's cross-motion as to Counts V and VI is denied.

CONCLUSION

Based on the foregoing reasons, the Court grants Plaintiffs, Michael Noland and James Clayborne's Motion for Partial Summary Judgment on Counts I through IV of their Amended Complaint, and grants in part and denies in part Defendant, Susana A. Mendoza, in her capacity as the Comptroller of the State of Illinois' Cross-Motion for Summary Judgment on all counts of Plaintiffs' Amended Complaint. The next status date shall be August 7, 2019 at 10:00 a.m. in Courtroom 2402.

ENTERED:

ENTERED
JUDGE FRANKLIN ULYSSES VALDERRAMA-1968
JUL 08 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Franklin U. Valderrama
Judge Presiding

DATED: July 8, 2019

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPAERTMENT, CHANCERY DIVISION

MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate,	)	
Plaintiffs,	)	Case No. 17 CH 7762
v.	)	Hon. Allen P. Walker
SUSANA A. MENDOZA, in her official capacity as Comptroller of the State of Illinois,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiffs, Michael Noland and James Clayborne, Jr.'s, Motion for Summary Judgment on Counts V and VI of their First Amended Complaint, and Defendant, Susana A. Mendoza's, in her official capacity as Comptroller of the state of Illinois' Cross-Motion for Summary Judgment on Counts V and VI of Plaintiffs' First Amended Complaint. For the following reasons, Plaintiffs' motion is granted and Defendant's motion is denied.

BACKGROUND

Michael Noland ("Noland") and James Clayborne, Jr. ("Clayborne") (collectively "Plaintiffs") are both former members of the Illinois Senate. Noland was a member of the Illinois Senate from 2007 to January 2017, and Clayborne was a member from 1995 to January 2019. Susana A. Mendoza ("Defendant") is the Comptroller of the State of Illinois and is responsible for maintaining the State's fiscal accounts and ordering payments into and out of them. Defendant is also responsible for payment of compensation due to members of the Illinois General Assembly.

In 2009, the State of Illinois faced a budget crisis. Between 2009 and 2017, the Illinois General Assembly passed a series of public acts which eliminated Cost-of-Living-Adjustments ("COLA")[1] for members of the Illinois General Assembly and required use of furlough days.[2] These pieces of legislation had the effect of reducing Plaintiffs' salaries over several years. Noland's salary was reduced during the fiscal years of 2010-2017 and Clayborne's salary was reduced during the fiscal years of 2010-2018.

[1] See 25 ILCS 120/5.6–6.5.
[2] See 25 ILCS 115/1.5–1.9.

On June 1, 2017, Noland filed a Complaint for Declaratory Judgment and Issuance of a Writ of Mandamus against the Defendant in her official capacity. On May 8, 2018, Noland added Clayborne as a Plaintiff in a jointly filed ten-count First Amended Complaint for Declaratory Judgment and a Writ of Mandamus (the "FAC"). In a July 2, 2019 Order (amended July 8, 2019), this Court granted summary judgment to Plaintiffs on Counts I-IV, declaring the statutes enacted between 2009 and 2017 violated Article IV, § 11 of the Illinois Constitution. The remaining counts, Counts V and VI, seek a writ of mandamus ordering Defendant to disburse payments to Plaintiffs for the unconstitutional statutorily imposed COLA restrictions and furlough days.

On August 5, 2019, Defendant filed a Motion for Leave to File Amended Affirmative Defenses to Plaintiffs' FAC, asserting laches, waiver, and statute of limitations defenses. On November 21, 2019, this Court denied Defendant's motion with regard to the laches and waiver defenses, but granted Defendant leave to file the statute of limitations defense to Plaintiffs' mandamus counts.

Plaintiffs subsequently filed a Motion for Summary Judgment on the sole remaining counts of their FAC, Counts V and VI. Defendant, in turn, filed a Cross-motion for Summary Judgment on the same counts of Plaintiffs' FAC. The fully briefed motions are presently before the Court.

CROSS-MOTION SUMMARY JUDGMENT STANDARD

Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (LexisNexis 2020); *Am. Country Ins. Co. v. Kraemer Bros.*, 298 Ill. App. 3d 805, 810 (1st Dist. 1998). The purpose of a motion for summary judgment is not to try a question of fact, but to determine if a question of material fact exists that would preclude the entry of judgment as a matter of law. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). Summary judgment is a drastic measure and should only be granted "when the right of the moving party is clear and free from doubt." *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 311 (2007) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). Summary judgment should not be granted where a reasonable person could draw different inferences from undisputed facts. *Seymour v. Collins*, 2015 IL 118432.

The moving party in a motion for summary judgment bears the burden of proof and the initial burden of production. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). The movant may meet the burden of production by either affirmatively disproving the non-movant's case with the introduction of undisputed evidence that would entitle the movant to judgment as a matter of law, or by establishing that the non-moving party lacks sufficient evidence to prove an essential element of the claim. *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 688 (4th Dist. 2000). While the non-moving party is not required to prove his or her case at the summary judgment stage, they must present a factual basis that would arguably entitle them to judgment in order to survive the motion. *Robidoux*, 201 Ill. 2d at 335.

When cross-motions for summary judgment are filed, the parties agree that no genuine issues of material fact exist, and they invite the court to decide the case based on the record. *Evergreen Real Estate Services, LLC v. Hanover Insurance Co.*, 2019 IL App (1st) 181867, ¶ 16.

The filing of cross-motions for summary judgment, however, does nothing to establish that there is no genuine issue of material fact or obligate a court to render summary judgment. *Travelers Property Casualty Co. of America v. ArcelorMittal USA Inc.*, 2019 IL App (1st) 180129, ¶ 11. If reasonable people can draw different inferences from the undisputed facts, summary judgment should not be granted. *Id.* When ruling, the court must liberally view all evidence in the light most favorable to the non-moving party and strictly view evidence proffered by the moving party. *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980).

DISCUSSION

In the July 2, 2019 Order (amended July 8, 2019), this Court addressed the merits of Plaintiffs' Counts I-IV of its FAC. The remaining Counts V and VI seek mandamus relief.[3] Plaintiffs argue that they are entitled to summary judgment on the mandamus claims, as there is no Illinois authority that prohibits this Court from declaring a statute unconstitutional while also issuing a writ of mandamus. Plaintiffs contend that the Court should grant summary judgment on Plaintiffs' mandamus claims, because Defendant has a mandatory obligation to pay Plaintiffs their unconstitutionally withheld salaries.

Moreover, Plaintiffs contend that Defendant's remaining affirmative defense that the mandamus claims are barred by the statute of limitations is not viable because the statute of limitations on the mandamus counts did not begin to accrue until this Court's July 2, 2019 Order (amended July 8, 2019). According to Plaintiffs, when a party's success in one action is a prerequisite to his right to maintain a new action, the statute of limitations does not begin to run as to the new action until the determination of the pending action, citing *Kelly v. Chicago Park Dist.*, 409 Ill. 91, 95-96 (1951). Plaintiffs maintain that the Court's favorable ruling on their constitutionality claims was a prerequisite to Plaintiffs' proceeding with the mandamus action. Thus, Plaintiffs argue that the statute of limitations for the mandamus claims did not begin to accrue until July 2, 2019.

Additionally, Plaintiffs assert that the statute of limitations defense in unavailable when a former public official sues to recover a constitutionally protected salary, citing to dictum in *People ex rel. Northrup v. City of Chicago*, 308 Ill. App. 3d 284, 296 (1st Dist. 1941). Plaintiffs argue that allowing a statute of limitations defense in this matter would essentially allow the legislature to avoid a constitutional mandate, and thus, would be contrary to public policy.

Plaintiffs stress that matters regarding a public official's salary are not merely private rights, but rather, public rights. According to Plaintiffs, other impacted members of the General Assembly also have a right to receive their full salaries due to the statutes which have been declared by this Court to be "facially unconstitutional." Plaintiffs cite to *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 355 Ill. App. 3d 352 (2d Dist. 2005), which held that facial challenges to free speech claims were not subject to a statute of limitations defense. Plaintiffs assert that the present case similarly involved a facial challenge to a constitutional claim, and that allowing the statute of limitations defense impermissibly elevates the legislative policy over the State Constitution.

[3] The Court notes that Counts VII-X preserve the Plaintiffs' right to appeal Counts I-IV.

Plaintiffs also contend that Defendant has a nondiscretionary duty to pay members of the General Assembly which have had portions of their salaries withheld. Plaintiffs contend that Defendant is obligated by Article V, § 17 to compensate members of the General Assembly. Plaintiffs insist that Defendant's duty is compelled by the Illinois Constitution and mandatory, affording Defendant no discretion whatsoever.

Defendant first responds that Plaintiffs voted in support of the first COLA restriction and implementation of the furlough. Specifically, Defendant notes that Noland voted to enact 25 ILCS 120/5.6, 25 ILCS 120/5.7, and 25 ILCS 120/5.8 in favor of COLA restrictions and 25 ILCS 115/1.5, 25 ILCS 115/1.6, and 25 ILCS 115/1.7 in favor of furloughs. Defendant also points out that Clayborne voted to enact the same COLA restrictions and furloughs. Defendant argues that not only did Plaintiffs willingly vote for the relevant legislation, but Noland chose not to commence this action until June 1, 2017 and Clayborne did not join this action until May 8, 2018.

Next, Defendant contends that Plaintiffs' mandamus claims are partially barred by the statute of limitations because 735 ILCS 5/13-205 provides a five-year statute of limitations for "all civil actions not otherwise provided for." Defendant asserts that the statute of limitations on Plaintiffs' mandamus claims began when the relevant statutes were enacted. As such, Defendant asserts that Plaintiffs' mandamus claims are now time-barred, as Noland's claims should have been brought prior to June 1, 2012 and Clayborne's claims should have been brought prior to May 8, 2013. According to Defendant, "a plaintiff cannot wait until it has assurance of the success in an action before the statute of limitations period will begin to run," citing *Sundance Homes, Inc. v. City of DuPage*, 195 Ill. 2d 257, 266 (2001).

Defendant contends that Plaintiffs' reference to *Kelly* is misguided, as that case stands for the proposition that the right to an office or position must be established before seeking suit on the right to salary. *Kelly*, 409 Ill. 91 at 95. Defendant argues that because Plaintiffs do not question whether they had a right to their office, *Kelly* is inapplicable. Defendant also claims that Plaintiffs' reliance on *Lamar* is misplaced. In *Lamar*, Defendant contends that the plaintiffs sought to amend a city zoning ordinance that banned certain billboards, and the legislation in that case allowed for a seven-year grace period in which non-conforming billboards could be become compliant with the ordinance. *Lamar*, 355 Ill. App. 3d at 354. Defendant distinguishes *Lamar* by arguing that here, Plaintiffs knew their salaries were curtailed by the relevant legislation, as evidenced by their voting history.

Defendant also notes that Plaintiffs do not bring a class action suit, but rather, assert their claims in their private and individual capacities, and therefore can only seek individual relief. Defendant posits that, based on this Court's July 2, 2019 Order, neither Noland nor Clayborne have standing to sue in their official capacity because they are not currently in office. In the event that the Court should order Defendant to pay the respectively withheld salaries, Defendant argues that she should be afforded discretion as to when those payments are to be made. Defendant asserts that Plaintiffs cannot seek relief for all other affected General Assembly members in the absence of a class action. According to Defendant, while Plaintiffs' request for relief may suggest a public interest, their FAC does not seek relief for other similarly situated legislative officials, but rather seeks reimbursement of only their individual salaries. Defendant argues that First Amendment free

speech claims based on overbreadth principles allow plaintiffs to seek to invoke the rights of nonparties in order to combat the "chilling effect" that the law might otherwise have—a circumstance not present in this case.

Mandamus is an extraordinary remedy used to compel a public officer to perform official nondiscretionary duties when the plaintiff has demonstrated a clear right to relief. *People ex. rel. Senko v. Meersman*, 2012 IL 114163, ¶ 39. "Where a public official has failed or refused to comply with requirements imposed by statute, a court may compel the official to comply with the statutory requirement by means of a writ of mandamus." *Ryan v. City of Chicago*, 2019 IL App (1st) 181777, ¶ 1. In order to obtain a mandamus remedy, the plaintiff must establish a clear right, a clear duty of the public officer to act, and clear authority of the public officer to comply with the order. *McFatridge v. Madigan*, 2013 IL 113676, ¶ 36.

I. Whether Plaintiffs Established a Clear Right to Relief

This Court first addresses whether the right that Plaintiffs seek to establish is public or private in nature, and whether Plaintiffs may request relief on behalf of all members of the General Assembly who were similarly affected by the relevant statutes. Plaintiffs argue the right they seek to establish is public in nature, as a public office is a public agency created for the benefit of the State. Plaintiffs contend that because they seek to compel Defendant to perform a public right, the requested relief can be granted to all legislators affected by the relevant statutes at issue. However, in the July 2, 2019 Order, this Court found that Plaintiffs did not have standing to bring suit in their official capacities, because Clayborne and Noland are no longer members of the General Assembly. Therefore, they cannot now allege a distinct and palpable injury that would be redressed by the requested relief. Moreover, the FAC does not name any other members of the Illinois General Assembly. As such, the Court finds that since Plaintiffs seek redress in their individual capacities and therefore do not have standing to assert the constitutional rights of others not before this Court, this Court cannot enter an Order directing Defendant to pay *all members* of the General Assembly.

Next, per the July 2, 2019 Order, this Court held that Plaintiffs were entitled to a clear right to receive wrongfully withheld portions of salaries, as the relevant statutes in this case are facially unconstitutional. Statutes that are held facially unconstitutional are void *ab initio*—"as if [they] had never been passed." *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 309 (2004). Therefore, the Court finds that Plaintiffs have established a clear right.

II. Whether Plaintiffs' Mandamus Claims are Barred by the Statute of Limitations

Having addressed the merits of Plaintiffs' claims in the July 2, 2019 Order, the question presently before this Court is whether the five-year statute of limitations in 735 ILCS 5/13-205 bars Plaintiffs' mandamus claims. In order for a cause of action to be barred by the statute of limitations, it must have first existed. *Aetna Life & Cas. Co. v. Sal E. Lobianco & Son Co.*, 43 Ill. App. 3d 765, 767 (2d Dist. 1976). Illinois courts have previously dismissed mandamus claims that have been brought prematurely. See *Foss, Schuman & Drake v. Vacin*, 57 Ill. App. 3d 660, 661-62 (1978) (affirming dismissal of mandamus claim against the mayor of Berwyn as premature because a law firm's claim for legal fees had not been reduced to judgment).

This Court finds that the statute of limitations does not bar Plaintiffs' mandamus claims. A mandamus claim requires a *clear* right to the relief sought, and prior to the July 2, 2019 Order, such relief was not clear. Plaintiffs' mandamus claims, Counts V and VI, did not become ripe until the July 2, 2019 Order declaring such relevant statutes unconstitutional. The Court agrees with Plaintiffs that the *Kelly* case is instructive here. In *Kelly,* former Chicago Park District employees brought suit via a mandamus action seeking reinstatement to their employment positions in 1935. *Kelly*, 409 Ill. 91, 93 (1951). The Illinois Appellate Court ordered reinstatement of the employees on June 30, 1942, and three (3) months later, the plaintiffs were terminated from their jobs. *Id.* The plaintiffs then sought back pay arising from the termination, which was approximately seven (7) years from their initial termination in 1935. *Id.* The *Kelly* court found that "[t]he cause of action for salaries could not accrue to plaintiffs until their rights to their respective positions were first determined." *Id.* at 95-96. This Court similarly finds that Plaintiffs' mandamus claims asking this Court to compel the Defendant to make such payments of withheld portions of Plaintiffs' salaries could not be brought until their statutory claims had been resolved.

III. Whether Defendant has a Clear, Nondiscretionary Duty

This Court next addresses whether the Defendant has a clear, nondiscretionary duty. Mandamus is "used to compel a public officer to perform a duty that does not involve the exercise of discretion by the officer." *Turner-El v. West*, 439 Ill. App. 3d 475, 479 (5th Dist. 2004).

Defendant, as Comptroller of the State of Illinois, acknowledges her duty to pay legislators' salaries but argues that she has discretion to determine when these salaries are to be paid. Article V, Section 17 of the Illinois Constitution provides in relevant part: "[t]he Comptroller, in accordance with law, shall maintain the State's central fiscal account, and order payments into and out of the funds held by the Treasurer." Ill. Const. 1970, art. V, § 17. Defendant argues that the word "maintain" in Section 17 gives the Defendant general discretion in determining how the payments should be performed. Additionally, Defendant argues that the potential payments could be significant in their amount, and therefore, the Defendant should have discretion to prioritize the payments that need to be made on behalf of the State to ensure a proper and orderly payment of the State's debts.

In this Court's July 2, 2019 Order, this Court found that Article V, Section 17 of the Illinois Constitution did not provide Defendant with any general discretionary authority. Section 17 includes the phrase "shall maintain," which is a command. This Court does not find such language as affording Defendant any discretion as to when payments are to be made. The General Assembly Compensation Act, 25 ILCS 115/1, specifically orders that legislators' salaries are to be paid "on the last working day of the month." Such specific instruction is contrary to the idea that the Defendant has discretion in determining when these payments are to be made.

Furthermore, this Court finds *Jorgensen* instructive in this matter. *Jorgensen* involved a class action lawsuit filed by Illinois judges against Governor Blagojevich and the Illinois Comptroller in their official capacities, seeking a declaration that the Governor's veto of judicial pay raises was unconstitutional. 211 Ill. 2d at 293-94. The Illinois Supreme Court found that it had

authority to compel the Comptroller to pay the judicial salaries in spite of the fact that there was no specific legislative appropriation. *Id.* at 315.

Here, while the Court recognizes that the payments due to Plaintiffs may very well be significant, Defendant has not provided this Court with any authority under which to construe its duties to pay legislators' salaries as being discretionary in nature. Moreover, because the Defendant is responsible for compensating members of the General Assembly, this Court finds that Defendant has a clear, nondiscretionary duty to pay Plaintiffs the portion of their withheld salaries that have been withheld.

IV. Establishment of Defendant's Clear Authority to Comply

Finally, the Court will address the last element required for a mandamus remedy—whether the Defendant has clear authority to comply with an order from this Court regarding payment of portions of Plaintiffs' withheld salaries.

In *Illinois City Treasurers' Ass'n v. Hamer*, 2014 IL App (4th) 130286, ¶ 29, the court found that "it is within the power of the courts to compel payment of county treasurers' stipends when the failure to pay stipends in the amount required by statute violates the constitution." Thus, the Court finds that Defendant has clear authority to comply with an order of mandamus compelling her to pay Plaintiffs' portions of their withheld salaries.

CONCLUSION

Accordingly, Plaintiffs' motion for summary judgment is granted and Defendant's motion is denied. All future dates are stricken.

ENTERED:

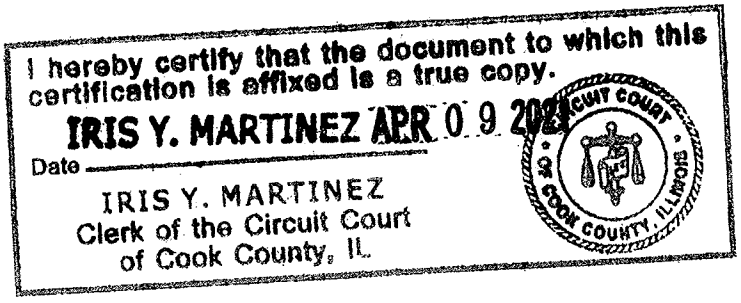
Allen Price Walker
Associate Judge

Apr. 08, 2021

Allen P. Walker
Judge Presiding

Circuit Court - 2071

DATED: April 8, 2021



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

MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate,	)	
Plaintiffs,	)	No. 2017 CH 07762
v.	)	Honorable Allen P. Walker
SUSANA A. MENDOZA, in her capacity as Comptroller of the State of Illinois,	)	
Defendant.	)	

FINAL JUDGMENT

This matter coming before the Court on Defendant's Motion for Entry of a Final Judgment and for Stay Pending Appeal, the Court being duly advised in the premises, the Court hereby finds, adjudges, and decrees as follows:

1. Pursuant to Supreme Court Rule 18, and in accordance with the Court's October 31, 2018, July 8, 2019, November 21, 2019, and April 8, 2021 orders which are incorporated herein, the Court finds that (a) the statutes whose constitutionality Plaintiffs challenge in this action —25 ILCS 120/5.6; 25 ILCS 120/5.7; 25 ILCS 120/5.8; 25 ILCS 120/5.9; 25 ILCS 120/6.1; 25 ILCS 120/6.2; 25 ILCS 120/6.3; 25 ILCS 120/6.4; 25 ILCS 120/6.5; 25 ILCS 120/6.6; 25 ILCS 115/1.5; 25 ILCS 115/1.6; 25 ILCS 115/1.7; 25 ILCS 115/1.8; and 25 ILCS 115/1.9 (the "Disputed Statutes")[1] — violate Article IV, Section 11 of the Illinois Constitution; (b) the Disputed Statutes are facially unconstitutional under this provision of the Illinois Constitution; (c) the Disputed Statutes cannot reasonably be construed in a manner that would preserve their validity; (d) the finding of unconstitutionality is necessary to the Court's decision and judgment; and (e) this decision and judgment cannot rest upon an alternative ground;

[1] 25 ILCS 120/6.6 became law on June 4, 2018, after Plaintiffs filed their First Amended Complaint. As noted in the Court's July 8, 2019 order, Plaintiffs' January 30, 2019 motion for partial summary judgment sought to have this statute, as well as those listed in their First Amended Complaint, declared unconstitutional. Defendant has advised the Court that she would not object to the filing of a supplemental pleading adding this statute, and in these circumstances the Court considers that unnecessary.

2. The Comptroller is ordered to issue warrants for payments to the Plaintiffs in the following amounts, representing the total amount of their respective salaries withheld under the Disputed Statutes: $71,507.43 to Plaintiff Michael Noland, and $104,412.93 to Plaintiff James Clayborne, Jr.; and

3. Enforcement of this Judgment is stayed pending any appeal.

DATE: May 6, 2021

Allen Price Walker
Associate Judge

May 06, 2021

Circuit Court - 2071

ENTERED:

Judge

Prepared by:
Amy M. McCarthy, AAG
Office of the Illinois Attorney General
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 814-2380
amy.mccarthy@illinois.gov (temporary/secondary)
Attorney No. 99000

APPEAL TO THE SUPREME COURT OF ILLINOIS

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate, Plaintiffs-Cross Appellants/Appellees, v. SUSANA MENDOZA, in her official capacity as Comptroller of the State of Illinois, Defendant-Cross Appellee/Appellant.	Direct Appeal to the Supreme Court under Rule 302(a)(1) No. 2017 CH 07762 Honorable FRANKLIN U. VALDERRAMA ALLEN P. WALKER Judges Presiding

NOTICE OF CROSS APPEAL

Plaintiffs, Michael Noland ("Noland") and James Clayborne, Jr. ("Clayborne"), (together, "Plaintiffs"), by and through their attorneys, Roetzel & Andress, LPA, hereby cross appeal to the Supreme Court under Supreme Court Rule 302(a)(1) from the Circuit Court's May 6, 2021 Final Judgment (the "Judgment"), and from all orders adverse to them preceding the Judgment, including without limitation the orders entered on May 1, 2018, July 8, 2019, and April 8, 2021. A copy of the Judgment is attached as Exhibit A.

By this cross appeal, Plaintiffs seek reversal of those parts of the Circuit Court's orders: (i) that held that Plaintiffs, as former legislators, did not have standing to sue in their official capacities; and (ii) that held that the Circuit Court's final judgment could not be applied to all members of the General Assembly and denied Plaintiffs' request for the Circuit Court to enter an order directing Defendant to pay all members of the General Assembly.

Date: May 28, 2021

Respectfully submitted,

/s/ Michael J. Scotti III

Michael J. Scotti, III, 6205868
#90484
Roetzel & Andress, LPA
30 N. LaSalle Street, Suite 2800
Chicago, IL 60602
312.580.1200

One of the Attorneys for MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate

CERTIFICATION OF SERVICE

The undersigned attorney hereby certifies that on the date shown below he caused a copy of the foregoing **Plaintiffs' Notice of Cross Appeal** to be filed with the Clerk of the Court for Cook County, copies sent via E-mail and electronically via the Clerk's Office E-Filing system to all counsel of record listed below:

Amy M. McCarthy Assistant Attorney General General Law Bureau 100 West Randolph Street, 13th Floor Chicago, IL 60601 *AMcCarthy@atg.state.il.us* *Attorney for Susana Mendoza*	Richard S. Huszagh Assistant Attorney General Civil Appeals Division 100 West Randolph Street, 12th Floor Chicago, IL 60601 *Richard.Huszagh@Illinois.gov* *Attorney for Appellant Susana Mendoza*

Dated: May 28, 2021

/s/ Garry L. Wills

Exhibit A

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

MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate,	)	
Plaintiffs,	)	No. 2017 CH 07762
v.	)	Honorable Allen P. Walker
SUSANA A. MENDOZA, in her capacity as Comptroller of the State of Illinois,	)	
Defendant.	)	

FINAL JUDGMENT

This matter coming before the Court on Defendant's Motion for Entry of a Final Judgment and for Stay Pending Appeal, the Court being duly advised in the premises, the Court hereby finds, adjudges, and decrees as follows:

1. Pursuant to Supreme Court Rule 18, and in accordance with the Court's October 31, 2018, July 8, 2019, November 21, 2019, and April 8, 2021 orders which are incorporated herein, the Court finds that (a) the statutes whose constitutionality Plaintiffs challenge in this action —25 ILCS 120/5.6; 25 ILCS 120/5.7; 25 ILCS 120/5.8; 25 ILCS 120/5.9; 25 ILCS 120/6.1; 25 ILCS 120/6.2; 25 ILCS 120/6.3; 25 ILCS 120/6.4; 25 ILCS 120/6.5; 25 ILCS 120/6.6; 25 ILCS 115/1.5; 25 ILCS 115/1.6; 25 ILCS 115/1.7; 25 ILCS 115/1.8; and 25 ILCS 115/1.9 (the "Disputed Statutes")[1] — violate Article IV, Section 11 of the Illinois Constitution; (b) the Disputed Statutes are facially unconstitutional under this provision of the Illinois Constitution; (c) the Disputed Statutes cannot reasonably be construed in a manner that would preserve their validity; (d) the finding of unconstitutionality is necessary to the Court's decision and judgment; and (e) this decision and judgment cannot rest upon an alternative ground;

[1] 25 ILCS 120/6.6 became law on June 4, 2018, after Plaintiffs filed their First Amended Complaint. As noted in the Court's July 8, 2019 order, Plaintiffs' January 30, 2019 motion for partial summary judgment sought to have this statute, as well as those listed in their First Amended Complaint, declared unconstitutional. Defendant has advised the Court that she would not object to the filing of a supplemental pleading adding this statute, and in these circumstances the Court considers that unnecessary.

2. The Comptroller is ordered to issue warrants for payments to the Plaintiffs in the following amounts, representing the total amount of their respective salaries withheld under the Disputed Statutes: $71,507.43 to Plaintiff Michael Noland, and $104,412.93 to Plaintiff James Clayborne, Jr.; and

3. Enforcement of this Judgment is stayed pending any appeal.

DATE: May 6, 2021 Allen Price Walker
Associate Judge

May 06, 2021

Circuit Court - 2071

ENTERED:

Judge

Prepared by:
Amy M. McCarthy, AAG
Office of the Illinois Attorney General
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 814-2380
amy.mccarthy@illinois.gov (temporary/secondary)
Attorney No. 99000

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 8, 2022, I electronically filed the foregoing RESPONSE BRIEF OF PLAINTIFFS-APPELLEES AND BRIEF OF PLAINTIFFS/CROSS-APPELLANTS with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system and will be served via that system.

Richard S. Huszagh

Primary e-mail: CivilAppeals@ilag.gov

Secondary e-mail: richardhuszagh@ilag.gov

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Michael J. Scotti III