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/Appellees/Cross-Appellants, v. SUSANA A. MENDOZA, in her capacity as Comptroller of the State of Illinois, Defendant/Appellant/Cross-Appellee.	)	On Direct Appeal to the Supreme Court from the Circuit Court of Cook County, County Department, Chancery Division, No. 2017 CH 07762 The Honorable FRANKLIN U. VALDERRAMA and ALLEN P. WALKER Judges Presiding.

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NATURE OF THE ACTION

In the wake of the 2007 recession that led to high unemployment and a dramatic decline in the State's revenues, the General Assembly passed a series of laws that reduced its members' salaries by eliminating annual cost-of-living adjustments and by requiring members to take furlough days. Co-Plaintiff-Appellee/Cross-Appellant Michael Noland, who as a state senator sponsored and routinely voted for these laws, stated that "most working families in Illinois are not seeing raises," and "the least we can do is cut our own pay." Years later, and shortly after he retired from the Senate, he filed this action alleging that these laws violate Article IV, Section 11 of the Illinois Constitution (the "Legislative Salary Clause") and seeking payment of the excluded salary. After announcing that he would not seek reelection, Co-Plaintiff-Appellee/Cross-Appellant James Clayborne, Jr., another state senator who also regularly voted for these laws, joined this action and sought the same relief. The circuit court ruled that the Legislative Salary Clause prohibits decreases in legislative salaries during a legislator's term in office. It then allowed Defendant-Appellant/Cross-Appellee Susana A. Mendoza, Comptroller of the State of Illinois, to file an affirmative defense asserting the statute of limitations, but denied her leave to file the defenses of laches and waiver, holding that they were insufficient as a matter of law. The circuit court later entered summary judgment against the Comptroller on her statute of limitations defense, holding that Plaintiffs' claims for payment were not

"ripe" until that court declared the challenged laws unconstitutional. The court also denied Plaintiffs' demand that relief be granted to all other legislators affected by these laws. Both sides appealed.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court erred by holding that the challenged statutes affecting Plaintiffs' salaries as legislators are facially unconstitutional and void *ab initio*.

2. Whether the circuit court erred by holding that the Comptroller's proposed laches defense was insufficient as a matter of law.

3. Whether the circuit court erred by holding that the Comptroller's waiver defense was insufficient as a matter of law.

4. Whether the circuit court erred by holding that the Comptroller's statute of limitations defense was unavailable because Plaintiffs' claims for mandamus did not accrue until that court first declared the challenged laws unconstitutional.

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."

STATEMENT OF FACTS

Introduction

Following the severe recession that began in 2007, which led to both high unemployment and a sharp decline in the State's revenues, the General Assembly passed a series of laws that reduced its members' salaries by eliminating annual cost-of-living adjustments ("COLAs") and by requiring all legislators to take unpaid furlough days. (C 584, 589–92, 880–81.) The first of these laws (collectively, the "Salary Reduction Laws") took effect in fiscal year 2009, and the legislature enacted materially similar laws for the next decade. (*Id.*)

Noland, who served in the Illinois Senate from January 2007 until January 2017, was a chief co-sponsor of the first of these laws and routinely voted for them. (C 585, 588, 937, 1020–21.) Declaring his support for these laws, Noland publicly stated that "most working families in Illinois are not seeing raises," and "the least we can do is cut our own pay." (C 109–10, 1138–39.) Then, five months after he left office, Noland filed this action — seeking payment of the salary he voted not to receive, under legislation he sponsored — alleging that the Salary Reduction Laws violated the Legislative Salary Clause of the Illinois Constitution (art. IV, § 11). (C 21–35.) After announcing that he would not seek reelection, Clayborne, who served in the Senate starting in 1995 and also regularly voted for these laws, joined this action and sought the same relief. (C 348, 583, 936–37.) The circuit court, after holding

that the Comptroller's affirmative defenses of laches and waiver were insufficient as a matter of law, and that her statute of limitations defense lacked merit because Plaintiffs' claim for payment of the disputed salary did not accrue until after the court ruled that the Salary Reduction Laws violated the Legislative Salary Clause, entered judgment in Plaintiffs' favor, ordering the Comptroller to pay them the disputed salary amounts. (C 1006–17, 1213–19, 1231–32.)

The Salary Reduction Laws

Under the Compensation Review Act, 25 ILCS 120/1 *et seq*. (the "Compensation Act"), the Compensation Review Board recommended salaries for various state officials, including members of the General Assembly, which took effect according to the terms of that Act. See *Quinn v. Donnewald*, 107 Ill. 2d 179, 183 (1985). In 1990, the Board recommended that the salaries of various state officials, including members of the General Assembly, be subject to annual cost-of-living adjustments, and the General Assembly approved that recommendation in Senate Joint Resolution 192. (C 587, 881.) See *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 289 (2004).

In 2009 the General Assembly, in response to the State's budgetary crisis triggered by the severe recession that began in 2007, enacted two laws — Public Act 96-045, and Public Act 96-800 — that required legislators to take certain furlough days and suspended their COLAs in fiscal year 2009. (C 584,

594–95, 598–99, 880–81; see 25 ILCS 115/1.5, 25 ILCS 120/5.6.)[1] Noland was a sponsor of Public Act 96-045 and a chief co-sponsor of Public Act 98-800. (C 1020–21.)

In each of the following years through 2019, the General Assembly enacted materially similar laws, imposing furlough days and suspending COLAs for its members. (C 589–92, 881.) Noland voted in favor of each of these laws before he left office, and Clayborne voted in favor of each of them when he was present for the vote. (C 1137–38.)[2]

Circuit Court Proceedings

A few months after leaving office, Noland brought this action challenging the validity of the Salary Reduction Laws that he sponsored and voted for, which he alleged violated the Legislative Salary Clause of the Illinois

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[1] The severe decline in State revenues is shown by the Commission on Government Forecasting and Accountability's March 16, 2010 report (at 33) (available at *https://cgfa.ilga.gov/Upload/03162010econforecastrevest FY2010-2011.pdf*, visited Dec. 13, 2021). Data reported by the Illinois Department of Employment Security also shows the surge in unemployment in this period, which for men rose "from a pre-recession level of 5.5 percent in 2007 to a peak unemployment rate of 12.0 percent in 2010," and for women rose from "4.4 percent in 2007 to as high as 9.3 percent in 2010." (See *https://ides.illinois.gov/resources/information/laus/characteristics.html*, visited Dec. 13, 2021).

[2] The Public Acts suspending COLAs and the corresponding amendments to the Compensation Act are as follows: P.A. 96-958 (§ 5.7); P.A. 97-71 (§ 5.8); P.A. 97-718 (§ 5.9); P.A. 98-30 (§ 6.0); P.A. 98-682 (§ 6.2); P.A. 99-355 (§ 6.3); P.A. 99-523 (§ 6.4); P.A. 100-25 (§ 6.5); P.A. 100-587 (§ 6.6). The Public Acts imposing furlough days and the corresponding amendments to the General Assembly Compensation Act are as follows: P.A. 96-958 (§ 1.6); P.A. 97-71 (§ 1.7); P.A. 97-718 (§ 1.8); P.A. 8-30 (§ 1.9). Plaintiffs' sponsorship and voting records for these laws are reported on the General Assembly's internet-based record of legislation from prior sessions (*https://ilga.gov/previousga.asp*) as part of the information provided on the "Bill Status" page for each Public Act.

Constitution. (C 21–35.) He did not sue on behalf of a putative class of similarly situated persons, but he purported to sue in his "official capacity as a former member of the Illinois Senate" and requested similar relief for other members of the General Assembly who did not join the suit as plaintiffs. (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 them their disputed

salaries. (C 366–69.) In those Counts, Plaintiffs alleged that the Salary Reduction Laws violated the Legislative Salary Clause, that "[t]he Comptroller has a duty to make [the disputed] payments," and that "[t]he Comptroller's duty to issue the payments is both non-discretionary, because it is mandated by the Illinois Constitution and by state law, and ministerial." (C 353, 355–56, 366, 367–68.) Counts V and VI sought an order requiring the Comptroller to make these payments to Plaintiffs and all other members of the General Assembly affected by the Salary Reduction Laws. (C 367–69.)

The Comptroller again moved to dismiss the action, arguing that the Legislative Salary Clause prohibits only increases in legislators' salaries during their terms in office, and that Plaintiffs had not alleged a valid claim for mandamus. (C 523–35.) Plaintiffs contested both arguments. (C 540–54.) In connection with the Comptroller's argument about their mandamus claims, Plaintiffs stated:

> Defendant argues that Plaintiffs fail to satisfy the requirements for issuance of a writ of mandamus. To the contrary, Plaintiffs pleads [sic] facts establishing, consisted [sic] with Illinois law, the elements for issuance of a writ of mandamus, including that the Defendant had a clear duty to follow the mandates of the Illinois Constitution and state law (Senate Joint Resolution 192), which required the payments that were wrongly withheld, and also had authority to order these payments to Plaintiffs.

(C 541.) The circuit court denied the motion and ordered the Comptroller to file an answer. (C 576; R 24–32.)

In her answer, the Comptroller denied that Plaintiffs were entitled to a declaratory judgment or mandamus relief. (C 583–607.) She further alleged as an affirmative defense that Clayborne — who was not running for reelection, and whose term of office would soon expire — lacked standing to sue in his official capacity. (C 609–10.)

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 the Comptroller's motion only to the extent that it challenged Clayborne's standing to sue in his official capacity, and granted Plaintiffs' motion for partial summary judgment on Counts I to IV, holding that the Legislative Salary Clause prohibits decreases, as well as increases, in legislators' salaries during their terms in office. (C 835–46, 871–77, 898–915.) The court held that Plaintiffs' constitutional challenge to the Salary Reduction Laws could not be an "as-applied" challenge because the court "has not held an evidentiary hearing," and, therefore, that the laws were "facially unconstitutional." (C 891, 895.) This left only Counts V and VI unresolved.

Following this ruling, the Comptroller moved for leave to file an amended pleading asserting the affirmative defenses of waiver, laches, and the statute of limitations. (C 926–42.) Plaintiffs opposed that motion, arguing among other things that such an amendment would be "futile" because none of these defenses was legally "viable." (C 945–55.) In support of that

argument, Plaintiffs relied on the appellate court's opinion in *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941), which, in an alternative holding, ruled that the plaintiff's constitutional claim could not be defeated by a statute of limitations or laches defense because doing so would "create a situation equivalent to avoiding the constitutional mandate." *Id.* at 296. (C 948–49.) The Comptroller responded that this Court had later held that constitutional claims are subject to statute of limitations defenses, and that laches defenses are not logically different. (C 995, 998–1000.)

The circuit court granted the Comptroller's motion in part, allowing her to assert the defense that Plaintiffs' claims were barred by the statute of limitations, but ruling that waiver and laches could not be asserted as defenses to Plaintiffs' claims. (C 1005–17.) For the statute of limitations defense, the court held that the Comptroller satisfied each of the factors relevant to allowing an amended pleading, including timeliness and lack of prejudice. (C 1008, 1012–16.) For the laches and waiver defenses, the court limited its analysis to whether the defenses were legally sufficient and held that they were not. (C 1009–12.) Regarding the laches defense, the court stated that it "finds *Northrup* persuasive, if not controlling on the viability of a laches affirmative defense in a case involving [a] public official's salary," and that "Defendant cannot state a cause of action for laches." (C 1011.) With respect to the waiver defense, the court held that "the defense of waiver is unavailable

where a public officer sues to recover salaries that cannot be reduced during the public official's term of office in violation of a constitutional provision." (C 1012.) The Comptroller then filed her amended affirmative defenses raising the statute of limitations. (C 1019–26.) (To avoid any forfeiture, this pleading noted that the defenses of laches and waiver were omitted only because the court disallowed them. (C 1024.))

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). The court agreed with Plaintiffs' contention that the Salary Reduction Laws were "facially unconstitutional" and therefore "void *ab initio*." (C 629–31, 1217.) The court further ruled that the Comptroller's statute of limitations defense lacked merit because Plaintiffs' mandamus claim seeking payment of the salary excluded by the Salary Reduction Laws was not "ripe" until the court first declared those Laws unconstitutional. (C 1217–18.) The court also held that Plaintiffs were entitled to relief for themselves, but could not obtain relief on behalf of non-party legislators. (C 1217.) The court then incorporated these rulings in a final judgment that included findings under Supreme Court Rule 18 and specified how much the Comptroller was ordered

to pay each of the Plaintiffs: $71,507.43 for Noland and $104,412.93 for Clayborne (before applicable payroll deductions). (C 1231–32.) The Comptroller filed a notice of direct appeal to this Court under Supreme Court Rule 302 (C 1233–37), and Plaintiffs cross-appealed the aspect of the judgment denying relief for non-parties (C 1242–46).

ARGUMENT

I. Summary of Argument

The circuit court's judgment in Plaintiffs' favor should be reversed for several independent reasons, each of which reduces or eliminates or greatly reduces the amount of any judgment in Plaintiffs' favor. The Comptroller does not challenge in this appeal the circuit court's ruling that the Legislative Salary Clause prohibits both increases and decreases in legislators' salaries that take effect during their terms in office. But the circuit court erred in declaring the Salary Reduction Laws *facially* unconstitutional and void *ab initio*, so that they could not apply even to Plaintiffs' terms of office that began *after* these laws took effect. At most, these laws were unconstitutional *as applied* to Plaintiffs for their terms of office that began *before* any of the Salary Reduction Laws applicable to that term took effect.

The circuit court also erred by disallowing the Comptroller's affirmative defenses of laches and waiver on the ground that they were insufficient as a matter of law. The defense of laches is available against constitutional claims, including claims for the payment of salary attached to a public position. Waiver is likewise a valid defense to such claims. Where the legislature itself creates a law setting its members' salaries, its members may validly agree to forego some of that salary after they occupy their positions and their rights to that salary accrue — which is what Plaintiffs did by affirmatively voting for the same laws that they later challenged.

Finally, the circuit court erred by entering summary judgment against the Comptroller on her statute of limitations defense. That court held that Plaintiffs' mandamus claims demanding payment of the salary excluded by the Salary Reduction Laws did not accrue (were not "ripe") until after it ruled in Plaintiffs' favor on their declaratory judgment claims regarding the validity of those laws. (C 1217–18.) But all of the elements for them to file their mandamus claims — including the Comptroller's alleged duty to pay the disputed amounts and failure to do so — were present as soon as those amounts came due and were not paid. Plaintiffs' additional declaratory judgment claims were not necessary to enable Plaintiffs to file their mandamus claims seeking payment of this salary. Indeed, Plaintiffs filed their mandamus claims before the circuit court ruled on their declaratory judgment claims. And before that ruling they argued that all of the "elements" necessary to pursue their mandamus claims were present. (C 541.)

II. Standard of Review

The circuit court's challenged rulings are subject to *de novo* review. That standard applies to the circuit court's holding that the Salary Reduction Laws are facially unconstitutional, see *People v. Bochenek*, 2021 IL 125889, ¶ 9; that the Comptroller's affirmative defenses of laches and waiver were insufficient as a matter of law, see *In re S.L.*, 2014 IL 115424, ¶ 16; that the time when a claim to recover the salary for a public position accrues, and the limitations period for such a claim begins, does not occur until after entry of a

declaratory judgment that the plaintiff has a legal right to that salary, see *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 312 (2007); *Ferguson v. City of Chi.*, 213 Ill. 2d 94, 99 (2004); see also *Sundance Homes, Inc. v. Cnty. of DuPage*, 195 Ill. 2d 257, 266 (2001); and that Plaintiffs were entitled to summary judgment on the Comptroller's statute of limitations defense to their claim to recover such salary, see *Hess v. Est. of Klamm*, 2020 IL 124649, ¶ 14.

III. The Circuit Court Erred by Holding that the Salary Reduction Laws are Facially Unconstitutional and Void *Ab Initio*.

Plaintiffs asserted, and the circuit court agreed, that the Salary Reduction Laws are facially unconstitutional and therefore void *ab initio*, as if they had never been enacted at all, and so could not be applied even for the parts of Plaintiffs' terms of office that began *after* one of these laws took effect. (C 629–31, 891–95, 1217.) That holding misapprehended the concept of facial unconstitutionality and, as a result, failed to limit the relief that Plaintiffs could potentially recover even if none of the Comptroller's affirmative defenses applied.[3]

"[S]tatutes carry a strong presumption of constitutionality, and a party challenging a statute has the burden of rebutting that presumption." *People v. McCarty*, 223 Ill. 2d 109, 135 (2006). To satisfy this burden, a party must "clearly establish any constitutional invalidity." *Allegis Realty Invs. v. Novak*,

[3] As noted, in this appeal the Comptroller does not challenge the circuit court's ruling that the Legislative Salary Clause prohibits the application of both salary increases and decreases during a legislator's term in office in which the increase or decrease was enacted.

223 Ill. 2d 318, 334 (2006). "The burden is a formidable one, and this court will uphold a statute's validity whenever it is reasonably possible to do so." *Id.*

"A facial challenge to the constitutionality of a legislative enactment is the most difficult challenge to mount successfully because an enactment is facially invalid only if *no set of circumstances* exist under which it would be valid." *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 305–06 (2008) (emphasis added, citations omitted). "If any situation may be posited where the statute could be validly applied, the facial challenge must fail." *In re M.T.*, 221 Ill. 2d 517, 533 (2006). Thus,

> [s]uccessfully making a facial challenge to a statute's constitutionality is extremely difficult, requiring a showing that the statute would be invalid under *any* imaginable set of circumstances. The invalidity of the statute in one particular set of circumstances is insufficient to prove its facial invalidity. So long as there exists a situation in which a statute could be validly applied, a facial challenge must fail.

Id. at 536–37 (emphasis in original; citations, internal quotation marks, and brackets omitted); *see also People v. Rizzo*, 2016 IL 118599 ¶ 24.

The text of the Legislative Salary Clause itself effectively refutes Plaintiffs' contention that the Salary Reduction Laws were facially unconstitutional and could not validly be applied in "*any* imaginable set of circumstances." *In re M.T.*, 221 Ill. 2d at 536 (emphasis in original). The Clause states that "changes in the salary of a member shall not take effect *during the term for which he has been elected*." Ill. Const., art. IV, § 11 (emphasis added.) Under the plain meaning of this language, therefore, such a

salary change may validly apply to a General Assembly member's term that begins *after* the law adopting that change takes effect (which Plaintiffs admit was true for some of their terms affected by the Salary Reduction Laws). (C 355, 357.)

If there were any doubt on the question, it is dispelled by the debates at the 1970 Constitutional Convention, where several delegates explained that the purpose of the provision was to prevent any pay increase from taking effect during the same term of office for legislators in which they enacted it. Introducing the provision at the Convention, Delegate Laurino explained:

> There are two ingredients in the proposed change: first, compensation and allowances shall be set by law, and second, no change in either salary or allowances shall become effective during the term for which a member has been elected. He cannot benefit from a pay raise until he is selected for another term, or reelected for another term. . . .
>
> And actually, the final clause of the section 10 should prove sufficient protection against danger that they may — legislators meaning they — might run wild with their own salaries, because it needs an intervening election before it becomes effective. And that, in essence, is section 10. I think it's really self-explanatory.

IV Record of Proceedings, Sixth Illinois Constitutional Convention ("Proceedings") 2705. Delegate Netsch likewise spoke to the reason for the provision:

> [T]here are some delegates — perhaps a large number — who either believe or believe the public believes that it is an important protection, that is, they want the legislators to be put in a position where they cannot vote themselves a salary increase that would be effective immediately but could take effect only at the conclusion of their term.

Proceedings at 2889. Thus, as Delegate Laurino declared, the provision is "self-explanatory" — it prevents salary changes only during the term of a legislator in which the change was enacted, not a later term. *Id.* at 2705.

Under that straightforward meaning of the Legislative Salary Clause, circumstances are easily envisioned in which the Salary Reduction Laws could validly apply to legislative terms beginning after any of these laws took effect. Indeed, such circumstances are presented by the facts of this case, in which Plaintiffs admitted that some of the Salary Reduction Laws applied, according to their terms, to parts of Plaintiffs' terms of office that began after those laws took effect. (C 355, 357.) Likewise, any of the Salary Reduction Laws could validly apply, according to its terms, to a new legislator whose first term began after that law took effect.

Instead of engaging in this analysis, the circuit court, citing *People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 32, held: "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." (C 891.) And, after holding that the Legislative Salary Clause prohibits mid-term decreases as well as increases in legislators' salaries, the court concluded that the Salary Reduction Laws "are facially unconstitutional." (C 895.) This reasoning misapprehended the Court's decision in *Hartrich*, which explained that an as-applied challenge cannot succeed "without a sufficient factual predicate," *id.* (citing *People v. Rizzo*, 2016 IL 118599, ¶ 26), and held that the

absence of such a factual predicate defeated the claimant's as-applied challenge in that case. Properly read, *Hartrich* did not hold that such a factual predicate must in every case be based on an evidentiary hearing and that in the absence of such a hearing a constitutional challenge must be a facial one. In *Hartrich*, the claimant, who contested the State's forfeiture of her motorcycle based on her husband's criminal conduct while driving it, argued that the forfeiture violated the excessive fines clause of the United States Constitution. 2018 IL 121636, ¶ 2. But she "ma[de] it clear that she is bringing only an as-applied constitutional challenge to the statute, not a facial one." *Id.*, ¶ 11. The Court then held that her as-applied challenge failed for lack of any factual support, stating:

> All as-applied challenges are, by definition, reliant on the application of the law to the *specific* facts and circumstances alleged by the challenger. . . .
>
> As this court explained in *Rizzo*, without an evidentiary hearing and sufficient factual findings, a court cannot properly conclude that a statute is unconstitutional as applied. Any finding of a statute's unconstitutionality as applied to a given set of facts would be premature without a sufficient factual predicate. *Rizzo*, 2016 IL 118599, ¶ 26. In this case, the record is entirely devoid of *any* evidence on the value of the motorcycle at the time of the forfeiture.

Id., ¶¶ 31–32 (emphasis in original).

Failing to consider the context of the Court's holding, the circuit court in this case read the Court's reference to the absence of "an evidentiary hearing *and* sufficient factual findings" (*id.*, ¶ 32, emphasis added) to mean

that every as-applied challenge requires not just a factual predicate, but an evidentiary hearing. (C 891.) That makes no sense, because parties could stipulate to facts necessary to evaluate an as-applied challenge, or a defendant could admit such facts in its answer. This reading of *Hartrich* is also inconsistent with the Court's holding in *Rizzo*, on which *Hartrich* relied. *Rizzo* confirmed that a finding of as-applied unconstitutionality requires a specific factual predicate, but it did not hold that an evidentiary hearing is a necessary means to establish that predicate. See *Rizzo*, 2016 IL 118599, ¶ 26 ("Because there was no evidentiary hearing *and* there were no findings of fact, the circuit court could not have made a separate as-applied finding.") (emphasis added). Under *Rizzo*, an as-applied challenge requires "'an evidentiary *record,*'" not an evidentiary *hearing*. *Id.* (quoting *People v. Mosley*, 2015 IL 115872, ¶ 47) (emphasis added). And here, the factual predicate for evaluating Plaintiffs' as-applied claims was provided by the admissions in the parties' pleadings and matters subject to judicial notice. (C 880 (holding that court, in ruling on Plaintiffs' motion for summary judgment, could consider facts subject to judicial notice); C 620 ("Defendant admits in her Answer . . . that the General Assembly reduced Plaintiffs' salary mid-term by enacting statutes that eliminated vested cost of living adjustments . . . and that mandated unpaid furlough days.").)

In short, there is no merit to Plaintiffs' contention, which the circuit court accepted, that the Salary Reduction Laws were facially unconstitutional,

and therefore void *ab initio*, with the consequence that they could not even apply to Plaintiffs' terms in office that began after those laws took effect. Thus, to the extent that Plaintiffs' claims are not barred by the Comptroller's affirmative defenses (discussed below), the monetary relief awarded to them should be reduced to include only what is justified on the ground that the Salary Reduction Laws are unconstitutional as applied to them, excluding the parts of new terms they served after any of these laws took effect.

IV. The Circuit Court Erred by Holding that the Comptroller's Laches Defense Was Unavailable as a Matter of Law.

The circuit court also erred in holding that laches is not a legally available defense to Plaintiffs' claims seeking the payment of salary from public funds. These claims accrued years before this action was commenced. Plaintiffs took no steps during that time to assert their rights. And the State enacted and implemented annual budgets that did not include such payments. Those facts supported the Comptroller's laches defense, which should have been allowed and, from the undisputed facts, would have barred all of the monetary relief Plaintiffs requested — except perhaps Clayborne's salary affected by the last of the Salary Reduction Laws, Public Act 100-587, which became law on June 4, 2018, just a few weeks after he joined this action. (C 348, 1231; see above at 6, n.2.)

In the circuit court, Plaintiffs argued that the Comptroller should be denied leave to file any of her proposed affirmative defenses, including laches, waiver, and the statute of limitations, because they were "futile" and not

legally "viable." (C 945–55.) For this proposition, Plaintiffs relied on the appellate court's 1941 decision in *Northrup*, 308 Ill. App. at 284, which, in an alternative basis for its decision (after ruling that the defenses were forfeited because they were not alleged in the circuit court), held that a public official's constitutional claim for compensation could not be defeated by the defenses of laches or the statute of limitations because doing so would "create a situation equivalent to avoiding the constitutional mandate." *Id.* at 296. (C 948–49.) In response, the Comptroller noted that this Court had since expressly ruled that constitutional claims may be defeated by the statute of limitations and had held constitutional claims to be barred by limitations and laches defenses. (C 995, 998–1000.) The circuit court then allowed the Comptroller to file a statute of limitations defense, but not a laches defense, stating that it "finds *Northrup* persuasive, if not controlling on the viability of a laches affirmative defense in a case involving [a] public official's salary." (C 1011.) That holding was wrong, and this Court should now clarify that constitutional claims for a public official's salary, like other constitutional claims, are subject to a laches defense.

Although this Court has not specifically overruled *Northrup*, it has expressly rejected the appellate court's rationale that allowing a statute of limitations defense would be "equivalent to avoiding the constitutional mandate." 308 Ill. App. at 296. In *Langendorf v. City of Urbana*, 197 Ill. 2d 100 (2001), for instance, the Court expressly rejected the contention that "that

a statute of limitations cannot be applied to an action involving the enforcement of a constitutional right." *Id.* at 110–11 (citing *Horn v. City of Chi.*, 403 Ill. 549, 560 (1949)). Subsequent Illinois precedent is consistent with this holding. See *People ex rel. Foreman v. Vill. of Round Lake Park*, 171 Ill. App. 3d 443, 455 (2d Dist. 1988) ("[T]he fact that a cause of action arises under a constitutional provision does not preclude the running of a statute of limitations against that cause of action[.]"). And federal courts follow the same approach. See, e.g., *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983) (holding that a "constitutional claim can become time-barred just as any other claim can").

There is no logical reason, and Plaintiffs offer none, why a constitutional claim should be subject to a statute of limitations defense but not a laches defense. Even *Northrup* treated the two as governed by the same principle, although it got that principle wrong. 308 Ill. App. at 296. In addition, this Court's precedent clearly holds that laches may operate to bar relief based on a claim that a statute is unconstitutional. In *Tully v. State of Illinois*, 143 Ill. 2d 425 (1991), this Court held that laches barred the plaintiff's constitutional challenge to a statute imposing an automatic retirement age for judges where he delayed asserting it for almost a year. *Id.* at 433–34. The Court's recent decision in *Tillman v. Pritzker*, 2021 IL 126387, similarly held that the taxpayer's claim, seeking relief for an alleged violation of the State Debt Clause of the Illinois Constitution, was barred by laches where he waited

years before filing his action. *Id.*, ¶¶ 25–31. Other courts likewise have expressly held that constitutional claims may be defeated by laches. See, e.g., *Southside Fair Hous. Comm. v. City of N.Y.*, 928 F.2d 1336, 1354 (2d Cir. 1991) ("Laches can bar constitutional claims.").

Contrary to the view adopted in *Northrup*, these cases recognize a distinction between nullifying a constitutional provision itself, and allowing a defense that defeats a claim based on that provision. As the Utah Supreme Court stated in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 2012 UT 66, "[a] time-bar dismissal does not imply a simultaneous determination of governmental power to act outside constitutional bounds. It merely indicates that a particular litigant has forfeited a right to complain about such ultra vires acts." *Id.*, ¶ 50.

Nor is there any logical basis to create a special exception to these principles for salary claims by public officials. If anything, claims involving public funds, which are subject to strict rules governing public budgets, present a particularly strong case for applying laches. In *People ex rel. Mulvey v. City of Chicago*, 292 Ill. App. 589 (1st Dist. 1937), the court held that the plaintiffs' mandamus claims arising out of the city's failure to appropriate sufficient funds to pay for fixed salaries, even if valid, were barred by laches. *Id.* at 594. More recently, in *Monson v. County of Grundy*, 394 Ill. App. 3d 1091 (3d Dist. 2009), the court held that the plaintiff's mandamus action seeking the payment of public funds was barred by laches because he filed suit

after the defendant county approved the budget and the fiscal year at issue had ended. *Id.* at 1094–95. Emphasizing that "[t]he doctrine of laches is grounded on the principle that courts are reluctant to come to the aid of a party who knowingly slept on rights to the detriment of the other party," the court held that "[w]hen a plaintiff files a complaint challenging budget decisions for a fiscal year that has ended, laches applies because the plaintiff's unreasonable delay prejudices the budgeting authority." *Id.* at 1094.

Similarly, in *PACE, Suburban Bus Division of Regional Transportation Authority v. Regional Transportation Authority*, 346 Ill. App. 3d 125 (2d Dist. 2003), the court applied laches to the regional bus entity's claim challenging a reduction in its operating subsidies, including a claim for monetary relief going back for six past years. *Id.* at 143–44. The court allowed the claim to proceed for the current fiscal year because the plaintiff had brought the action shortly after the budget for that year was adopted, but disallowed the claim for past budget years that had concluded, stating:

> Pace filed its complaint on January 11, 2002, shortly after the 2002 fiscal year started and shortly after the RTA made the challenged budget decisions. Because Pace sued promptly, laches does not apply to the 2002 budget decisions.
>
> Laches does apply, however, to Pace's request for a monetary award representing subsidies that Pace alleges it should have received in the years 1996 through 2001. When Pace filed its complaint, these budget years had concluded, and, presumably, the funds at issue were no longer available. It would be highly prejudicial to require the RTA to pay these "back subsidies" long after these funds have become a part of the RTA's budget history.

Id. at 144.[4]

Here, too, Plaintiffs have no good excuse for their delay in seeking judicial assistance. They had actual knowledge, not just constructive knowledge, of the Salary Reduction Laws, which they routinely voted for, and the first two of which Noland sponsored. And the apparent reason for their delay is not difficult to discern. After voting for these laws, Plaintiffs remained in office, and the voters could have seen such a suit as reflecting the type of hypocrisy often attributed to politicians, jeopardizing Plaintiffs' chances for reelection. Indeed, it is telling that although Noland sponsored the earliest Salary Reduction Laws and voted for all of them that affected his salary as a legislator, he waited (albeit only briefly) until after he left office before filing this action. And Clayborne, who likewise regularly voted for the Salary Reduction Laws for a decade when he was a senator, similarly waited to join the suit until after announcing he would not run for reelection. And, as this Court recently explained in *Tillman*, "[t]he fact that a petitioner requests

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[4] Other courts have applied laches in similar situations. See, e.g., *Lavin v. Bd. of Educ. of City of Hackensack*, 447 A.2d 516, 520-21 (N.J. 1982) (holding that laches barred public employee's claim for extra compensation prescribed by statute where she delayed seeking recovery for years, and in interim her employer "did not budget for the additional expense"); *Maynard v. Bd. of Educ. of Wayne Cnty.*, 357 S.E.2d 246, 255-56 (W. Va. 1987) (applying laches to bar recovery by public official of back pay, stating: "A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of expenditure of public funds. Failure to do so constitutes laches. . . . Generally, courts have been reluctant to award retroactive monetary relief to public employees who have filed actions after a lengthy delay, where to afford such relief would cause substantial prejudice to the public's fiscal affairs.").

only prospective relief does not preclude the application of *laches* where he had constructive notice of his legal claims years before filing his action." 2021 IL 126387, ¶ 30.

The prejudice to the State from this delay is obvious. The fiscal years for which Plaintiffs seek relief, going back to 2009, are long past, with the budgets for those fiscal years closed. See *Monson*, 394 Ill. App. 3d at 1094–95; *PACE*, 346 Ill. App. 3d at 143–44; *Mulvey*, 292 Ill. App. at 592–98; see also *People ex rel. Griffin v. City of Chi.*, 382 Ill. 500, 504–06 (1943) (approving and adopting same result as *Mulvey*). In addition, if Plaintiffs had brought this action sooner, the General Assembly could have changed the legislation it enacted to operate prospectively for multiple years and future terms of office, as permitted by the Legislative Salary Clause, thereby avoiding claims for retroactive expenditures as Plaintiffs now demand. See *People ex rel. Casey v. Health & Hosps. Governing Comm'n of Ill.*, 69 Ill. 2d 108, 115 (1977) (holding that prejudice for laches can consist of leading defendant "to pursue a course different from what he would have otherwise taken").

Nor can Plaintiffs minimize the sums at stake by focusing solely on the recovery they personally seek. Even just for them, the circuit court computed this recovery to be $175,920.36, which cannot fairly be described as *de minimis*, or even minor. (C 1232.) In addition, the magnitude of this recovery should be evaluated in light of the number of other potential legislators who could seek similar relief, and which Plaintiffs actually sought for them in this

case (C 349, 367–69), which, if not time barred or otherwise precluded, could easily amount to many millions of dollars.[5]

In short, the circuit court erred as a matter of law by holding that laches was not available as a defense to Plaintiffs' claims seeking to require the Comptroller to pay the salary excluded by the Salary Reduction Laws.

V. The Comptroller's Proposed Waiver Defense Alleged a Valid Ground to Defeat Plaintiff's Claims.

The circuit court also erred by denying the Comptroller leave to file her proposed waiver defense on the ground that salary claims by public officials cannot be waived. That defense presents a complete bar to all recovery by Plaintiffs.

"Individuals may waive substantive rules of law, statutory rights and even constitutional rights." *Smith v. Freeman*, 232 Ill. 2d 218, 228 (2009). "In general, 'waiver' means the voluntary relinquishment of a known right and arises from an affirmative, consensual act consisting of an intentional relinquishment of a known right." *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 66 (citation, internal quotation marks, and brackets omitted); see also *Freeman*, 232 Ill. 2d at 228 (stating elements for waiver of constitutional right). That standard is easily met here, where Plaintiffs each routinely voted for the Salary Reduction Laws that they now contend were

[5] As a precautionary measure, Plaintiffs' lawyers have filed a class action asserting the same claims for other members of the General Assembly (*Fortner v. Pritzker*, Cook County Circuit Court No. 2021 CH 2663).

invalid and unenforceable against them.

Plaintiffs do not dispute the factual aspects of the Comptroller's waiver defense. Instead, they argued, and the circuit court agreed, that the prohibition against changing legislators' salaries during their terms in office is a non-waivable right, such that allowing a member of the General Assembly to waive it would violate the public policy that the Legislative Salary Clause is intended to implement. (C 947–50, 1011–12.) That holding is unsound.

There is no flat rule that constitutional rights cannot be waived. See *Freeman*, 232 Ill. 2d at 228. Still, some rights are considered non-waivable — especially in advance of any violation of the duty that the right protects — to ensure that their purpose is not circumvented, including as the result of a disparity of bargaining power. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974) (holding that Title VII rights against employment discrimination "are not susceptible of prospective waiver"); *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986) (distinguishing validity of advance waiver of Title VII violations and releases of Title VII claims for prior discriminatory actions); see generally *United States v. Olano*, 507 U.S. 725, 733 (1993) (noting that "[w]hether a particular right is waivable . . . depend[s] on the right at stake"). Thus, for example, no person can waive in advance the right to invoke the protection of bankruptcy laws, *In re Huang*, 275 F.3d 1173, 1177 (9th Cir. 2002); rights under the Workers' Compensation Act, 820 ILCS 305/23, *Checker Taxi Co. v. Indus. Comm'n*, 343 Ill. 139, 144 (1931); or rights

under minimum wage laws, *Lewis v. Giordano's Enters., Inc.*, 397 Ill. App. 3d 581, 597 (1st Dist. 2009).

The concerns motivating the public policy against such waivers are uniquely absent for reductions in legislators' salaries. There is no risk of oppression due to gross disparities in bargaining power, and there is little risk of harm to critical social interests. Members of the General Assembly do not bargain with anyone else over their salaries. Instead, they have ultimate control over their own salaries through the legislative process. Because they have this power, it can hardly be said that public policy must prevent them from accepting less than the amount that they have themselves determined. See *Pratts v. City of Duluth*, 289 N.W. 788, 789 (Minn. 1939) (noting absence of basis for objection "where the employing body is empowered to determine [the compensation]") (discussing *Riley v. City of N.Y.*, 96 N.Y. 331, 339 (N.Y. 1884)); see also *Annotation: Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount*, 118 A.L.R. 1458 (1939) ("cases where a particular salary or compensation is fixed by a certain body (such as a municipal council *or even a state legislature*), which has the power to repeal or alter the measure with respect to compensation at any time, do not present the distinctive question under consideration [in this annotation]") (emphasis added).

In addition, the reasons for not allowing a public official to agree *in advance* to accept a lower salary or wages than a governing statute

prescribes are absent when such an official voluntarily agrees to accept less *after* the official takes the position and the compensation accrues. In that situation, the danger of undue influence, oppression, or coercion are minimal, if not entirely absent. Thus, courts in other jurisdictions, noting this distinction, have denied claims for compensation by public officials based on actions supporting a finding of waiver or release that were taken after they accepted their positions and their salary or compensation began to accrue. See, e.g., *Van Houghten v. City of Englewood*, 12 A.2d 668, 670 (N.J. 1940); *Lupo v. Bd. of Transp. of City of N.Y.*, 105 N.Y.S.2d 623, 624 (N.Y. Sup. Ct. 1951); *Schwarz v. City of Philadelphia*, 12 A.2d 294, 296 (Pa. 1940); see generally *Annotation*: *Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount*, 160 A.L.R. 490 (1946) § I (stating that even when "antecedent" agreement to accept less compensation than prescribed by statute is prohibited, "acceptance of a lesser amount after the compensation has accrued and become due" may operate to bar recovery under "the doctrines of estoppel [and] waiver"). Several of these cases recognized periods of fiscal distress as an additional reason for giving effect to a voluntary acceptance of reduced salary. See *Van Houghten*, 12 A.2d at 670; *Pratts*, 289 N.W. at 789; *Molloy v. City of Chattanooga*, 232 S.W.2d 24, 25-26 (Tenn. 1950); *Maxwell v. City of Madison*, 292 N.W. 301, 302–03 (Wis. 1940). That factor was present here, and even emphasized by Noland in declaring his support for

the Salary Reduction Laws. Thus, the Court should recognize and apply that same principle for members of the General Assembly who possess the ultimate power to control their own salaries.

The decisions on which the circuit court relied in refusing to allow the Comptroller's waiver defense are not inconsistent with this view. In *Pitsch v. Continental & Commercial National Bank of Chicago*, 305 Ill. 265 (1922), the plaintiff routinely agreed twice a month, as an express condition of his continuing employment as a notary for the defendant bank, to accept only one-fourth of the statutory minimum salary for his services. *Id.* at 268–72. In effect, then, he agreed in advance not to receive the statutory minimum pay for his services, set by the legislature, and the Court held that this agreement was contrary to public policy and unenforceable. *Id.* at 269-72; see also *id.* at 272 ("the whole matter of fixing his compensation for official services by private contract when it had already been fixed by law was contrary to public policy and the contract was therefore void").

In *Galpin v. City of Chicago*, 269 Ill. 27 (1915), the plaintiff "stated publicly during his campaign for election . . . that if elected state's attorney he would accept an annual salary of $10,000," and he was then elected. *Id.* at 41. Refusing to enforce this commitment, the Court held: "[I]t 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." *Id.* Again, the plaintiff did not himself control the relevant salary, and he made the disputed promise not to accept it before it accrued. Here, by contrast, Plaintiffs were part of the body that set their own salaries, free from any risk of duress, oppression, or coercion, and they did not waive that salary before assuming their public offices and before it accrued.

Whatever objection to the Salary Reduction Laws might be asserted by a legislator who voted against them, that objection is unavailable to Plaintiffs, who voted for these laws at every opportunity, and where Noland publicly declared that they embodied a fair and sensible public policy. Having taken that position, Plaintiffs can hardly complain now about having to accept the consequences of the voluntary choices they made when it was time for them to formally register their approval, or opposition, to these laws. Thus, in the unique circumstances presented here, where Plaintiffs are members of the body that sets their own salaries and affirmatively voted to accept a reduction in those salaries after they assumed office and their right to receive those salaries accrued, public policy does not preclude the defense of waiver.

For these reasons, the Court should reverse the circuit court's ruling that the Comptroller's waiver defense was unavailable as a matter of law.

VI. The Circuit Court Erroneously Held That the Statute of Limitations on Plaintiffs' Claims Did Not Begin to Run Until After It Entered a Declaratory Judgment on These Claims.

After first ruling that Plaintiffs' mandamus claims were subject to the Comptroller's statute of limitations defense, the circuit court held that this

defense was ineffective because the applicable statute of limitations did not begin to run until after that court entered summary judgment on Plaintiffs' declaratory judgment claims. (C 1218.) This holding is unsound as a matter of law. Indeed, if the premise of this holding were accepted, other claims for coercive relief could avoid the applicable statute of limitations by the device of filing a separate claim for a declaratory judgment on one of the elements of the claim for coercive relief and seeking to have the declaratory judgment claim resolved first.

There is no dispute in this case that the relevant statute of limitations for Plaintiffs' claims is five years, under Section 13-205 of the Code of Civil Procedure, which governs "all civil actions not otherwise provided for." 735 ILCS 5/13-205 (2018). It is also undisputed that much of the salary claimed by Plaintiffs was payable more than five years before Noland brought this suit, and more than five years before Clayborne joined it. The only disputed issue in connection with this defense relates to when Plaintiffs' claims to recover their unpaid salary "accrued," with the Comptroller asserting that these claims accrued when the salary would have been due but was not paid, and Plaintiffs maintaining that they accrued only after the circuit court entered judgment on Plaintiffs' declaratory judgment claim alleging that the Salary Reduction Laws violated the Legislative Salary Clause. (C 1047-50, 1183–84.)

The circuit court's acceptance of Plaintiffs' position on this issue was wrong as a matter of law. As a general matter, a cause of action accrues when

all of the elements necessary to bring the claim are present. *W. Am. Ins. Co. v. Sal E. Lobianco & Son Co., Inc.*, 69 Ill. 2d 126, 129–30 (1977) (tort action); *Lowrey v. Malkowski*, 20 Ill. 2d 280, 285 (1960) (Dram Shop action); *MC Baldwin Fin. Co. v. DiMaggio, Rosario & Veraja, LLC*, 364 Ill. App. 3d 6, 14 (1st Dist. 2006) (breach of contract and professional negligence); see also *Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*, 341 F.3d 644, 650 (7th Cir. 2003) (applying Illinois law). Under this standard, "a limitation period begins 'when facts exist which authorize one party to maintain an action against another'" and "will not await commencement until a plaintiff has *assurance* of the success of an action." *Sundance Homes*, 195 Ill. 2d at 266 (emphasis in original, quoting *Davis v. Munie*, 235 Ill. 620, 622 (1908)).

The necessary facts and elements of Plaintiffs' action to seek recovery of the disputed salary payments — the Comptroller's alleged duty under the Legislative Salary Clause to make those payments to Plaintiffs, her breach of that duty, and Plaintiffs' injury when she did not make those payments — were all present for each disputed payment when it was allegedly due and payable but the Comptroller, in accordance with the Salary Reduction Laws, did not pay it. Cf. *Luminall Paints, Inc. v. La Salle Nat'l Bank*, 220 Ill. App. 3d 796, 801–02 (1st Dist. 1991) (holding that claim for nonpayment of amounts under lease accrued when each installment was due) (citing *Light v. Light*, 12 Ill. 2d 502, 506 (1957)). The circuit court's ruling in Plaintiffs' favor on the meaning of the Legislative Salary Clause was not a necessary "fact" or

"element" of their claim to recover the salary precluded by the Salary Reduction Laws. Nothing prevented them from including this claim in their complaint before the circuit court made that ruling. Indeed, they *did* include that claim in their pleadings before this ruling, belying their suggestion that it was not available, and that the limitations period did not begin to run, before that ruling.

The Court's holding in *Sundance Homes* is instructive. The statute of limitations issue in that case arose in an action to recover development impact fees imposed by DuPage County that the Court had declared unconstitutional in an earlier case: *Northern Illinois Home Builders Ass'n v. County of DuPage*, 165 Ill. 2d 25 (1995) ("*NIHBA*"). The county, as the defendant in the subsequent action, asserted that the claim was barred by Section 13-205 because the plaintiff did not file its complaint "within five years from the date its cause of action accrued," which the defendant maintained was "the date [the plaintiff] had actually paid the road impact fees." 195 Ill. 2d at 261. The plaintiff, citing *Kelly v. Chicago Park District*, 409 Ill. 91 (1951), argued that "a court decision can 'create' a cause of action"; that "its cause of action did not accrue until [the Supreme Court] filed its opinion in *NIHBA*"; that "it had no right to a refund of the impact fees" before that opinion; and that its action was timely filed because "the[] right to a refund accrued, and a refund became 'recoverably certain' only upon [the Supreme Court's] decision in *NIHBA*." *Id.* at 262, 275. Rejecting these arguments, the Court held that the plaintiff's

claim was barred by the five-year limitations period. *Id.* at 275–82.

Specifically addressing *Kelly*'s relevance, the Court stated:

> Appellants argue that *Kelly* supports their position insofar as the *Kelly* court held that a statute of limitation did not begin to run upon [the] employees' salary claims, and indeed the cause of action on same did not even accrue, until the employees established their rights of employment through a separate *mandamus* action. Assuming, without addressing, the continued vitality of the holding in *Kelly*, we do not believe it applies to the facts and circumstances of the present case. *It is obviously not only permissible, but desirable, to bring related claims at once in a single action*.

Id. at 276 (emphasis added). (*Kelly* is further discussed below, at 38-39.)

The Court in *Sundance Homes* also found the federal court cases on which the plaintiff relied — *Neely v. United States*, 546 F.2d 1059, 1068 (3d Cir. 1976), and *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972) — to be unpersuasive because they related to criminal convictions and ancillary matters, and "although they couch their analyses in terms of 'accrual' of an action, in substance they invoke 'discovery' principles and involve retroactive application of" decisions by the United States Supreme Court — *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968) — "to causes which had *already* accrued." 195 Ill. 2d at 276–78 (emphasis in original); see also *id.* at 277 ("If the cause of action had not already accrued, it would seem there would have been no need for the *Neely* court to state that the statute of limitation was 'suspended' until the date of the *Marchetti* and *Grosso* decisions.").

Reinforcing the point, the Court held:

> By application of the *Neely* and *Chevrolet Impala* analyses, a cause of action would not accrue on a constitutional claim until the first challenge succeeded, an event which could conceivably take place decades after final judgment was entered. This absurd analysis, which defies accepted notions of finality, . . . is inconsistent with principles expressed in our own statutory schemes.

Id. at 277–78.

The same reasoning controls here. All of the elements for Plaintiffs to bring their payment claims were present long before they filed this action. Not only could they have included those claims with their claims for a declaration of their rights under the Legislative Salary Clause, but they actually did so.

Although the circuit court's decision mentioned *Sundance Homes* (C 1216), it did not examine that opinion's relevance and application in this situation, and instead held that the statute of limitations issue was controlled by *Kelly* (C 1218). That ruling was erroneous, for *Kelly*, if it retains any vitality, should be limited to its particular facts, which are not presented in this case.

Kelly involved a dispute over whether a group of park district employees had statutory job protection when several park districts were consolidated. 409 Ill. at 92–94. After being terminated, the plaintiffs filed a mandamus action to be restored to their positions, and that action was ultimately successful, after appeal, more than six years after they brought it. Three months later, the plaintiffs filed a new action to recover the salaries for their positions, in which they prevailed. *Id.* On appeal, the defendant renewed its

objection that the salary claims were barred by the five-year statute of limitations because they should have been included in the original mandamus proceeding, and that reinstatement and recovery of any salary owed "are but two different types of remedy for the same cause of action." *Id.* at 95. This Court disagreed and, distinguishing cases holding that "civil service reinstatement and recovery of salary may be accomplished in one proceeding," held that "[t]he cause of action for salaries could not accrue to plaintiffs until their rights to their respective positions were first determined." *Id.* The Court stated:

> [W]hether it be an elective office or an appointive position, establishing the right to the office or position must be a condition precedent to the right to salary, and until the former right is established no cause of action for salary can accrue. *Where 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 suit, which decides whether the new right exists*.

Id. at 95–96 (emphasis added).

Whatever validity *Kelly* may still have in the particular circumstances in which it was decided, it is not applicable here. At a minimum, *Kelly* is readily distinguishable because Plaintiffs' salary claim did not depend on any right to reinstatement to a public position, and they did not file a separate action for such reinstatement, but instead filed a single action in which they included their salary claims as their only claims for coercive relief.

It is true that some causes of action do not accrue, for statute of limitations purposes, until the conclusion of other litigation establishes an element of the cause of action — often the plaintiff's injury. For example, a claim for legal malpractice in handling a civil action typically accrues when the underlying case is resolved in a manner adverse to the malpractice plaintiff. *Hermansen v. Riebandt*, 2020 IL App (1st) 191735, ¶ 81; *Lucey v. Law Offs. Of Pretzel & Stouffer, Chtd.*, 301 Ill. App. 3d 349, 356 (1st Dist. 1998). Similarly, a claim for malicious prosecution accrues when "the criminal proceeding on which it is based has been terminated in the plaintiff's favor," *Ferguson*, 213 Ill. 2d at 99. A malpractice claim based on a wrongful conviction "does not accrue until the plaintiff's conviction is overturned." *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 406 (5th Dist. 2001). A claim for indemnity accrues when the plaintiff suffers an injury, typically when an adverse judgment is entered against it. *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 199 (1989). And a claim on an executor's bond accrues upon the failure of the executor to pay the judgment against him. *Nevitt v. Woodburn*, 160 Ill. 203, 211–12 (1895).

But the operative principle in those cases — that where the judgment in other litigation is an *element* of the plaintiff's cause of action (generally the element of injury), the entry of that judgment triggers accrual of the cause of action for limitations purposes — is not present here. Nothing about Plaintiffs' salary claim required them first to obtain a judgment in another

action. On that ground alone, *Kelly* is inapposite.

Again, *Kelly* is distinguishable on the ground that it involved an initial claim to reinstatement to a public position, which is not present here. And *Sundance Homes* significantly undercut *Kelly*'s holding that a cause of action for public salaries "could not accrue" until the plaintiffs' "rights to their respective positions were first determined." 409 Ill. at 95. But in this case there is no similar claimed right to occupy a disputed position, and the Court need not formally overrule that limited holding in *Kelly*.

Further, *Kelly*, if it retains any vitality, cannot be extended to situations in which a plaintiff, in a single action, includes a declaratory judgment claim that simply addresses a liability element of its claim for coercive relief when all of the elements of that claim are already present. That is not the proper office of a declaratory judgment action, which is available to give parties advance guidance for their future conduct "*before* there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right," *Carle Found. v. Cunningham Twp.*, 2017 IL 120427, ¶ 26 (citation and internal quotation marks omitted, emphasis added), not to decide "an element of a single claim," *id.*, ¶ 27 (citation and internal quotation marks omitted), or to declare "what law applies to the determination of a party's rights" without determining those rights, *id.*, ¶ 29.

In any event, even if Plaintiffs had a valid basis to file a claim for a declaratory judgment in addition to their claims seeking payment of their

disputed salary, all of the elements of the latter claims were present, and those claims therefore accrued, starting the statute of limitations, long before Plaintiffs even filed this action. The rule adopted by the circuit court would create a roadmap to frustrate the policy behind statutes of limitations through the simple device of supplementing a claim for coercive relief with a claim for a declaratory judgment on some point of law, or question of liability, that is encompassed by the claim for coercive relief. That rule, which would elevate procedural maneuvering over substantive rights, has nothing to commend it and should be firmly rejected.

CONCLUSION

For the foregoing reasons, the circuit court's judgment in Plaintiffs' favor should be reversed.

December 13, 2021

Respectfully submitted,

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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 42 pages.

/s/ *Richard S. Huszagh*

Appendix

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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.

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[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-

[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 ULYSES 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 DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

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4231-5231

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

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Defendant, Susana A. Mendoza, in her capacity as Comptroller of the State of Illinois' Motion for Leave to File Amended Affirmative Defenses. For the reasons that follow, Defendant's motion is granted in part and denied in part.

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 1995 to January 2019. Defendant, Susana A. Mendoza ("Defendant") is the Comptroller of the State of Illinois.

In 2009, the General Assembly enacted Public Act 96-800,[1] which eliminated the Cost-of-Living Adjustments ("COLAs") to which Noland and Clayborne (collectively, "Plaintiffs") 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. 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. Plaintiffs did not receive COLAs from July 2009 through the end of each of their respective elected terms in January 2017 and June 2018.

In 2009, the General Assembly enacted Public Act 96-45,[2] which mandated that Plaintiffs 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 Act 96-45, the Comptroller reduced Plaintiffs' salary for fiscal year 2010 by twelve (12) days of compensation.

[1] Codified in relevant part at 25 ILCS 120/5.6.
[2] Codified in relevant part at 25 ILCS 115/1.5.

Every year from 2009 through 2013, the Illinois General Assembly passed a bill mandating either six (6) or twelve (12) furlough days.

On June 1, 2017, Noland filed a Complaint for Declaratory Judgment and Issuance of a Writ of Mandamus (the "Complaint") against Defendant in her capacity as the Comptroller of the State of Illinois, alleging that the bills changing the salary and COLA mid-term violated the Illinois Constitution. Counts I and II sought declarations that the statutes 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 Section 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 add a new party. Defendant did not object to this request. Without any objection, the Court granted the motion.

On May 8, 2018, Plaintiffs filed a ten-count First Amended Complaint for Declaratory Judgment and a Writ of Mandamus, adding Clayborne as a Plaintiff. Count I seeks a declaration that the Illinois statutes eliminating COLA payments were unconstitutional and that Defendant's action in withholding Plaintiffs' COLA salary adjustments for the period from July 2009 to January 2017 changed Plaintiffs' salary in violation of the Illinois Constitution. Count II makes the same allegations as Count I. Count III seeks a declaration that the bills imposing furlough days and eliminating COLAs mid-term violate the Illinois Constitution. Count IV makes the same allegations as Count III. Count V 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 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 Plaintiffs as former member of the Illinois Senate to preserve for appeal the Court's dismissal of Counts I, II, III and IV of Noland's original Complaint.

Defendant filed an Answer to the First Amended Complaint denying all material allegations. The parties subsequently filed cross-motions for summary judgment.

On July 8, 2019, the Court granted Plaintiffs' Motion for Partial Summary Judgments on Counts I through IV of their Amended Complaint. The Court also granted in part and denied in part Defendant's Cross-Motion for Summary Judgment. Specifically, the Court found Defendant was entitled to summary judgment on all counts asserted by Plaintiffs to the extent that such counts are brought in their official capacity. Further, the Court found that Plaintiffs were entitled to summary judgment on Counts I through IV of the First Amended Complaint, which sought a finding that the statutes are facially unconstitutional. Last, the Court held Defendant was not entitled to summary judgment on Counts V and VI because she failed to establish that the remedy

of mandamus is improper because payment of salaries of the members of the General Assembly by the Comptroller is a discretionary act.

On August 5, 2019, Defendant filed a Motion for Leave to File Amended Affirmative Defenses to add the affirmative defenses of laches, statute of limitations, and waiver. Plaintiffs objected. The fully briefed motion is now before the Court.

STANDARD

Section 2-616(a) of the Illinois Code of Civil Procedure governs the amendment of pleadings. Section 2-616(a) provides that "at any time before final judgment amendments may be allowed on just and reasonable terms… challenging the cause of action or defense or adding new causes of action or defenses..." 735 ILCS 5/2-616(a) (West 2016). Courts consider for four factors in determining whether amendments to pleadings should be permitted under Section 2-616(a): (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maint. Inc.*, 146 Ill. 2d 263, 273 (1992). The most important factor is prejudice to the opposing party, such as where an amendment leaves the party unprepared to respond to a new theory at trial. *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (3d Dist. 2004). The proponent of the amendment must meet all four factors. *Hayes Mech. Inc. v. First Indus., LP*, 351 Ill. App. 3d 1, 7 (1st Dist. 2004).

DISCUSSION

Defendant argues that her motion meets all four of the *Loyola* factors. Not surprisingly, the Plaintiffs disagree.

As noted above, courts consider the following four factors when determining whether amendments to pleadings should be permitted: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy v. S & S Roof Maint. Inc.*, 146 Ill. 2d 263, 273 (1992). The Court addresses each factor in turn.

A. Whether the proposed amendment would cure the defective pleading

As to the first factor, whether the proposed amendment would cure the defective pleading, Defendant asserts that the proposed amendment would allow her to amend the existing Answer by adding the affirmative defenses of laches, statute of limitations, and waiver. According to Defendant, allowing the addition of these defenses would promote the resolution of Plaintiffs' remaining mandamus claims on the merits. Plaintiffs disagree, countering that the proposed affirmative defenses are not viable affirmative defenses to a mandamus claim and such, allowing the filing of the affirmative defenses would be futile.

The threshold issue before the Court is whether each proposed affirmative defense states a cognizable affirmative defense, thus satisfying the first *Loyola* factor. Courts have consistently observed that if the proposed amendment does not state a cognizable claim, it fails the first factor and the court need not proceed with any further analysis. *Hayes Mechanical, Inc.*, Ill. App. 3d at 7. Here, Defendant has proposed filing three affirmative defenses: (1) laches; (2) waiver; and (3) statute of limitations. The Court begins with the first proposed affirmative defense, laches.

i. Laches

Defendant maintains that the proposed affirmative defense of laches is a viable affirmative defense which bars an untimely mandamus claim, citing *People ex rel. Mulvey v. City of Chicago*, 292 Ill. App. 589, 594 (1st. Dist. 1937) and *Monson v. Cty. of Grundy*, 394 Ill. App. 3d 1091, 1094 (3d Dist. 2009). The doctrine of laches, notes Defendant, "is grounded on the principle that courts are reluctant to come to the aid of a party who knowingly slept on rights to the detriment of the other party." *Id* at 1094. Here, laches, according to Defendant is appropriate because Plaintiffs in essence waited too long to bring their claim.

Defendant also argues that the defense of laches can be used to bar relief based on a claim that a statute is unconstitutional, citing *Tully v. State of Ill.*, 143 Ill. 2d 425, 434 (1991).

Plaintiffs respond that Defendant's proposed affirmative defense of laches would be futile because Defendant's assertion of laches violates public policy. Plaintiffs note that Illinois law holds that the salary of a public officer is not a private right that can be waived or lost through the lapse of time in asserting that right, citing *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941), *Galpin v. City of Chicago*, 269 Ill. 27 (1915), and *Pitsch v. Continental & Commercial National Bank*, 305 Ill. 265 (1922). Further, argue Plaintiffs, when a public officer's salary is set by law, the defenses of waiver, estoppel, laches, or the statute of limitations are unavailable against a claim to recover salary withheld in violation of that law, citing *Northrup*, *Galpin*, and *Pitsch.* Plaintiffs contend that *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941), is directly on point, and supports their contention that the affirmative defense of laches is futile here.

Last, Plaintiffs contend that the cases cited by Defendant, *Mulvey*, *Tully,* and *Monson* are distinguishable and do not support the viability of the proposed affirmative defenses. Plaintiffs maintain that these cases are inapplicable because they case did not involve a salary protected by law nor did they implicate public rights.

Defendant replies that Plaintiffs' reliance on *Northrup* is misplaced because in that case, the court denied the defenses of laches and statute of limitations because they were never alleged in the circuit court. Further, Defendant contends that Plaintiffs' characterization of *Tully* is incorrect because *Tully* solely concerned the issue of the fundamental right to hold a public office. Moreover, Defendant argues, the Illinois Supreme Court has rejected the proposition that a constitutional claim cannot be defeated by a laches defense, citing *Langendorf v. City of Urbana*, 197 Ill. 2d 100, 110-11 (2001).

Laches is an equitable doctrine that precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party. *Mo v. Hergan,* 2012 IL App (1st) 113179. In order to succeed on a laches defense, a defendant must establish both (1) the plaintiff's lack of diligence in presenting her claim; and (2) prejudice to the defendant as a result of the delay. *Id.* ¶ 36; *W. Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985). Because it is an equitable doctrine, a court has discretion to determine whether laches applies in a particular case. *City of Countryside v. City of Countryside Police Pension Bd. of Trs.,* 2018 IL App (1st) 171029, ¶ 64. As there are no fixed rules for when laches applies, the court must examine all of the circumstances, including the defendant's conduct. *Whitlock v. Hilander Foods, Inc.* 308 Ill. App. 3d 456, 464 (2d Dist. 1999).

The Court begins by noting that defense of laches may be raised to bar untimely mandamus claims. However, that is not the end of the inquiry. The question before the Court is whether laches can be asserted as an affirmative defense where the right asserted is a salary protected by law.

Plaintiffs rely on *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941), in support of their argument that the affirmative defense of laches cannot apply in this case. The Court turns to *Northrup.*

In *Northrup*, plaintiffs were individuals who served as aldermen of the City of Chicago who brought a mandamus action to compel the City of Chicago to appropriate and pay to plaintiffs' additional compensation for services rendered by them as members of the city council for the years 1932, 1933 and 1935. *Id.* at 285. Prior to January 1, 1930, the city council of the City of Chicago passed an ordinance fixing the salaries of members of the city council at $5,000 per annum. This ordinance was never repealed. From 1932 to 1935, the City experienced financial distress and the city council passed ordinances reducing the salaries of the members of the city council along with other City employees to reduce the expenditures of the City. *Id.* Plaintiffs served as aldermen when the ordinance was passed and all but two of the plaintiffs voted in favor of the ordinances. *Id.* The plaintiffs argued that the ordinances violated Section 11 of Article IX of the Illinois Constitution of Illinois which provided that "the fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall not be increased or diminished during such term. *Id.* at 287. Defendants appealed the trial court's judgment in favor of the plaintiffs and argued, among other things, that the trial court erred in not holding that the plaintiffs' claims were barred by laches, estoppel, gift by plaintiffs to defendants, and statute of limitations. *Id.* at 288.

The appellate court affirmed the trial court. The appellate court surveyed several cases including *Galpin v. City of Chicago*, 269 Ill. 27 (1915) and *Pitsch v. Continental & Commercial National Bank*, 305 Ill. 265 (1922), and found no authority for the proposition advanced by the defendant, that estoppel, laches, or gift operate to bar a challenge to a constitutional claim brought by a public official with respect to the salary of that official. *Id.* at 290. On the contrary, noted the court, several cases condemned any such attempt. As to defendant's contention that the statute of limitations was a defense to plaintiffs' claims, the court found that that defense was unavailable because it was not raised in the trial court and therefore could not be asserted on appeal. *Id.* at 295-96. The court went on to find that the affirmative defenses raised by the defendant were contrary

to public policy because they would have the effect of avoiding the constitutionally mandated salary. *Id.*

Defendant argues that *Northrup* is inapplicable because in that case, the court denied the defenses of laches and statute of limitations because they were never alleged in the circuit court. The Defendant overreaches. While it is true that the appellate court found that the statute of limitations defense could not be asserted on appeal because it was not raised in the trial court, this Court finds no such discussion on laches. On the contrary, the court found that laches was not a defense to the plaintiffs' claim. As such, the Court finds *Northrup* persuasive, if not controlling on the viability of a laches affirmative defense in a case involving public official's salary.

Therefore, the Court finds Defendant cannot state a cause of action for laches, and as such, fails to satisfy the first *Loyola* factor.

ii. Waiver

Turning to the second proposed affirmative defense of waiver, Defendant argues that waiver is appropriate because Plaintiffs affirmatively voted against receiving the payments they now seek and the State enacted budgets and appropriations in successive years that excluded any money for the payments being sought. Defendant notes that waiver is an affirmative act which consists of an intentional relinquishment of a known right and can be express or implied, citing *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307 (2004). Additionally, Defendant asserts that waiver applies to constitutional rights as well as other rights, citing *First Nat. Bank in DeKalb v. Keisman*, 47 Ill. 2d 364 (1970).

Plaintiffs counter that the defense of waiver is unavailable where a public officer, whose salary is set by statute, has agreed to accept less than the statutory amount, citing *Pitsch v. Continental & Commercial National Bank*, 305 Ill. 265 (1922), and *Kennedy v. City of Joliet*, 380 Ill. 15 (1942). Further, Plaintiffs contend that because they were public officers whose salaries were incident to the office and were protected by constitutional mandate of Article IV, § 11 of the Illinois Constitution, the defense of waiver is contrary to the Constitution and public policy of the State of Illinois, citing *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941).

Defendant replies that Plaintiffs' reliance on *Kennedy* is misplaced because the court in *Kennedy* did not address the actual merits of any of the proposed affirmative defenses. Further, Defendant argues that the Illinois Supreme Court has expressly approved the assertion of the affirmative defense of waiver that Defendant seeks to assert as a bar to recovery on constitutional claims, citing *Sundance Homes, Inc. v. City of DuPage*, 195 Ill. 2d 257 (2001), and *Tully v. State of Ill.*, 143 Ill. 2d 425 (1991).

Waiver is an intentional relinquishment of a known right, which may be express or implied from the conduct of the party that has allegedly waived its right. *Wagner Excello Foods v. Fearn Int'l,* 235 Ill. App. 3d 224, 232 (1st Dist. 1992). The question of waiver is a question of fact when the material facts are in dispute or when "reasonable minds" differ from the inferences drawn from

undisputed evidence. *Id.* at 233. Where there is no dispute as to the material facts and only one reasonable inference can be drawn from them, the question of waiver is a matter of law. *Id.*

Individuals generally may waive substantive rules of law, statutory rights, and even constitutional rights enacted for their benefit, so long as the waiver is knowing, voluntary, and intentional. *Ferguson v. Moore*, 313 Ill. App. 3d 931, 937 (2d Dist. 2000). However, the defense of waiver is unavailable where a public officer sues to recover salaries that cannot be reduced during the public official's term of office in violation of a constitutional provision. See *Galpin*, 269 Ill. 27 (1915). *Pitsch v. Continental & Commercial National Bank*, 305 Ill. 265 (1922

The Court finds *Pitsch* instructive on this point. In *Pitsch*, the plaintiff, a notary, accepted employment with a bank at a compensation less than statutory fees. *Pitsch,* 305 Ill. at 267-68. *Pitsch* held that a contract whereby a public officer whose compensation was fixed by statute agreed to accept for his official services something different than that provided by statute is contrary to public policy. In *Pitsch*, the court held that the agreement by the plaintiff and defendant did not constitute waiver. *Id.* at 273-74. Accordingly, the Court finds the proposed affirmative defense of waiver is futile as a matter of law.

iii. Statute of Limitations

As for the third affirmative defense of statute of limitations, Defendant insists that Plaintiffs' claims are barred by the statute of limitations as there is a five-year statute of limitations period for constitutional claims seeking monetary relief, citing 735 ILCS 5/13-205 (West 2016), and *Sundance Homes, Inc. v. City of DuPage*, 195 Ill. 2d 257 (2001). Defendant insists that Plaintiffs have asserted their claims outside the statute of limitations period.

Plaintiffs retort that the doctrine of *nullum tempus occurrit regi,* which translates to "time does not run against the king," mandates that statute of limitations cannot be asserted against the state or municipal governments in matters involving public rights, citing *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457 (1983). *Nullum tempus occurrit regi*, according to Plaintiffs, is grounded in the principle 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, citing *Id.* Plaintiffs assert that this doctrine prevents the application of the statute of limitations because the salary of a legislator is an incident of office and therefore, even though Plaintiffs are bringing their claims in their individual capacity, the salaries belong to their office as former public officials, citing *Galpin v. City of Chicago*, 269 Ill. 27 (1915).

Defendant replies that the Illinois Supreme Court has rejected the premise that constitutional claims are exempt from a statute of limitations defense, citing *Langendorf v. City. of Urbana*, 197 Ill. 2d 100, 110-11 (2001). Defendant notes that a constitutional claim can become time-barred just as any other claim, and that courts have recognized a distinction between nullifying a constitutional provision itself and allowing a defense that defeats a claim based on that provision, citing *Block v. North Dakota ex rel. Board of Univ. & School Lands*, 461 U.S. 273, 292 (1983), and *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1354 (2d Cir. 1991).

Additionally, Defendant argues that Plaintiffs' salary claims are not exempt from a statute of limitations defense because they are not suing on behalf of the sovereign, which would bar the defenses, but instead are suing the sovereign, citing *In re Estate of Deuth,* 2013 IL App (3d) 120194, ¶ 10. Defendant contends that Plaintiffs' remaining claims brought in their individual capacity cannot be considered public rights because they are suing the State for public funds to be paid to them personally, and therefore are not asserting a right belonging to the general public. Defendant notes that *City of Shelbyville* is inapplicable because the individual right of a public officer to be paid salaries does not constitute a public right.

The Court turns to *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457 (1983). In *City of Shelbyville*, the Illinois Supreme Court held that the statute of limitations did not apply to the City's claim for money damages arising from the defendant builder's failure to construct city streets in accordance with a city ordinance, applying the common law rule that the statute of limitations may not be asserted against the State or its county or municipal subdivisions as plaintiffs in actions involving public rights. *Id.* at 464-68. This rule, noted the court, is grounded in the purpose of preserving public rights when the government is slow to the rights on the public's behalf. *Id.* at 461-64.

In this case, Defendant does not seek to assert the affirmative defense of statute of limitations against the State of Illinois, but rather seeks to assert the defense against private citizens suing the State. The Court finds this case factually distinguishable from *City of Shelbyville* and more importantly, the underlying rationale in *City of Shelbyville* is not implicated here. While not noted by the parties, this Court has already determined that Plaintiffs do not have standing to sue on behalf of the State in their official capacities, and instead, only have capacity to sue the State to enforce their individual rights to be paid previously withheld salaries. Thus, it cannot be said that Plaintiffs are pursuing their claims on a theory of protecting the public akin to that which was implicated in *City of Shelbyville*. Therefore, the doctrine underlying the statute of limitations is inapplicable because plaintiffs' claims do not implicate the assertion of public rights against the State.[3]

Accordingly, the Court finds Defendant's proposed affirmative defense of statute of limitations is not futile as a matter of law and therefore satisfies the first *Loyola* factor.

In sum, the Court finds that Defendant fails to satisfy the first *Loyola* factor with respect to Defendant's proposed affirmative defenses of laches and waiver. Specifically, Defendant's proposed affirmative defenses of laches and waiver are futile and are not cognizable under Illinois law in this mandamus action. However, as discussed above, Defendant has satisfied the first *Loyola* factor with respect to the affirmative defense that the claims are barred by the statute of limitations. As such, the Court will proceed to consider the remaining *Loyola* factors as they pertain to the statute of limitations defense.

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[3] *Galpin v. City of Chicago*, 269 Ill. 27 (1915) does not compel a different conclusion as *Galpin* did not involve a statute of limitations defense.

B. Whether the other party would sustain prejudice or surprise

As for the second *Loyola* factor, Defendant contends that Plaintiffs are not prejudiced or surprised in allowing the proposed affirmative defenses. Defendant maintains that because Plaintiffs delayed filing any challenge to the COLA and furlough legislation, Plaintiffs cannot reasonably claim to be prejudiced by Defendant's proposed affirmative defenses before they have affirmatively sought judgment on their mandamus claim.

Plaintiffs counter that the Court has already determined that the relevant statutes are unconstitutional on their face and are thus void. Further, Plaintiffs argue, the Court's previous ruling on the parties' cross-motions for summary judgment, as well as the inherent public policy concerns, mandate that Plaintiffs should be paid their full salaries. Accordingly, Plaintiffs posit, if Defendant is permitted to amend her affirmative defenses, they would be greatly prejudiced by the further delay of their salary payments as required by the Illinois Constitution.

Defendant replies that Plaintiffs have not pointed to any material prejudice in allowing her to amend her affirmative defenses. Additionally, Defendant notes that Plaintiffs' desire to avoid addressing the merits of their mandamus claims is not the type of prejudice that warrants denial of her motion. Defendant contends that amendments to pleadings should be liberally allowed in the interest of justice to promote the resolution of cases, and that any doubts must be resolved in favor of the party seeking the amendment, citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1st Dist. 1998). Last, Defendant argues that there can be no prejudice or surprise in the proposed affirmative defenses because they are grounded in Plaintiffs' own actions of voting in support of the challenged legislation and failing to bring any challenge until after leaving office.

Prejudice to the party opposing the amendment is the most important of the *Loyola* factors and substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant. *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (3rd Dist. 2004). The Court observes that Plaintiffs have not identified any material prejudice in allowing the amendment, nor does the Court find any prejudice. While not expressly argued by Defendant, this case has not been set for trial and thus Plaintiffs will have sufficient time to address the affirmative defense. See *Ocasek v. City of Chicago*, 275 Ill. App 3d 628, 637 (1st Dist. 1995) (amendment to include affirmative defense of statue of repose allowed, even though pleader was aware of it at the time of filing and did not provide excuse for omission, since opposing party suffered little prejudice as trial had not started); *Behr v. Club Med, Inc.*, 190 Ill. App. 3d 396, 407 (1st Dist. 1989) (right to amend to include affirmative defense of statute of limitations upheld, in part because trial had yet to begin); and *Foreman v. Village of Round Lake Park*, 171 Ill. App. 3d 443, 449 (2d Dist. 1988) (trial court's allowance of amendment to include statute of limitations defense did not prejudice opposing party because, though motion for summary judgment was pending, trial has not begun). Further, courts should not deny leave to amend without showing prejudice to the opposing party other than mere inconvenience. *Gvengros*, 99 Ill. App. 3d at 376.

The Court agrees that Plaintiffs can claim no undue surprise in allowing the proposed affirmative defense because the defense is based on facts which have already been pled in this matter. *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (1st Dist. 2007). Accordingly, the Court

finds that Plaintiffs would not sustain prejudice or surprise by allowing the proposed amended affirmative defense that the claims are barred by the statute of limitations, and therefore the second *Loyola* factor is met with respect to this proposed affirmative defense.

C. Whether the proposed amendment is timely

As to the third *Loyola* factor, Defendant next asserts that the proposed amendment is timely because the Court has not yet entered a final judgment on the matter. Moreover, Defendant argues that because the Court previously ruled that the mandamus claim is not premature, now is the appropriate time to file amended affirmative defenses relating to the mandamus claims.

Plaintiffs retort that the amendment is untimely because Defendant has been aware of the facts upon which she bases her defenses for over two years, and has already filed three potentially dispositive motions. Specifically, Plaintiffs argue that Defendant was aware of the facts on which her proposed affirmative defenses are grounded since the date the initial complaint was filed on June 1, 2017. Plaintiffs note that Defendant's previous motion practice in this case includes: (1) a Section 2-619.1 motion to dismiss the Complaint; (2) a Section 2-615 motion to dismiss the Amended Complaint; and (3) a cross-motion for summary judgment. Plaintiffs observe that the above referenced motions all note that Plaintiffs voted in favor of the statutes they challenge, but did not contain any defense based upon that fact.

Defendant replies that her motion is timely because there has been no final and appealable order entered in this case. Section 2-616(a), observes Defendant, allows for amendments on just and reasonable terms at any time before final judgment, citing 735 ILCS 5/2-616(a) (West 2016).

The Court finds that Defendant's motion is timely. As noted by the Defendant, the Court has not entered final judgment in this case. In fact, no trial date has been set. See *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525-26 (1st Dist. 2007) (the stage of litigation at which the proposed amendment if brought is certainly a relevant consideration). *Cf. Anger v. Gottfried*, 29 Ill. App. 3d 559, 563-64 (1st Dist. 1975) (plaintiff's motion for leave to amend, filed approximately seven months after filing the complaint, five months after the defendant's summary judgment motion, and fifty days after the trial court granted summary judgment in defendant's favor, was not timely filed); and *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143118, ¶ 19 (2015) (upholding trial court's denial of plaintiffs' motion for leave to amend their complaint because the motion was untimely filed six months after the dismissal of the case with prejudice with no explanation in the delay). Accordingly, the Court finds this factor, whether the proposed amendment is timely, has been met.

The Court turns, then, to the final *Loyola* factor, whether the movant has had previous opportunities to amend.

D. Whether previous opportunities to amend could be identified

As to the final factor, Defendant argues that there has not been previous opportunities to amend because Plaintiffs have not yet sought summary judgment on their mandamus claims, and accordingly the time is now ripe for the Court to determine whether the relief sought is barred by

any affirmative defenses. Additionally, Defendant posits that if the Court had ruled against Plaintiffs on their constitutional challenge, there would be no need to address the mandamus claims.

Plaintiffs counter that Defendant's contention that the mandamus claims are now ripe is misplaced because she sought dismissal of the claims in prior motion practice. Further, Plaintiffs argue that Defendant could have asserted the proposed affirmative defenses at the outset of the litigation, and her lack of diligence in asserting the matters cannot be overlooked.

Defendant replies that the Court awarded Plaintiff Noland the opportunity to amend his pleading after ruling that it was deficient, and that the Court should not deny her the same opportunity. Defendant argues that because her original affirmative defenses regarding the mandamus claims were denied, she should be afforded the opportunity to amend her pleading to assert other defenses.

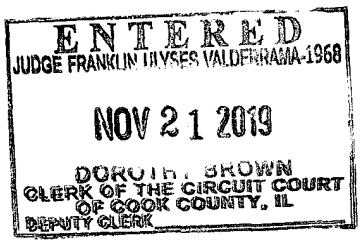
The Court first addresses Defendant's argument that it would be inequitable or unjust to deny her the opportunity to add the affirmative defenses, given that the Court permitted Noland to amend the Complaint. As contained in the Court's Order of May 1, 2018, Defendant raised no objection to Noland's request for leave to file an amended complaint; therefore, the Court had no occasion to determine if the amendment was appropriate.

Turning to the substance of this factor, the Court notes that motions for leave to file amendments should be liberally granted, with all doubts resolved in favor of allowing them. *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1st Dist. 1998). Defendant argues that her proposed amended affirmative defense is now ripe after the Court denied the Defendant's motion for summary judgment. Put simply, had the Defendant met her burden on her motion for summary judgment, the proposed amendment would not be an issue. Accordingly, when considering this factor together with the lack of prejudice to Plaintiffs in allowing the amendment, the Court finds the fourth *Loyola* factor, whether previous opportunities to amend have been identified, has been met.

In sum, having considered all four *Loyola* factors, the Court finds that Defendant has met her burden on all four *Loyola* factors, which favor granting Defendant leave to file her three proposed affirmative defense of statute of limitations. Accordingly, the Court grants Defendant's motion as to the affirmative defense of statute of limitations.

CONCLUSION

Based on the foregoing reasons, the Court grants Defendant, Susana Mendoza, in her capacity as the Comptroller of the State of Illinois' Motion for Leave to File Amended Affirmative Defenses in part and denies the motion in part.



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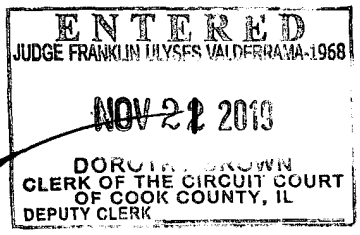

Franklin U. Valderrama
Judge Presiding

DATED: November 21, 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
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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,	)	Direct Appeal to the Supreme Court under Rule 302(a)(1)
Plaintiffs-Appellees,	)	No. 2017 CH 07762
v.	)	
SUSANA A. MENDOZA, in her capacity as Comptroller of the State of Illinois,	)	Honorable FRANKLIN U. VALDERRAMA, ALLEN P. WALKER
Defendant-Appellant.	)	Judges Presiding.

NOTICE OF APPEAL

Defendant Susana A. Mendoza, in her capacity as Comptroller of the State of Illinois (the "Comptroller"), hereby appeals 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 her preceding the Judgment, including without limitation the orders entered on October 31, 2018, July 8, 2019, November 21, 2019, and April 8, 2021. A copy of the Judgment is attached as Exhibit A.

By this appeal, the Comptroller seeks reversal of the Judgment and of the Circuit Court's orders (a) requiring her to issue warrants to Plaintiffs for compensation as state legislators contrary to the terms of multiple statutes — 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") — that the Court found to violate Article IV, Section 11 of the Illinois Constitution; (b) holding that the Comptroller's defenses to Plaintiffs' claims for these payments, under principles of waiver, laches, and the statute of limitations, were insufficient as a matter of law; and (c) denying the Comptroller leave to assert the

defenses of waiver and laches. The Comptroller further seeks a judgment on appeal holding that as a matter of law Plaintiffs' claims are collectively barred by waiver, laches, and the statute of limitations, or, in the alternative, a remand of the case for any necessary factual development on these defenses.

May 7, 2021

KWAME RAOUL
Attorney General,
State of Illinois

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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.

Exhibit A

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:
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Certificate of Filing and Service

I certify that on May 7, 2021, I electronically filed the foregoing Notice of Appeal with the Clerk of the Court for the circuit court of Cook County, by using the Odyssey eFileIL system.

I further certify that counsel for the other participants in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and will be served via the Odyssey eFileIL system.

Garry Wills – *gwills@ralaw.com*

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.

Richard S. Huszagh
Assistant Attorney General

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CERTIFICATE OF FILING AND SERVICE

I certify that on December 13, 2021, I electronically filed the foregoing **Brief of Defendant-Appellant/Cross-Appellee** 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

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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.

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