**Nos. 122793 & 122822 (consol.)**

**IN THE SUPREME COURT OF ILLINOIS**

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| Rochelle Carmichael; June Davis; Zeidre Foster; Oscar Hall; Anthony Lopez; Kathleen Mahoney; Joseph Notaro; Michael Senese; David Torres; The Chicago Teachers Union, Local 1, American Federation of Teachers, AFL-CIO; Local 1001, Laborers' International Union of North America, AFL-CIO; and Local 9, International Brotherhood of Electrical Workers, AFL-CIO;<br><br>Plaintiffs-Appellees/Appellants,<br><br>v.<br><br>Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago; Retirement Board of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago; Municipal Employees' Annuity & Benefit Fund of Chicago; Retirement Board of the Municipal Employees' Annuity & Benefit Fund of Chicago; Public School Teachers' Pension & Retirement Fund of Chicago; and Board of Trustees of the Public School Teachers' Pension & Retirement Fund of Chicago;<br><br>Defendants-Appellees,<br><br>And<br><br>State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois,<br><br>Intervenor-Defendant-Appellant/Appellee. | Direct Appeal Pursuant to Supreme Court Rule 302(a) (Case No. 122793)<br><br>And<br><br>Direct Appeal Pursuant to Supreme Court Rule 302(b) (Case No. 122822)<br><br>From the Circuit Court of Cook County, Illinois County Department, Chancery Division,<br><br>No. 12-CH-37712<br><br>The Honorable CELIA G. GAMRATH, MARY L. MIKVA Judges Presiding. |

# REPLY BRIEF OF PLAINTIFFS-APPELLEES / APPELLANTS CASE NO. 122822

**CROSS-RELIEF REQUESTED**

**ORAL ARGUMENT REQUESTED**

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Carolyn Taft Grosboll
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J. Peter Dowd
Justin J. Lannoye
George A. Luscombe III
DOWD, BLOCH, BENNETT, CERVONE
AUERBACH & YOKICH
8 South Michigan Avenue, 19th Floor
Chicago, Illinois 60603
Tel: (312) 372-1361
Fax: (312) 372-6599
Email: gluscombe@laboradvocates.com
Firm I.D. Number: 12929

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## ARGUMENT[1]

### I. The Act's Amendments to the LABF and MEABF Highest Average Annual Salary Calculation Rules Violate the Pension Clause and the Contracts and Takings Clauses.

The P.A. 97-0651 amendments to 40 ILCS 5/8-138(g-1), 8-233(e), 11-134(f-1) & 11-217(e) diminished plaintiffs' preexisting pension benefits by limiting the salary base for their pensions, violating the Pension Clause as well as the Contracts and Takings Clauses. (Pl. Br. 38-61.) Thus, the Court should reverse the dismissal of Counts IV.A to IV.E and V.A to V.E. To defend the decision below, the State argues that there was no diminishment in benefits insisting that before the Act 40 ILCS 5/8-117 & 11-116 defined the word "salary" to include only governmental employer salaries. A union salary, therefore, should never have been used by the LABF or MEABF in the "highest average annual salary" calculation. That *post hoc* effort to save the Act is unsupported by the pre-Act statutory text, legislative intent, or the universal rules of pension systems.

#### A. The State's *post hoc* new interpretation of the Pension Code to try to save P.A. 97-0651 is not supported by the text or legislative intent.

The State contends that the "salary" to be used for the "highest average annual salary" calculation must be "the salary attached to the *government position* in which he actually worked, or from which he was on leave." (State Appellee Br. 18.) Notably, the State cannot point to any statutory language before the Act that says anything like that. Nothing in Articles 8 or 11 before the Act said the salary for the "highest average annual salary calculation" must be the hypothetical salary attached to the governmental position the member held when he or she was granted leave to work for a union. To reach its

[1] This Reply brief is limited to the issues raised in plaintiffs' appeal in Case No. 122822. Capitalized terms not otherwise defined have the meaning given in the Combined Appellee/Appellant Brief of Plaintiffs-Appellees/Appellants ("Pl. Br.").

desired end, the State wrongly strings together unconnected phrases from different statutory sections that plainly were intended to serve other purposes. Those sections were clearly intended to serve ministerial purposes such as directing that overtime should not be included in the salary, or that to convert an hourly wage to an annual salary the wage should be multiplied by 2080 (the number of hours in a normal full time work year) or that a monthly salary should be converted to an annual salary by multiplying the monthly salary by 12. *See* 40 ILCS 5/8-117(b), 8-233(a)-(b), 11-116(a), 11-217(a)-(b) (2010).

Nothing in those sections suggests that they were intended to serve the different purpose of defining a limited class of payors of a "salary." Why would they? At the time they were enacted in 1963 or earlier, the only salaries that employees would have been earning or upon which they would be contributing to the pension fund were government salaries. (*See* Pl. Br. 45-46.) There would have been no reason to prophylactically define the payor of a "salary" as limited to a governmental entity. Even if the legislature used language that is often (but not exclusively) used to refer to public salaries, the "fact that a statute does not address alternative" salary payors "does not imply the legislature intended the provisions" to exclude alternatives presented by changed circumstances in the future. *Bd. of Govs. of State Coll. & Univ. v. Ill. Educ. Labor Rel. Bd.*, 170 Ill. App. 3d 463, 475 (4th Dist. 1988). *See also People v. Reese*, 2017 IL 120011, ¶ 30 ("A reviewing court may also consider the circumstances existing when the statute was enacted, contemporaneous conditions, and the goals sought to be achieved."). If the legislature had intended to limit the payor of a "salary" it could have easily done so in a straightforward manner (e.g., "a salary must be paid by an 'employer' as defined in section . . .") in contrast to the contortions through which the State constructs that intent.

In its new formulation, the State ascribes an intent to the legislature in 1963 that it certainly did not have. The State's argument is also contradicted by the Pension Code language concerning contributions and the calculation of benefits and the contemporaneous application of the statutes by the fiduciaries responsible for interpreting and applying the Code. The State's new interpretation is tellingly not even consistent with the Act's purported clarification that the salary for pension purposes should be based solely on the salary paid to the employee *before* the leave of absence. *See* P.A. 97-0651 (amendments to 40 ILCS 5/8-138(g-1) & 11-134(f-1)). The State now argues that the "salary" of an employee on a union leave of absence is the salary the City or Board of Education might have paid the employee over the years had he or she not taken a leave of absence. (*See* State Appellee Br. 18, 24-25 & 25 n.6.) The State's hypothetical "salary" would thus both be (1) a salary that no employer ever actually paid the employee and (2) a salary upon which the employee had never made any contributions to the retirement system.

The State's attempt to save the Act is imaginative but inconsistent with the meaning and intent of the pre-Act statutory text. The much more logical interpretation is that for employees on union leaves of absence, the salary in the "highest average annual salary" calculation was the salary from their positions at the union that they were actually earning, and upon which they were actually contributing to the pension system during the last 10 years of service. That is consistent with the plain meaning of the text, the intent of the legislature in 1991 that passed P.A. 86-1488, and 20 years of application of the Pension Code by the administrative bodies tasked with applying it.

The State's attenuated analysis of the statutory text cannot save its implausible

argument. Sections 8-117 and 11-116 both define "salary," without any limitation on the payor, as the "Annual salary of an employee as follows: . . .." 40 ILCS 5/8-117 & 11-116. In turn, "employee" is defined the same as "participant" to be an "employee of an employer" within certain classifications. 40 ILCS 5/8-113(a) & 11-110(a). Sections 8-110 & 11-107 define "employer" to include certain governmental entities including the City and Board of Education. 40 ILCS 5/8-110 & 11-107. All of that is perfectly consistent with the conclusion that the "salary" of an "employee" on a union leave of absence is the salary earned by the employee from the union during the leave of absence.

As the State acknowledges, employees on leaves of absence retain their status as employees of their governmental employers. (State Appellee Br. 19.) *See also Callahan v. Bd. of Trs. of the Fireman's Pension Fund, Bloomington, Ill.*, 83 Ill. App. 2d 11, 17 (4th Dist. 1967) ("The general purpose of a leave of absence is to preserve the status of the employee."). Thus, while on their leaves of absence working for their unions they remain "employees" within the Pension Code definitions. *See* 40 ILCS 5/8-113(a) & 11-110(a). This is further supported by the fact that those definitions define "employee" and "participant" identically (*id.*) and the Pension Code expressly identifies the individual on a leave of absence working for the local labor organization as a "participant." 40 ILCS 5/8-226(c) & 11-215(c)(3) (2010).

The State tries to avoid this straightforward interpretation by insisting that the salary must nonetheless be attached to the governmental "position" from which the employee is on leave. (State Appellee Br. 18.) But nothing in the statutes says that and it is inconsistent with the contemporaneous 20-year application of the statutes by the LABF and MEABF Boards. The "position" of the employee as used in Section 8-117(b) and 11-

116(a) during a union leave of absence is the employee's position at the union in which he or she is actually working and earning a salary. (*See* Pl. Br. 47.) Thus, the "annual salary" is the "salary" the "employee" would have earned "if the employee worked the full normal working time in his position" at the union "at the rate of compensation, exclusive of overtime and final vacation, appropriated or fixed as salary or wages for service in the position" by the union. 40 ILCS 5/8-117(b) & 11-116(a). Under these sections, when an employee earns any overtime or receives a final vacation payout, his salary (for contribution and pension purposes) is limited to only the salary he would have earned "*if* the employee worked the full normal working time in his position." *Id.* (emphasis added).

To make the leap contradicted by the text that the "position" must be the governmental position held before the employee goes on leave, the State argues that the use of words such as "appropriated" in Sections 8-117 and 11-116 "firmly convey the impression of a salary set by a public entity." (State Appellee Br. 26.) The State's "impression" cannot bear the weight the State would have it hold. The State, for example, concedes that "appropriate" can refer to the action of a non-public entity. None of the authority cited by the State supports the conclusion that the word "appropriate" can only be used to refer to a public entity. (*See* State Appellee Br. 25.) The State's citation of a Black's Law Dictionary definition of "appropriation" from almost 50 years after the 1963 Pension Code also ignores the Black's definition of "appropriate" current in 1963. That contemporary edition of Black's defined "appropriate" generally as "To prescribe a particular use for particular moneys; to designate or destine a fund or property for a distinct use or for the payment of a particular demand," not limited to public entities.

Black's Law Dictionary (4th Ed. 1951), p. 1248. (*See also* Pl. Br. 48 (citing other dictionary definitions).) All of the language relied on by the State is, at best, ambiguous, and cannot make the State's case. *See Kanerva v. Weems*, 2014 IL 115811, ¶ 55.

Similarly, the State's response that the Board of Education's annual budget resolution might qualify as an "ordinance" sidesteps the plaintiffs' actual argument. (State Appellee Br. 26; Pl. Br. 49.) The fact remains that the Board of Education's budget resolution does not specify position salaries. Thus, the salaries paid by the Board of Education to thousands of LABF and MEABF members would not qualify as a "salary" set forth in an ordinance under the State's exclusionary interpretation. (Pl. Br. 49.) Because the State's interpretation is not supported (let alone compelled) by the statutory text, the Court should reject the State's argument that necessarily leads to such an absurd result. *See Bank of N.Y. Mellon v. Laskowski*, 2018 IL 121995, ¶ 12 ("[A] court also will presume that the legislature did not intend absurd, inconvenient, or unjust results.").

The State also argues that plaintiffs "do not identify any other source, apart from these definitions, to determine what is a pensionable salary." (State Appellee Br. 20.) Not so. As with every other pensionable salary base in the Pension Code and the commonplace rules for pensions, the salary for pension purposes is the same salary upon which the member contributed to the system. *See Collins v. Bd. of Trs. of Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 112 (1993) ("[W]e also look to other articles of the Code that are concerned with the same subject and, therefore, that share the same purpose."). This agrees with the common-sense conclusion that it is the salary that the member earned in the last 10 years of service. *See* 40 ILCS 5/8-138(g-1), 8-226(c)(1)-(2), 11-134(f-1), 11-215(c)(3)(A)-(B) (2010); *cf.* 40 ILCS 5/8-234, 11-218. *See also Nelson v.*

*Artley*, 2015 IL 118058, ¶ 29 ("[C]ourts do not set aside common experience and common sense when construing statutes." (internal quotation marks omitted)).

The State also sets up the straw-man argument that plaintiffs believe that the P.A. 86-1488 amendments in 1991 "changed" the meaning of the Pension Code "salary" sections. (State Appellee Br. 20.) That is not the case. Those sections never restricted a "salary" to one paid by a governmental employer. Thus, the 1991 amendments did not need to "change" those sections to carry out the evident intent of the legislature that year that both contributions and pensions could be based on the union salary earned during the leave of absence. If there were any validity to the State's exclusionary interpretation of the "salary" provisions (there is not), the Court is not bound by such a form-over-function reading of the statutes to the frustration of the intent of the later General Assemblies that created the union credit provisions. *See Collins*, 155 Ill. 2d at 112 ("Ambiguity caused by a literal and confined construction may be modified, changed or rejected to conform to an otherwise clear legislative intent, and the judiciary has the authority to read language into a statute that the legislature omitted through oversight." (internal citations omitted)).

The State next wrongly insists that the contemporaneous, uniform 20-year administration of the statutes by the LABF and MEABF Boards is irrelevant to the interpretation of the statutory text. The State's premise that the statutes unambiguously barred the use of a union salary in the highest average annual salary calculation is simply incorrect. As discussed, the text of the statutes strongly support the legislative intent that the union salary earned in the last 10 years of service and upon which the participant was contributing to the funds should be used in the pension calculation. And the contemporaneous, long-standing interpretation of those statutes by the administrative

bodies tasked with enforcing them is clearly relevant to their proper construction. *See People ex rel. Watson v. House of Vision*, 59 Ill. 2d 508, 514-15 (1974) ("A reasonable construction of an ambiguous statute by the governmental officers or departments charged with its enforcement, if contemporaneous, consistent, long-continued, and in concurrence with legislative acquiescence, creates a presumption of correctness which is only slightly less persuasive than a judicial construction of the same act.").

Plaintiffs also explained how the circuit court's interpretation created the absurd result that if a member retired while on a union leave of absence extending more than six years he or she would not have 4 years of (or any) government salaries in the last 10 years of service from which to calculate his or her pension. (Pl. Br. 53-54.) The State attempts to respond with its new interpretation that the funds should instead have used some governmental salary the employee hypothetically might have earned in those final years before retirement had he or she not taken the leave of absence. (State Appellee Br. 24.) No one ever interpreted the statutes that way before the State's lawyers in this case. As the State admits, not even the 97th General Assembly in 2012—which the State insists was only "clarifying" the statutes—agreed with the State's new found interpretation. (*See* State Appellee Br. 25 n. 6.) It is telling that to save the Act the State must resort to such a *post hoc* rationalization in conflict with the Act's own terms.

The State has no way to avoid another absurd result of its interpretation that divorces the contribution salary base from the pension salary base. If the union salary were lower than the government salary, the member would receive a pension based on a salary higher than the one his or her contributions were based on. (*See* Pl. Br. 55.)

Finally, the State falls back on its mistaken assertion that any ambiguity in the

meaning of the Pension Code before P.A. 97-0651 could be validly "clarified" by the 97th General Assembly in 2012 against the rights of the retirement system members. (State Appellee Br. 26-27.) The legislative intent that controls the meaning of the Pension Code before the Act is that of the prior General Assemblies who enacted those statutes. (*See* Pl Br. 41 (citing *O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 421, 441 (2008).) It is not the intent of legislators in 2012 who wanted to reduce pension benefits but were in no position to speculate as to the intent of other lawmakers decades before.

Moreover, any ability a later legislature might have to clarify a prior, ambiguous legislative enactment cannot apply to retroactively "clarify" the intent of a pension statute, as here, *against* the rights of the participants. If the legislature had that power it could nullify the protections of the Pension Clause and the rule that "where there is any question as to legislative intent and the clarity of the language of a pension statute, it must be liberally construed in favor of the rights of the pensioner." *Kanerva*, 2014 IL 115811, ¶ 55. (Pl. Br. 42, 51-52.) Notably, neither of the cases cited by the State used the later legislative enactment to clarify the meaning of the preexisting statutes at issue. *See Collins*,, 155 Ill. 2d at 115-17; *In re Marriage of Cohn*, 93 Ill. 2d 190, 203 (1982). The Pension Clause and the liberal construction rule both require the Court to reject the 97th General Assembly's attempt to circumvent the plaintiffs' constitutional protections through a purported legislative "clarification" diminishing their pension benefits.

### B. If the Court were to affirm the circuit court's interpretation of the Pension Code as barring pensions based on union salaries, the Court should make that ruling apply only prospectively.

The ruling below was mistaken that Articles 8 and 11 of the Pension Code before the Act barred calculating the "highest average annual salary" using the union salary the employee earned and contributed upon during his or her leave of absence. But if the

Court agrees with that interpretation (it should not), it should apply that ruling prospectively only following the factors in *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 285 (2009). (Pl. Br. 56-59.) If not, the retirement security of members such as Davis and Lopez will be wiped out despite their reasonable reliance on the administrative application of those statutes before any contrary judicial determination. This Court has warned against the retroactive applications of new judicial decisions that would hold individuals "'to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination . . .' [*quoting Lemon v. Kurtzman*, 411 U.S. 192, 207 (1973)] that their actions are proper." *Bd. of Comm'r of the Wood Dale Pub. Lib. Dist. v. County of Du Page*, 103 Ill. 2d 422, 429 (1984).

The State nonetheless insists that the 97th General Assembly's purported "declaration of existing law" requires retroactive application of what would be the Court's new interpretation of the pre-Act statutory text. (State Appellee Br. 39-41.) That argument rests on a faulty premise. It is not the meaning of P.A. 97-0651 that is at issue. It is the meaning of the statutes before the Act that the Court is interpreting. *See O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 421, 441 (2008). Thus, the legislature's purported declaration in 2012 of the scope of its amendment is irrelevant.

The authority to interpret the statutes before the Act lies with this Court, not with the 97th General Assembly. *See People v. Bruner*, 343 Ill. 146, 158 (1931). If, based on the *Exelon* factors, the Court finds that an interpretation of the pre-Act statutes bars pensions based on union salaries, that interpretation should be applied prospectively only. The 97th General Assembly had no constitutional authority pursuant to the Pension Clause to compel the retroactive application of an interpretation of the pension laws that

reverses the long-standing, prior application relied upon by the participants.

And those *Exelon* factors do strongly favor prospective-only application of any new interpretation of the pre-Act pension statutes. (Pl. Br. 56-58.) In response, the State insists that the circuit court's interpretation of the law did not overturn any prior judicial precedent. But that is the point. There was no prior judicial precedent. Thus, all the employees had to go on was the text of the statutes and 20 years of consistent adjudications of pension claims by the boards granting pensions based on union salaries. In the absence of contrary judicial authority, there is no reason why the members should be penalized for relying on the fiduciaries with the statutory authority to administer their respective articles of the Pension Code. *See* 40 ILCS 5/1-109, 8-203, 11-192.

The State also argues that the pre-Act statutes were unambiguous, and therefore, the circuit court's ruling was clearly foreshadowed. (State Appellee Br. 42.) But the State's interpretation is certainly not "a common sense construction based on the clear wording of the statute." *Marozas v. Bd. of Fire & Police Comm'rs.*, 222 Ill. App. 3d 781, 788 (1st Dist. 1991) (cited by State Appellee Br. 42). If accepted, it would instead be a highly selective construct of diverse statutory sections divorced from both common pension rules and the good-faith interpretations of decades of fiduciaries. The lay-person, retirement system members here should not have their retirement security wiped out by the legal fiction that they should have always known that the legislature or courts in the future would decide the administrative agency fiduciaries were wrong for decades.

And equity favors a prospective-only application. A retroactive application of a new interpretation barring the use of union salaries would leave plaintiffs such as Davis and Lopez with poverty-level pensions of between $1300 and $2000 per month. (*See* Pl.

Br. 58.) This is despite their decades of service to their governmental employers and decades of contributions based on their government *and* union salaries. It is impossible to imagine that the legislatures before 2012 intended that result.

## II. The LABF and MEABF Should be Estopped From Wiping Out the Pensions of Members who Reasonably Relied on the Retirement System Fiduciaries' Decades-Long Practice of Awarding Pensions Based on Union Salaries.

The defendants' arguments in response to plaintiffs' equitable estoppel claim (Count XIV) all turn on the legal fiction that the lay, retirement system participants should have known, based only on the text of the Pension Code as interpreted by the circuit court after the fact, that their union salaries could never have been used to calculate their pensions. This is despite the fact that the LABF and MEABF fiduciaries for decades interpreted the statutes exactly the opposite. Even the circuit court initially ruled that before the Act the Pension Code allowed pensions to be based on union salaries. The Court should not allow these retirees' pensions to be wiped out based on a legal fiction that ordinary employees could foresee future statutory constructions that were not obvious to the well-educated fiduciaries of the retirement boards, their attorneys, or even the circuit court prior to the State's inventive argument.

Plaintiffs acknowledged the high burden for establishing equitable estoppel against a municipality. (Pl. Br. 61-62.) The distinction here is that the pension fund boards are fiduciaries required to administer their retirement systems in accordance with the Pension Code "solely in the interest of the participants and beneficiaries" with the "care, skill, prudence and diligence" of knowledgeable retirement plan fiduciaries. 40 ILCS 5/1-109. Thus, participants reasonably relied on the application of the statutes by the pension fund board fiduciaries who had the authority to calculate and award pensions.

Moreover, because the pension boards do have the actual authority to award

pensions (40 ILCS 5/8-203, 11-192), there is no issue of "apparent authority," contrary to the State's arguments. (*See* State Appellee Br. 32-33.) In other words, the pension boards have "express authority to bind" the retirement systems to the payment of pensions. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40. The LABF is similarly mistaken that *Matthews v. Chi. Transit Auth.*, 2016 IL 117638, controls this case. (*See* LABF Br. 7-9.) Unlike the facts found by the Court in *Matthews*, *id.*, ¶¶ 88-89, the pension boards here have the statutory authority to bind the retirement systems to the payment of pensions, and they granted pensions based on union salaries through their proper procedures. Further, for all the reasons discussed above, it cannot be said that the LABF and MEABF Boards' actions were contrary to the unambiguous language of the Pension Code. Thus, no unambiguous statutory text that the plaintiffs could have been deemed to understand exists to bar their estoppel claims here.

The State next argues that the pension boards' decades-long application of the Pension Code was not a representation to the plaintiffs that they were entitled to rely upon. (State Appellee Br. 35; *see also* LABF Br. 9-10.) But what else could retirement system participants rely on to plan for their retirements? The decisions of the pension fund boards interpret and apply the law under their articles of the Pension Code. Thus, the reasonable participant could only look to how the Boards apply the Pension Code in awarding pensions to other members with union service credit.

The State also insists that an estoppel claim cannot be based on a "representation concerning a question of law." (State Appellee Br. 37.) However, an exception to that principle applies where, as here, a fiduciary relationship exists. *See Stephens v. Collison*, 249 Ill. 225, 238 (1911) ("The rule as to misrepresentations of law is not the same where

a fiduciary relation exists as it is where there is no such relation between the parties."); *Vega v. Contr. Cleaning Maint., Inc.*, No. 03 C 9130, 2004 U.S. Dist. LEXIS 20949, at *30-31 (N.D. Ill. Oct. 18, 2004) (applying Illinois law); Ill. Law & Practice, Fraud § 17.

Finally, the State insists that estoppel cannot apply if the pension boards did not know their representations regarding the members' rights to earn pensions based on union salaries were untrue. (State Appellee Br. 37.) However, in order to support estoppel, "the representation need not be fraudulent in the strict legal sense or done with an intent to mislead or deceive." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 314 (2001). "[I]t is sufficient that a fraudulent or unjust effect results from allowing another person to raise a claim inconsistent with his or her former declarations." *Id.*

Here, if the pension boards are permitted to apply the State's new interpretation of the Pension Code, it will be individuals like June Davis at age 80 who will be left to live on a greatly-reduced pension of about $1,300 per month. (*See* Pl. Br. 64-65.) These participants cannot be blamed for following the law and the guidance of the pension boards and contributing to the LABF or MEABF instead of saving for retirement in some other way. To leave these retirees in poverty because of the legal fiction that they should have come up with an interpretation of the law that no one else did before 2012 would be a grave injustice that this Court should not allow.

## III. LABF and MEABF Members Hired Before the Act who Contributed to the Funds Based on Union Salaries Have a Contractual Right to Use Those Same Salaries in the Highest Average Annual Salary Calculation.

The defendants do not dispute that even before the 1970 Constitution's Pension Clause an individually enforceable contractual right arose when a pension system offered a form of optional service credit in consideration for additional contributions and the member made the necessary contributions. *See Gorham v. Bd. of Trs. of the Teachers'*

*Ret. Sys. of Ill.*, 27 Ill. 2d 593, 598 (1963). That is exactly what happened here. The Court should recognize the contractual rights of the LABF and MEABF members who contributed to the funds before the Act based on union salaries in consideration for a pension based on those same salaries in accordance with the 20-year standing offer of the funds. (*See* Pl. Br. 59-60.) The judgment on Count XIII below should also be reversed.

Defendants' arguments in response are essentially the same as to the estoppel claim and should be rejected for the reasons discussed above. The LABF and MEABF Boards had the authority to award pensions under their respective articles of the Pension Code. 40 ILCS 5/8-203, 11-192. Thus, this case is distinguishable from cases in which the governmental entity had no authority to make the type of decision at issue. *See, e.g.*, *Gaffney v. Bd. of Trs. of Orland Fire Prot. Dist.*, 2012 IL 110012, ¶ 45. Moreover, as discussed above and in plaintiffs' opening brief, the Pension Code did not unambiguously bar pensions based on union salaries. Finally, despite defendants' fears, recognizing the contracts here will not forever prevent the correction of an incorrect interpretation of the law (which it was not in any event). The class of individuals who contributed based on union salaries before the Act is closed. The Court should not allow such abstract concerns to extinguish the valid contractual expectations of these participants.

## IV. 40 ILCS 5/8-226(c)(3) Does Not Apply to Defined Contribution Plans.

### A. The common meaning of the language of Section 8-226(c)(3) applies only to defined benefit pension plans.

As enacted in 1987, 40 ILCS 5/8-226(c)(3) allowed union service credit so long as the "participant does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." That section is most reasonably understood as referring only to defined benefit pension plans like the MEABF

itself. The prohibition, therefore, does not cover defined contribution plans, and the circuit court's judgment on Counts X and XII should also be reversed. (Pl. Br. 67-75.)

The MEABF's defense of the circuit court's judgment at best establishes an ambiguity in the scope of the Section 8-226(c)(3) prohibition. And any such ambiguity must be resolved "in favor of the rights of the pensioner" to limit the scope of the prohibition to defined benefit pension plans. *Kanerva*, 2014 IL 115811, ¶ 55.

Notably the dictionary definitions of "pension" that the MEABF cites in its brief support plaintiffs' position. For example, a defined contribution plan does not guarantee "'a regular payment, not wages, to one who has fulfilled certain requirements, as of service, age, disability, etc.'" (MEABF Br. 5 (quoting Webster's New World Dictionary (2nd Concise Ed. 1982).) A defined contribution plan guarantees only the value of the contributions to the plan, and the benefit does not turn on factors such as service, age, or disability. *See In re Marriage of Blackston*, 258 Ill. App. 3d 401, 402 (5th Dist. 1994).

Indeed, the only definition of "pension plan" cited by either the MEABF or the circuit court that encompasses defined contribution plans is the definition from ERISA. (*See* MEABF Br. 5; C 2351.) Courts, however, have recognized that ERISA's specialized definition of "pension plan" is so broad and contrary to the common meaning of the term that it is likely to catch any non-ERISA expert unaware. *See Modzelewski v. Resol. Trust Corp.*, 14 F.3d 1374, 1377 (9th Cir. 1994). The MEABF acknowledges that ERISA's definition is not controlling here, but urges the Court to follow it anyway. Given the very different purpose of the ERISA definition of "pension plan" to have a wide sweep in order to protect the expected benefits of plan participants (*see Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983)), it would be wrong to follow that definition here in

construing the General Assembly's limitation on benefits.

Section 8-226(c)(3)'s reference to "credit" that is "based on his employment by the organization" further implies the legislature's intent to refer only to defined benefit pension plans. It is true that "credit" can refer to the balance in an account. But "credit" "based" on "employment" more naturally refers to credit based on a period of employment, *i.e.*, service, as in a defined benefit plan. (Pl. Br. 72, 75.)

The MEABF is also again mistaken to rely on the labels from the CTU and IBEW Local 9 defined contribution plans here to interpret the statutory language enacted by the General Assembly. (*See* Pl. Br. 74-75.) As private sector pension plans, they are governed by ERISA, not the Illinois Pension Code, and under the ERISA definitions, they are pension plans. The plans, thus, had an obligation to accurately describe the legal status of the plans under their governing law. *See* 29 U.S.C. § 1022(a). When enacting Section 8-226(c)(3) in 1987, the legislature was not so constrained by ERISA.

The MEABF again cites sections of the Pension Code enacted in 2012 referencing defined contribution plans to argue that the legislature knew how to distinguish between defined contribution plans and defined benefit plans 25 years earlier. (MEABF Br. 7.) The very opposite inference should be drawn. The "legislature knows exactly how to use the term" defined contribution plan "when that is what it means." *Brucker v. Mercola*, 227 Ill. 2d 502, 532 (2007). (Pl. Br. 75.) More to the point, however, plaintiffs' argument is not that the legislature in 1987 "was unaware of defined contribution plans in 2012 or 1987." (MEABF Br. 7.) The point is that by using the term "pension plan" the legislature intended only the common meaning of that term which, as the dictionary definitions reflect, does not include defined contribution plans. That meaning was only more

common in the 1980s. *See Bandak v. Eli Lilly & Co. Ret. Plan*, 587 F.3d 798, 801 (7th Cir. 2009) ("Nor were defined contribution plans common prior to 1997."). The MEABF is simply wrong that there "is no basis in law or common usage to limit the term 'pension plan' in section 8-226 solely to defined benefit plans." (MEABF 7.) As all the dictionary definitions show, that *is* the common usage of the term, and there is no reason to believe the legislature in 1987 intended a different meaning in Section 8-226(c)(3).

### B. Any decision that Section 8-226(c)(3) covers defined contribution plans should include guidance as to the scope of that coverage.

Section 8-226(c)(3) is best understood as not covering defined contribution plans. If the Court nonetheless were to hold that it does, it should provide guidance as to the scope of the coverage as requested by plaintiffs. (*See* Pl. Br. 76-78.) But if the Court agrees with the MEABF and the circuit court that the issues are not ripe, it should vacate the circuit court's advisory opinions on these questions. (*See* Pl. Br. 76.) On the merits, the MEABF's objections to the plaintiffs' requested guidance are not persuasive.

***Waivers***. The MEABF wrongly argues that waivers of contributions to a defined contribution plan should not be recognized because the statute does not reference waivers. (MEABF 12.) The statute does not have to expressly reference waivers, because once any contributions have been waived, a participant does not "receive credit in any pension plan," and the prohibition is facially inapplicable. 40 ILCS 5/8-226(c)(3). Moreover, MEABF's argument that the prohibition is triggered the moment the contribution is deposited in the plan and thereafter could never be reversed is punitive and hyper-formalistic to the extreme. Once those contributions are waived, the participant receives no benefit from the plan, and therefore no conceivable legislative purpose could be served by barring union service credit pursuant to Section 8-226(c)(3). It also bears

repeating that the MEABF's new position against waivers is a 180 degree reversal of its past policy of accepting such waivers of credit in defined benefit plans. (*See* Pl. Br. 77.)[2]

***Defined contribution plans with no employer contributions in particular years or no employer contributions at all.*** Plaintiffs also requested clarification that if a member receives no employer contributions for a given year in a defined contribution plan then the Section 8-226(c)(3) prohibition is not applicable for that year. (Pl. Br. 77-78.) Contrary to MEABF's argument this does not require any limiting definition of "credit," because if the member does not receive contributions in the plan for that year he or she does not receive anything at all. So whatever "credit" means, the member did not receive it. Similarly, in defined contribution plans, such as the CTU 401(k) plan, with no employer contributions at all, the benefit is funded solely by employee salary deferrals. (*See* Pl. Br. 78; SUP C 1752.) The entire benefit is the employees' own money. They receive nothing (except for favored tax treatment) from the plan. There is, therefore, no basis to apply the Section 8-226(c)(3) prohibition. The MEABF is also wrong to suggest this guidance would not apply to any plaintiff's facts in this case, as it applies to the CTU plaintiffs, such as June Davis and Anthony Lopez. (*See* Pl. Br. 77-78; SUP C 1754-55.)

### C. Any decision that Section 8-226(c)(3) covers defined contribution plans should be applied prospectively only.

Finally, if the Court were to conclude that Section 8-226(c)(3) covers defined contribution plans (it should not), it should make that decision apply prospectively only to years of service following the Court's decision. (Pl. Br. 78-79.) The MEABF argues that the Court "cannot order a statutory pension fund such as MEABF to disburse

[2] In contrast to the MEABF's entirely unfounded assertion that Notaro might revoke his waiver in bad faith after receiving his pension, the MEABF is well aware that the waiver is revocable *only* if the courts rule that Section 8-226(c)(3) does not apply to defined contribution plans making the waiver legally unnecessary. (C 1504-05.)

annuities in a manner contravening the letter of the Pension Code." (MEABF Br. 14.) But it is the Court's power to interpret the Pension Code. As in *Exelon*, the Court may apply a new interpretation of a statute to years only following the Court's ruling. *See Exelon Corp.*, 234 Ill. 2d at 286 ("Therefore, we hold that this decision will apply only prospectively to taxes incurred, or tax credits sought, for the tax year 2009 and thereafter."). Only with a prospective-only application of any new interpretation that Section 8-226(c)(3) covers defined contribution plans can this Court prevent June Davis from losing all of her service and benefits earned while on leave of absence and being left in poverty with a $1,000 a month pension. (*See* Pl. Br. 79.) If decades ago the MEABF fiduciaries had given her proper guidance, she could have planned for her retirement accordingly. But they did not. Now 80 years old, it is too late for Ms. Davis.

## CONCLUSION

For the above reasons and the reasons in plaintiffs' opening brief, the circuit court's July 14, 2017, judgments on Counts I.A, II.A, and III.A should be affirmed, and the circuit court's September 29, 2014, judgments on Counts IV.A to IV.E and V.A to V.E and July 14, 2017, judgments on Counts X, XII, XIII & XIV should be reversed.

Respectfully submitted,

Dated: June 29, 2018

/s/ George A. Luscombe III
One of Plaintiffs' Attorneys

J. Peter Dowd
Justin J. Lannoye
George A. Luscombe III
DOWD, BLOCH, BENNETT, CERVONE
AUERBACH & YOKICH
8 South Michigan Avenue, 19th Floor
Chicago, Illinois 60603
(312) 372-1361 (Tel.)
(312) 372-6599 (Fax)
Email: gluscombe@laboradvocates.com

**Supreme Court Rule 341(c) 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) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Dated: June 29, 2018

/s/ George A. Luscombe III
George A. Luscombe III

**Verified Certificate of Filing and Service**

I, George A. Luscombe III, an attorney, certify that on June 29, 2018, I caused to be electronically filed this *Reply Brief of Plaintiffs-Appellees/Appellants* ("Reply Brief") with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system. To the best of my knowledge, counsel of record for the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system. On June 29, 2018, I also caused to be served this Reply Brief on each of them by e-mail to their e-mail address of record, listed below.

Richard S. Huszagh
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
Email: CivilAppeals@atg.state.il.us
RHuszagh@atg.state.il.us

*Attorneys for Intervenor-Defendant-Appellant/Appellee: State of Illinois, ex rel. Lisa Madigan, Attorney General of the State of Illinois*

Cary E. Donham
Graham C. Grady
John F. Kennedy
TAFT, STETTINIUS, & HOLLISTER, LLP
111 East Wacker Drive, Suite 2800
Chicago, Illinois 60601
Email: cdonham@taftlaw.com

*Attorneys for Defendants-Appellees: Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago; Retirement Board of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago*

Joseph M. Burns
David Huffman-Gottschling
JACOBS, BURNS, ORLOVE & HERNANDEZ
150 North Michigan Avenue, Suite 1000
Chicago, Illinois 60601
Email: davidhg@jbosh.com

*Attorneys for Defendants-Appellees: Public School Teachers' Pension and Retirement Fund of Chicago; and Board of Trustees of the Public School Teachers' Pension and Retirement Fund of Chicago*

Mary Patricia Burns
Vincent D. Pinelli
Larisa L. Elizondo
BURKE BURNS & PINELLI, LTD.
70 W. Madison Ave., Suite 4300
Chicago, Illinois 60602
Email: vpinelli@bbp-chicago.com

*Attorneys for Defendants-Appellees: Municipal Employees' Annuity & Benefit Fund of Chicago and the Retirement Board of the Municipal Employees' Annuity & Benefit Fund of Chicago*

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code

of Civil Procedure, I certify, to the best of my knowledge, information, and belief, that the statements in this Verified Certificate of Filing and Service are true and correct.

Dated: June 29, 2018

/s/ George A. Luscombe III
George A. Luscombe III