Nos. 122793 & 122822

IN THE
SUPREME COURT OF ILLINOIS

Rochelle Carmichael; Zeidre Foster; Oscar Hall; Anthony Lopez; John 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,	)	Direct Appeal Pursuant to Supreme Court Rule 302(a),
	)	and
	)	Direct Appeal Pursuant to Supreme Court Rule 302(b)
Plaintiffs-Appellees/Appellants, v. 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,	)	From the Circuit Court of Cook County, Illinois, County Department, Chancery Division,
	)	No. 12 CH 37712
Defendants-Appellees, and State of Illinois *ex rel.* Lisa Madigan, Attorney General of the State of Illinois,	)	The Honorable CELIA G. GAMRATH, MARY L. MIKVA, Judges Presiding.
Intervenor-Defendant-Appellant/Appellee.	)	

BRIEF OF INTERVENOR APPELLANT, STATE OF ILLINOIS *ex rel.* LISA MADIGAN, ATTORNEY GENERAL

LISA MADIGAN
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Counsel for Intervenor, State of Illinois

RICHARD S. HUSZAGH
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2587
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
rhuszagh@atg.state.il.us

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NATURE OF THE CASE

These consolidated appeals arise out of a circuit court judgment resolving claims relating to parts of Public Act 97–651 (the "Act") that modified provisions in three Articles of the Pension Code concerning benefits in a public pension system that may be earned by someone working for a private labor union during a leave of absence from government employment. The Act preserved the ability of individuals already on a leave of absence to continue accruing public pension service credits for employment with a labor union, but it disallowed such service credits for union employment during a leave of absence commencing after the Act took effect. The plaintiffs' claims included a challenge to that aspect of the Act on the ground that it violates Article XIII, Section 5 of the Illinois Constitution (the "Pension Clause"). The State argued that the General Assembly may authorize the accrual of public pension benefits for private employment, but that such rights are merely statutory, not constitutionally protected by the Pension Clause, and therefore may be prospectively discontinued, at least for persons who have not yet begun a leave of absence to work for a union. Addressing a question of first impression, the circuit court sustained the plaintiffs' claim, holding that the scope of the Pension Clause's constitutional protection is not limited to pension benefits earned through public employment, but extends to any Pension Code provision granting public pension benefits for private employment, including future employment. The State appealed that ruling directly to this Court under Supreme Court Rule 302(a). (Appeal No. 122793.)

ISSUE PRESENTED FOR REVIEW

Whether the constitutional protections of the Pension Clause include the ability to take a future leave of absence from government employment and accrue public pension benefits for private employment.

JURISDICTION

The Court has jurisdiction of the State's direct appeal under Supreme Court Rule 302(a). The circuit court's July 14, 2017 judgment, which resolved most of the claims and contained an express finding under Supreme Court Rule 304(a) that there was no just reason to delay appeal or enforcement, declared unconstitutional provisions of the Act that prospectively disallowed service credits in three public pension funds for employment with a labor union during a leave of absence commencing after the Act took effect. (A 11-13, 24-25.) The plaintiffs filed a notice of appeal from several aspects of that judgment on August 9, 2017 (C 2365-70), and the State filed its notice of separate appeal from the aspect of the above-described aspect of the judgment declaring parts of the Act unconstitutional on August 21, 2017 (C 2371-73, 2385-87).

STATEMENT OF FACTS

Introduction

Following a series of newspaper articles reporting that several individuals accrued retirement benefits in public pension systems for decades of work with private labor unions during leaves of absence from employment with the City of Chicago, the General Assembly passed the Act, which amended the provisions of three Article of the Pension Code relating to the pension benefits that may be earned for employment with a labor union during a leave of absence from government employment. (A 2-3; C 630-59, 690.) The Act amended Articles 8, 11, and 17 of the Pension Code, which govern the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund, the Laborers' and Retirement Board Employees' Annuity and Benefit Fund, and the Public School Teachers' Pension and Retirement Fund for the City of Chicago (collectively, the "Funds"). (A 2-3; C 630-59.) Among other things, the Act prospectively eliminated the ability to earn service credits in the Funds for work with a private labor union during a leave of absence from government employment that began after the Act took effect. (A 3; C 642-43, 650-51, 658.) The Act did not affect any leave-of-absence service credits earned before it took effect on January 5, 2012. Nor did it prevent persons already on a leave of absence when it took effect from continuing to earn future public pension service credits for union employment. (A 3.)

Counts I.A, II.A, and III.A of the plaintiffs' complaint alleged that, for public employees who were members of one of the Funds when the Act took effect

but who, at that time, had not begun a leave of absence to work for a labor union, these provisions of the Act (the "future-leave-of-absence provisions") violate the Pension Clause by preventing them from later taking a leave of absence and earning public pension service credits for union employment. (C 101-02, 108-09, 116-17.) Addressing an issue of first impression, the circuit court sustained this claim. (A 11-13.) The State appealed this decision. (C 2371, 2382, 2386.)

Relevant Pension Code Provisions

In 1963, the General Assembly enacted the Pension Code to "revise and codify the laws relating to . . . retirement systems [and] pension funds . . . for persons performing services for the state, its agencies, instrumentalities, political subdivisions and municipal corporations . . . ." 1963 Ill. Laws pp. 161, 179. Before passage of the Act almost three decades later, the General Assembly amended the statutory provisions for the Funds to establish a conditional ability for members to receive service credits for employment with a private labor union during a leave of absence from their public employment. See 40 ILCS 5/8–226(c), 5/11–215(c)(3), 5/17–134(4) (2010). The statutory conditions included payment of contributions at a specified rate for each period of creditable service. *Id.*

Public Act 97–651

Following a series of newspaper articles reporting that some participants in the Funds were receiving six-figure annuities based on their private employment with a union, and that some of these participants were receiving both public pension benefits and benefits from a union pension plan based on the same work,

or were receiving public pension benefits while continuing to earn a salary in the union position that contributed to those benefits, the General Assembly passed the Act, which was signed into law and took effect on January 5, 2012. (A 2; C 206, 490, 560, 622, 628, 1697-98.) In particular, the Act's future-leave-of-absence provisions amended sections 8–226(c), 11–215(c)(3), and 7–134(4) of the Pension Code to specify that no service credits in the three Funds are available in connection with any leave of absence to work for a private labor union that began after the Act took effect. (C 642-43, 650-51, 658.)

Plaintiffs' Claims

About nine months after the Act took effect, the plaintiffs filed this action challenging the constitutionality of several of the Act's provisions, including the future-leave-of-absence provisions. (C 52-179.) The plaintiffs (collectively, "Plaintiffs") include active and retired members of the Funds who had taken a leave of absence from government employment to work for a labor union, as well as three unions who represent employees who are members of the Funds. (C 57-60.) After going on a leave of absence, none of the individual plaintiffs returned to active public employment. (*Id.*) One took a leave of absence that lasted almost a decade (C 60, par. 13), and another was still on a leave of absence for more than a decade (C 58, par. 7). Three continued to work for the union and receive salaries for that work after they "resigned" from their government jobs while on a leave of absence, and then started receiving retirement annuities from the Funds based in part on their union employment. (C 57-58, 60, pars. 5, 9, 13.)

Four of the plaintiffs received service credits in one of the Funds for employment with a labor union for which they also received credit in a defined-benefit union pension plan. (C 83-84, pars. 93, 95.) Two of the plaintiffs, Zeidre Foster and Michael Senese, began a leave of absence after the Act took effect. (C 58-59, pars. 6, 10.)

Intervention by the State

Because Plaintiffs challenged the constitutionality of several provisions of the Act, they sent the Attorney General a notice of these challenges pursuant to Supreme Court Rule 19. (C 475-77.) The circuit court allowed the Attorney General, on behalf of the State of Illinois (the "State"), to intervene to defend against these constitutional challenges. (C 472.)

The Circuit Court's Rulings

The State moved to dismiss Plaintiffs' claims that the Act's future-leave-of-absence provisions violated the Pension Clause. (C 514-18.) After briefing and argument, the circuit court denied this motion, stating:

> [T]he State's public/private distinction is foreclosed by *Buddell v. Board of Trustees for the State University Retirement System*, [118 Ill. 2d 99 (1987).] That case dealt with a Pension Code provision allowing participants to purchase service credit for past military service . . . . While military service is "public" service, that fact was irrelevant to the Court's analysis. The vested right to military service credit was a benefit the participant was entitled to as a public employee. *Id.* at 105.

(C 697.)

The circuit court later denied the State's motion for summary judgment and granted Plaintiffs' motion for summary judgment on their Pension Clause claim challenging the Act's future-leave-of-absence provisions. (A 11-13.) The court again concluded that the Pension Clause did not recognize any distinction between the accrual of service credits in a public pension system for public employment and the accrual of such service credits for private employment. (A 12-13.) Explaining its decision, the court stated: "Participants are entitled to Pension Protection Clause protection not because they performed public work, but because they are public employees with vested rights flowing from membership in the public pension systems." (A 13.)

ARGUMENT

I. Summary of Argument

Addressing a question of first impression, the circuit court held that the scope of the Pension Clause's constitutional protection of retirement benefits in a public pension plan includes the ability to earn service credits for *private* employment (here, with a labor union), including the ability to earn such service credits during a *future* leave of absence. The consequence, the circuit court held, is that an amendment to the Pension Code prospectively eliminating the ability to earn service credits for private employment during a leave of absence from government service may not constitutionally be applied to persons who were public employees before that amendment took effect, even if at that time they had not yet commenced such a leave of absence. This reading of the Pension Clause was in error.

The Pension Clause secured, but did not change the common understanding of, a public pension, which this Court has repeatedly held represents a form of deferred compensation for *public* service that is intended to induce *continued* public service. By conferring a "contractual" status on retirement benefits in a public pension plan, the Pension Clause did not adopt a different conception of what such benefits represent or sever them from their traditional basis in actual government employment. To the contrary, the history, purpose, and text of the Pension Clause, along with the constitutional convention debates relating to its adoption, uniformly align with the conclusion that it was intended

to provide a constitutional protection for retirement benefits in a public pension plan based on public employment, not private employment.

This does not mean that Pension Code provisions allowing pension system members to earn service credits for private employment are not binding, or have no legal effect. Such provisions establish a *statutory* right to such credits, which may not be taken away once they are earned in accordance with the relevant statutory conditions, including financial contributions for the credits granted. But they do not establish a *constitutional* right, under the Pension Clause, against the prospective elimination of those provisions for anyone who has not yet begun such a leave of absence. Thus the Act, which did not affect the ability of system members *already* on a leave of absence to continue earning service credits for employment with a labor union, permissibly eliminated the ability of public servants who had not yet taken a leave of absence to do so in the future and earn public pension service credits for employment with a private labor union. Consequently, the circuit court's judgment against the State and for Plaintiffs on their Pension Clause challenge to the Act's future-leave-of-absence provisions should be reversed.

II. Standard of Review

The circuit court's judgment is subject to *de novo* review for two reasons. First, it resolved the disputed claims by summary judgment. See *Cohen v. Chicago Park Dist.*, 2017 IL 121800, ¶ 17. Second, it involves the proper interpretation of the Illinois Constitution. See *Hooker v. Illinois State Bd. of Elections*,

2016 IL 121077, ¶ 21.

III. The Act's Provisions Prospectively Eliminating the Ability to Earn Service Credits in a Public Pension Plan for Private Employment During a Future Leave of Absence Do Not Violate the Pension Clause.

Addressing a question of first impression, the circuit court erroneously held that the benefits protected by the Pension Clause include the future ability to earn public pension service credits for *private* employment. As described below, the Pension Clause establishes a constitutional protection for retirement benefits based on *public* service, not private employment. The circuit court therefore erred by holding that the Act violated the Pension Clause by prospectively eliminating the ability to earn public pension service credits for employment with a private labor union during a leave of absence from a government job that began after the Act took effect.

The Act did not affect any service credits already earned for employment with a private labor union. Nor did it eliminate the ability of anyone on a leave of absence that started *before* the Act took effect to continue to accrue service credits for employment with a labor union after it took effect. Instead, the Act operated only prospectively, eliminating the ability to earn service credits in any of the Funds for work with a private labor union during a leave of absence that started *after* it took effect. That aspect of the Act did not violate the Pension Clause because its constitutional protection of benefits in a public retirement system does not extend to benefits for future private-sector employment.

A. Standards Governing Claims Challenging the Constitutionality of a Statute

"[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 Investors v. Novak*, 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.*

B. Principles of Constitutional Interpretation

The ultimate goal in interpreting a constitutional provision is to determine the intent of the persons who adopted it. *Walker v. McGuire*, 2015 IL 117138, ¶ 16. For a provision in the Illinois Constitution, that inquiry focuses on the common understanding of the voters who ratified it. *Id.*; *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 13 (1996); *People ex rel. Cosentino v. Adams Cty.*, 82 Ill. 2d 565, 569 (1980); *Wolfson v. Avery*, 6 Ill. 2d 78, 88 (1955).

The principles governing interpretation of the Illinois Constitution are generally the same as those for interpreting statutes. *Walker*, 2015 IL 117138, ¶ 16; *Wolfson*, 6 Ill. 2d at 94. At the same time, constitutional provisions are often composed in broader strokes than statutes, with the expectation that their meaning and application in particular circumstances will be determined by the courts, in light of each provision's purpose. See *Wolfson*, 6 Ill. 2d at 94.

A constitutional provision is interpreted in light of the words used, the circumstances surrounding its adoption, and "the object to be attained or the evil

to be remedied," *Walker*, 2015 IL 117138, ¶ 16 (citation and internal quotation marks omitted); see *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 216 (1979); *Wolfson*, 6 Ill. 2d at 93-94; see also *People v. Reese*, 2017 IL 120011, ¶ 30 (statute); *Prazen v. Shoop*, 2013 IL 115035, ¶ 21 (same). Words should be given their ordinary and commonly accepted usage and meaning unless doing so would be inconsistent with the provision's intended purpose. *Beelman Trucking v. Illinois Workers' Comp. Comm'n*, 233 Ill. 2d 364, 373 (2009); *Lucas v. Lakin*, 175 Ill. 2d 166, 173 (1997); *People v. McCoy*, 63 Ill. 2d 40, 45 (1976); *Wolfson*, 6 Ill. 2d at 93-94. That meaning does not always correspond to the outer limits of a term's literal definition. *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 526 (1990); *Hamer v. Board of Educ. of Sch. Dist. No. 109*, 47 Ill. 2d 480, 489 (1970) (holding that Constitution's guarantee of "free schools," in light of "the popular and natural meaning of the term" when Constitution was adopted, did not include furnishing free textbooks); *Wolfson*, 6 Ill. 2d at 93-94. In addition, individual words or expressions should not be read in isolation from the rest of a constitutional or statutory provision, without regard to its apparent purpose. *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill. 2d 281, 287 (2008); *Williams v. Staples*, 208 Ill. 2d 480, 487 (2004).

If the intended meaning of a constitutional provision is subject to reasonable doubt after a court considers its text and intended purpose, the court may consult the corresponding constitutional debates. *Walker*, 2015 IL 117138, ¶ 16; see also *Sayles v. Thompson*, 99 Ill. 2d 122, 125 (1983) ("The meaning of a . . .

constitutional provision depends upon the intent of the drafters at the time of its adoption"). Application of these principles leads to the conclusion that the Pension Clause was not intended to create a constitutional right to accrue retirement benefits in a public pension plan for private employment.

C. The Pension Clause Was Intended to Establish a Constitutional Protection for Retirement Benefits in a Public Pension System Based on Public Service, Not Private Employment.

The Pension Clause provides:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

Ill. Const., art. XIII, § 5. The Pension Clause had no counterpart in the 1870 Constitution and was added to the 1970 Constitution to change the legal status of public pension systems that had been held to create no contractual rights, and thus could be modified or repealed at any time, because employee participation and contributions were mandatory. See *Buddell v. State Univ. Ret. Sys.*, 118 Ill. 2d 99, 102, 106 (1987); see also *Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶¶ 57-58.

The Pension Clause plainly applies only to *public* pension systems: those "of the State, any unit of local government or school district, or any agency or instrumentality thereof." Its reference to "membership" in such retirement systems also obviously applies to *government employees* who are participants and

earn benefits in them based on their public service. See also 1963 Pension Code, 1963 Ill. Laws pp. 161, 179 (quoted above). And the "benefits" of membership in a public pension plan naturally include the right, upon satisfaction of the necessary conditions, to receive a "pension," which is commonly understood and defined as "[a] regular series of payments made to a person (or the person's representatives or beneficiaries) for past services or some type of meritorious work done; esp., such a series of payments made by the government," or "[a] fixed sum paid regularly to a person (or to the person's beneficiaries), esp. by an employer as a retirement benefit." Black's Law Dictionary (10th ed. 2014). Thus, the intention to secure public employee pensions by giving them a contractual status is evident from the Pension Clause's text. By contrast, nothing in the text, purpose, or history of the Pension Clause, and nothing in the constitutional convention debates relating to its adoption, indicates that it was also intended to include within the scope of its constitutional protection retirement benefits in a public pension system based on private employment.

1. Traditional Understanding and Purpose of a Public Pension

Long before adoption of the 1970 Constitution, public pensions were commonly understood to constitute a form of deferred compensation for public service intended to induce government employees to continue in public service. See, e.g., *Hughes v. Traeger*, 264 Ill. 612, 618 (1914); *DeWolf v. Bowley*, 355 Ill. 530, 533 (1934). In *Hughes*, the Court rejected multiple constitutional challenges to a statute establishing a pension fund for City of Chicago employees, including

the claim that the law appropriated public funds for a private purpose. 264 Ill. at 617-18. Quoting at length from Judge Dillon's well-known treatise on municipal law, the Court held that "pensions for municipal services . . . 'are, in effect, *pay withheld to induce long-continued and faithful service*,'" which benefits the public in two ways: first, "'by encouraging competent and faithful employés to *remain in the service and refrain from embarking in other vocations*,'" and second, by "'retiring from . . . public service'" employees who, "'by devoting their best energies for a long period of years to the *performance of duties in a public office or employment*,'" may no longer be able to perform those as well as "'others more youthful or in greater physical or mental vigor.'" *Id.* at 618 (emphasis added) (quoting 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 430 (5th ed. 1911) ("*Dillon*"). The Court further held that the term "pensions," as used in the statute's title, sufficiently described the law's purpose where it corresponded to this meaning as described in Dillon's treatise, in "many judicial opinions," and "the recognized usage of writers, speakers, and lexicographers." *Id.*

Two years later, the Court again held that annuities paid by a public retirement system are legally justified on the ground that they "'are in the nature of *compensation for services previously rendered* for which full and adequate compensation was not received at the time of the rendition of the services.'" *People ex rel. Kroner v. Abbott*, 274 Ill. 380, 385 (1916) (emphasis added) (quoting *Dillon* § 430); see also *Sommers v. Patton*, 399 Ill. 540, 548-49 (1948); *DeWolf*, 355 Ill. at 533 (stating that public pensions "show appreciation for meritorious public

service" and encourage public employees "to remain in the service"). Thus, well before adoption of the 1970 Constitution, the common, ordinary understanding of membership in a public retirement system, and of the benefits of such membership, corresponded to benefits earned by government employees based on their prior public service.[1]

2. Constitutional Convention's Understanding of Protected Public Pension Benefits

Not surprisingly, the delegates to the 1970 constitutional convention understood membership in a public retirement system, and the benefits of such membership, in the same sense. Such benefits were considered to be annuities or other payments (e.g., disability payments) for public service, and no one suggested they might also represent payments for private employment.

Introducing the proposed constitutional provision that became the Pension Clause, Delegate Kinney, a sponsor, said she wanted "to offer a provision covering pension rights for *state or local government employees*." 3 Record of Proceedings, Sixth Illinois Constitutional Convention ("Proceedings") at 2188 (emphasis

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[1] The same understanding — that benefits in a public retirement system constitute a form of deferred compensation for earlier public service — has continued after adoption of the 1970 Constitution. See, e.g., *In re Marriage of Hackett*, 113 Ill. 2d 286, 292-93 (1986) (reaffirming that public pension benefits are "a form of deferred compensation"); *In re Marriage of Papeck*, 95 Ill. App. 3d 624, 629 (1st Dist. 1981). Other jurisdictions also treat public pension benefits as a form of deferred compensation for prior public service. See *Bakenhus v. City of Seattle*, 296 P.2d 536, 538 (Wash. 1956); *State ex rel. Spire v. Public Employees Ret. Bd.*, 410 N.W.2d 463, 466 (Neb. 1987); *Hall v. Elected Officials' Ret. Plan*, 383 P.3d 1107, 1114 (Ariz. 2016); *In re Request for Advisory Opinion*, 806 N.W.2d 683, 697 (Mich. 2011); see also *Marriage of Papeck*, 95 Ill. App. 3d at 629 (noting out-of-state authorities).

added). Later offering an illustration, Delegate Kinney stated:

> If a police officer accepted employment under a provision where he was entitled to retire at two-thirds of his salary after twenty years of service, that could not subsequently be changed to say he was entitled to only one-third of his salary after thirty years of service, or perhaps entitled to nothing.

4 Proceedings at 2929. Similarly, the related debates repeatedly mentioned the goal of ensuring the payment of benefits to retired public employees for their public service under government pension plans, as traditionally understood.[2] Indeed, in debating the Pension Clause, the convention delegates used the terms "civil servant" and "public employee" no less than 17 times. 4 Proceedings at 2925-28, 2931-32. By contrast, the only references to private employment related to participation in private-sector pensions, not public retirement systems. See, e.g., *id.* at 2929 (Delegate Lyons) (noting recent legislative initiatives by Congress to address the subject of retirement benefits "because there is thought to be an immense need in this country for just this kind of protection, not only in the public, but *also in the field of private employees*") (emphasis added).[3]

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[2] See, e.g., 4 Proceedings at 2926 (Delegate Kemp) (commenting that "the government or municipal employee is not notoriously overpaid"); *id.* (Delegate Kinney) ("many police officers . . . have said to me that . . . if they cannot rely on their pensions, they may as well leave now").

[3] Contrary to the circuit court's suggestion (C 697, 2346-47), the State in this case did not simply invent the distinction between public and private employment as a basis for accruing public pension benefits. Before the Constitutional Convention, many States, including Illinois, had laws authorizing members of such systems to receive credit for military service that interrupted their government employment. See, e.g., *People ex rel. Serbin v. Calderwood*, 333 Ill. App. 541, 544-

3. Promoting the Purpose of Public Pensions

An additional reason not to interpret the Pension Clause to provide a constitutional protection for the accrual of retirement benefits in a public pension plan based on private employment is that doing so would frustrate, not promote, the traditional purpose and justification for public pensions. As noted above (at 15-16), the Court has repeatedly held that public pensions serve the purpose of inducing government employees to *remain* in public service. *People ex rel. Judges Ret. Sys. v. Wright*, 379 Ill. 328, 337 (1942); *DeWolf*, 355 Ill. at 533; *Sommers*, 399 Ill. at 548-49; *Abbott*, 274 Ill. at 385; *Hughes*, 264 Ill. at 618; see also *Crowley v. Retirement Bd. of Mun. Emp't Annuity & Ben. Fund of Chicago*, 70 Ill. App. 3d 723, 727 (1st Dist. 1979). But reading the Pension Clause to protect the accrual of public pension plan benefits for private employment would constitutionalize a system that has the exact opposite effect of encouraging public servants to *discontinue* active government employment. For this reason as well, that cannot realistically be what Illinois voters intended when they ratified the 1970 Constitution.

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45 (1st Dist. 1948); *Murphy v. Zink*, 54 A.2d 250, 253-55 (N.J. 1947) (tracing history of New Jersey laws following Civil War, World War I, and other military campaigns); *Thigpen v. City of Atlanta*, 45 S.E.2d 695, 696 (Ga. 1947). Military service is, of course, a form of public service. On the other hand, the Supreme Court of Arkansas, in *Chandler v. Board of Trustees of Teacher Retirement System*, 365 S.W.2d 447, 449 (Ark. 1963), declared invalid, under that State's constitution, a statute authorizing benefits in a public retirement system for employees of a private labor union for services "rendered . . . in the course of their work for a private employer."

4. Precedent Under the Pension Clause

The Court has never decided the issue raised in this case. But its precedent under the Pension Clause is fully consistent with the principle that the Clause's constitutional protection of retirement benefits in a public pension system does not extend to the accrual of such benefits based on private employment. In *Buddell* the Court, describing the nature of the contractual relationship secured by the Pension Clause, emphasized that a public employee's "consideration" for constitutionally guaranteed pension benefits consists of his "employment and *continued employment by the public body*." 118 Ill. 2d at 105-06 (emphasis added). Thus, in conformity with the traditional justification for and common understanding of public pensions, the Court considered public employment itself to be an essential element for the unique constitutional status conferred on public pension benefits by the Pension Clause.

In the proceedings below, Plaintiffs and the circuit court relied heavily on *Buddell*'s holding that rights protected by the Pension Clause become constitutionally vested, and may not thereafter be diminished or impaired, once a government employee becomes a member of a public retirement system. *Id.* The State does not question that well-established principle. But Plaintiffs' argument, and the circuit court's reasoning, skip over the separate, threshold question of whether the accrual of retirement benefits based on private employment *is* a right within the scope of the Pension Clause's constitutional protection. *Buddell* involved credit for military service, which is the quintessential form of public

service. *Id.* at 101, 103. No case has ever held that the Pension Clause's special constitutional protection for public pension benefits includes the accrual of such benefits based on *private* employment. And, as set forth above, the Illinois voters who ratified the 1970 Constitution cannot plausibly be deemed to have attributed such an unusual and incongruous meaning to the Pension Clause.

It is true that the rights protected by the Pension Clause are generally found in the Pension Code. See *DiFalco v. Board of Trs. of Firemen's Pension Fund*, 122 Ill. 2d 22, 26 (1988). But such rights are not limited to ones contained in the Pension Code, see *Kanerva v. Weems*, 2014 IL 115811, ¶¶ 3, 37, 40-41 (retiree health insurance prescribed by statute outside Pension Code), nor do they include every provision in the Pension Code, see *People ex rel. Ill. Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 273-75 (1975) (funding provisions of Pension Code Article 16 enacted before 1970); see also *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 233 (1998) (funding provisions of Pension Code for state retirement systems enacted after 1970). Thus, the fact that Articles 8, 11, and 17 of the Pension Code contained leave of absence provisions before the Act took effect does not, by itself, establish that the ability to earn service credits in a public pension for private employment is constitutionally protected by the Pension Clause. Instead, this Court must determine, as a threshold matter, whether that ability is the type of benefit the Pension Clause was intended to include within its constitutional protection. And, as set forth above, the Court should conclude that the Pension Clause was not intended to do so where that ability is not tradi-

tionally associated with or commonly understood to be the type of benefit provided by a public retirement system, but instead is contrary to the historical justification for public pensions as a form of deferred compensation for government employment intended to induce continued public service.

* * *

In short, this Court should reject Plaintiffs' proposed interpretation of the Pension Clause because that interpretation is inconsistent with the traditional meaning and common understanding of public pensions, the text and purpose of the Pension Clause, the understanding of the 1970 constitutional convention delegates, and relevant precedent interpreting the Clause.

CONCLUSION

For the foregoing reasons, the circuit court's judgment denying the State's motion for summary judgment and granting Plaintiffs' motion for summary judgment on Counts I.A, II.A, and III.A of their complaint should be reversed.

February 20, 2018

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

RICHARD S. HUSZAGH
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2587
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
rhuszagh@atg.state.il.us

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Counsel for Intervenor,
State of Illinois

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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

/s/ *Richard S. Huszagh*

Appendix

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

4246/P
5246/P
4246/D
4246/P
9203/D

ROCHELLE CARMICHAEL, *et al.*,

Plaintiffs,

v.

LABORERS' & RETIREMENT BOARD EMPLOYEES' ANNUITY & BENEFIT FUND OF CHICAGO, *et al.*,

Defendants,

and

STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,

Intervenor-Defendant.

No. 12 CH 37712
Judge Celia Gamrath
Calendar 6

FINAL AMENDED MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

This cause comes to the court on the State of Illinois' June 19, 2017 Unopposed Section 2-1203 Motion to Amend June 7, 2017 Judgment, and Plaintiffs' June 30, 2017 Motion for Attorney's Fees, Illinois Supreme Court Rule 304 Certification, Modification of Escrow Order and for a Stay of Enforcement of the Order Modifying the Escrow Order Pending Appeal. The motions are granted. This Final Amended Order amends and supersedes the June 7, 2017 Memorandum Opinion and Order.

This cause comes to the court on cross-motions for summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1005 (West 2016). Judge Mary Mikva dismissed multiple counts of Plaintiffs' complaint. The parties seek summary judgment on the remaining counts of Plaintiffs' complaint (counts I-III A-E, VI-VII A-E, X, and XI A-B) and supplemental complaint (counts XII-XIV), challenging the applicability and constitutionality of Public Act ("P.A.") 97-0651, which alters Articles 8, 11, and 17 of the Illinois Pension Code (40 ILCS 5/8-101 *et seq.*, 11-101 *et seq.*, 17-101 *et seq.* (eff. Jan. 5, 2012)). The motions are granted in part and denied in part. The court invalidates two distinct provisions of P.A. 97-0651 as a violation of the Pension Protection Clause.

BACKGROUND

Judge Mikva's November 27, 2013 Dismissal Order, and September 29, 2014 Reconsideration Order, provide the factual and procedural history of this case. The court here reviews briefly the parties to the suit, the operative changes to the Pension Code, and the background leading to the instant cross-motions for summary judgment.

A. Parties to the Suit

Plaintiffs are nine retired or working employees of the City of Chicago or Chicago Board of Education. Zeidre Foster, Anthony Lopez, Michael Senese, and David Torres are current employees. Rochelle Carmichael, Oscar Hall, Joseph Notaro, and June Davis are retired employees. Plaintiff Kathleen Mahoney is the wife of the late John Mahoney, a retiree and an original Plaintiff in this action. After her husband's death, Mahoney intervened on her own behalf for the 50% survivor's annuity based on her husband's pension. *See* 40 ILCS 5/8-150.1(j). Each of the nine Individual Plaintiffs is a participant in one of the three public pension systems named as Defendants. Three local labor organizations intervened as Union Plaintiffs: Chicago Teachers Union, Local 1, American Federation of Teachers, AFL-CIO ("CTU"); Local 1001, Laborers' International Union of North America, AFL-CIO ("Laborers' Local 1001"); and Local 9, International Brotherhood of Electrical Workers, AFL-CIO ("IBEW Local 9").

Defendants are three public pension funds and governing boards (the "Funds") affected by changes to Articles 8, 11, and 17 of the Pension Code. Amendments to Article 8 affect the Municipal Employees' Annuity and Benefit Fund of Chicago ("MEABF"); amendments to Article 11 affect the Laborers' and Retirement Board of Employees' Annuity and Benefit Fund of Chicago ("LABF"); and amendments to Article 17 affect the Public School Teachers' Pension and Retirement Fund of Chicago ("CTPF"). The Office of the Attorney General appeared on behalf of the State of Illinois as Intervenor-Defendant (the "State"). The State primarily shouldered the defense of P.A. 97-0651's constitutionality, while the Funds argued against Plaintiffs' jurisdictional, declaratory, and equitable claims.

B. Public Act 97-0651

In response to news coverage of alleged abuses of public pension funds, the General Assembly passed P.A. 97-0651, altering the Pension Code administered by the Funds. The law limits public workers' ability to: (1) count as periods of service leaves of absence during which they worked for private unions; and (2) apply their private union salary to calculate their public

pension annuity. These changes affect different Plaintiffs in different ways, but they all allege P.A. 97-0651 unconstitutionally diminishes their constitutionally protected pension benefits.

The Funds calculate pension annuities through a formula. The inputs for the formula are derived from the years of service of an employee, dictating the percentage of his or her salary, multiplied by the highest average annual salary in the last few years before retirement. Participants have incentives to serve as public employees for long stretches of their careers to obtain the highest percentage and to increase their salary to obtain a higher annuity. The Individual Plaintiffs accomplished both by receiving service time for years employed by private unions while on leaves of absence from their public positions. They were also able to apply their higher private union salary to the public annuity calculation. P.A. 97-0651 changes all of this, overturning years of practice by the Funds and altering the way annuities are calculated.

Plaintiffs challenge the constitutionality of three reforms in P.A. 97-0651 that modify the annuity calculation. Only the constitutionality of the first two reforms is at issue here. The constitutionality of the third reform regarding "highest average annual salary" was dismissed by Judge Mikva in her Reconsideration Order.

1. Denial of service time for post-January 5, 2012 leaves of absence in Articles 8, 11, and 17

First, Plaintiffs challenge the constitutionality of P.A. 97-0651, which limits the counting of service time in the annuity calculation to "[l]eaves of absence without pay *that begin before the effective date of this amendatory Act*...during which a participant is employed full-time by a local labor organization that represents municipal employees," provided other requirements are met. Pub. Act 97-0651 (eff. Jan. 5, 2012) (amending 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4)) (new text in italics). Before the enactment of P.A. 97-0651, Articles 8, 11, and 17 of the Pension Code allowed participants to count such leaves of absence as periods of service in their annuity calculation, regardless of when the leaves of absence began. After P.A. 97 0651, leaves of absence that begin on or after January 5, 2012, are excluded.

2. Expansion of the "any pension plan" proviso to cover union affiliate plans in Articles 8 and 11

Second, Plaintiffs attack the constitutionality of expanding the phrase "any pension plan" to cover union affiliate plans in connection with the union service time allowance. Before the enactment of P.A. 97-0651, the union service time allowance came with a proviso that leaves of absence for union work could count toward the annuity calculation, provided "the participant

does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." 40 ILCS 5/8-226(c), 11-215(c)(3)(C). P.A. 97-0651 amends Articles 8 and 11 by expanding the definition of "any pension plan," as follows:

> For the purposes of this Section, the phrase "any pension plan established by the local labor organization" means any pension plan in which a participant may receive credit as a result of his or her membership in the local labor organization, including, but not limited to, the local labor organization itself and its affiliates at the local, intrastate, State, multi-state, national, or international level. The definition of this phrase is a declaration of existing law and shall not be construed as a new enactment.

Pub. Act 97-0651 (eff. Jan. 5, 2012) (amending 40 ILCS 5/8-226(e), 11-215(e)). This definition curtails the ability to count time for union service where a participant receives credit in any pension plan established by the local labor organization itself, as well as its affiliates at any level.

3. Exclusion of private union salary in the "highest average annual salary" calculation in Articles 8 and 11

Third, P.A. 97-0651 modifies Articles 8 and 11 by adding a new subsection (e) and clarifying the meaning of "highest average annual salary." Subsection (e) provides:

> This Article shall not be construed to authorize a salary paid by an entity other than an employer, as defined in [Section 8-110 or Section 11-107], to be used to calculate the highest average annual salary of a participant. This subsection (e) is a declaration of existing law and shall not be construed as a new enactment.

Pub. Act 97-0651 (eff. Jan. 5, 2012) (adding 40 ILCS 5/8-233(e), 11-217(e)). "Employer," as defined in sections 8-110 and 11-107 and referred to in subsection (e), is limited to large cities, certain public entities, and boards.

P.A. 97-0651 also amends sections 8-138(g-1) and 1-134(f-1) by clarifying the meaning of "highest average annual salary," as follows:

> For the purpose of calculating this annuity, "final average salary" means the highest average annual salary for any 4 consecutive years in the last 10 years of service. *Notwithstanding any provision of this subsection to the contrary, the "final average salary" for a participant that received credit under [Sections 8-226(c) and 11-215(c)(3)] means the highest average salary for any 4 consecutive years (or any 8 consecutive years if the employee first became a participant on or after January 1, 2011) in the 10 years immediately prior to the leave of absence, and adding to that highest average salary, the product of (i) that highest average salary, (ii) the average percentage increase in the Consumer Price Index during each 12-month calendar year for the calendar years during the participant's leave of absence, and (iii) the length of the leave of absence in years, provided that this shall not exceed the participant's salary at the local labor organization.*

For purposes of this Section, the Consumer Price Index is the Consumer Price Index for All Urban Consumers for all items published by the United States Department of Labor.

Pub. Act 97-0651 (eff. Jan. 5, 2012) (amending 40 ILCS 5/8-138(g-1), 11-134(f-1)) (new text in italics). When taken together, these amendments have the effect of limiting the annuity calculation to a participant's public-employer salary only, which is typically less than paid by private unions.

In her Reconsideration Order, Judge Mikva characterized these changes as a permissible legislative clarification of "highest average annual salary" and dismissed with prejudice Plaintiffs' constitutional claims in counts IV-V A-E. Plaintiffs do not ask this court to revisit Judge Mikva's ruling. Rather, they ask the court to avoid the detrimental effect of this legislation based on theories of contract and estoppel set forth in counts XIII-XIV of their supplemental complaint.

ANALYSIS

Summary judgment is warranted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c). By filing cross-motions for summary judgment, the parties "invite the court to decide the issues presented in the action as questions of law." *American States Ins. Co. v. Koloms*, 281 Ill. App. 3d 725, 727-728 (1st Dist. 1996).

Statutes are presumptively constitutional, and the challenging party has the burden of rebutting this presumption. *People v. McCarty*, 223 Ill.2d 109, 135 (2006). To carry this burden, a plaintiff must "clearly establish any constitutional invalidity." *Allegis Realty Investors v. Novak*, 223 Ill.2d 318, 334 (2006). A court must uphold a statute's validity "whenever it is reasonably possible to do so." *Id.* "Under settled Illinois law, 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 v. Weems*, 2014 IL 115811, ¶ 55. This rule applies "with equal force" to interpretations of the Pension Protection Clause. *Id.*

C. Plaintiffs' Standing

In their cross-motions for summary judgment, LABF and MEABF argue the Individual and Union Plaintiffs lack standing to bring their claims. Judge Mikva rejected LABF's previous attacks on standing. (Order, May 9, 2013; Hearing Transcript, May 9, 2013 at 26:20—27:2, 27:5—29:8, 30:18—31:5, 36:19-20, 41:5-16, 76:13—78:7, 83:19-22.) The court adopts the earlier reasoning and rejects the new standing challenges raised by LABF and MEABF. This is

juxtaposed with the court's finding on count XI (section D *infra*) that the Funds lack jurisdiction to revise pension annuities for Plaintiffs Carmichael, Hall, and Mahoney.

1. Individual Plaintiffs have standing to sue

LABF and MEABF challenge the standing of Individual Plaintiffs Senese, Torres, Davis, and Mahoney, arguing the court lacks subject matter jurisdiction to hear their claims. Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceeding in question belongs. *People v. M.W. (In re M.W.)*, 232 Ill.2d 408, 415 (2009).

LABF contends Plaintiffs Senese and Torres lack standing to bring their claims where neither of them applied for pension benefits and Senese is not eligible to apply. LABF insists the two Plaintiffs' claims are not ripe and the harms alleged are merely speculative; thus, the court should not decide them. *See Sedlock v. Bd. of Trs.*, 367 Ill. App. 3d 526, 529 (3d Dist. 2006). MEABF similarly challenges this court's subject matter jurisdiction over Plaintiffs Davis and Mahoney on the grounds that neither has received a final administrative adjudication for their annuity—Davis's application having only been processed upon Order of this court on October 10, 2014, and Mahoney's annuity having derived from her late husband's 2003 calculation after his death in 2016. Given its "exclusive original jurisdiction in...all claims for annuities, pensions, benefits or refunds" (40 ILCS 5/8-203), MEABF argues this court lacks jurisdiction to consider Plaintiffs' claims because no final administrative decision has been rendered. The court disagrees.

In *Canel v. Topinka*, 212 Ill.2d 311 (2004), the Illinois Supreme Court held:

> An aggrieved party may seek judicial review of an administrative decision without complying with the exhaustion of remedies doctrine where a statute, ordinance or rule is attacked as unconstitutional on its face. A party may also seek review where issues of fact are not presented and agency expertise is not involved. Moreover, exhaustion is not required if the administrative remedy is inadequate or futile or in instances where the litigant will be subjected to irreparable injury due to lengthy administrative procedures that fail to provide interim relief.

212 Ill.2d at 321 (citations omitted).

Here, Plaintiffs attack the constitutionality of P.A. 97-0651. There are no issues of fact, no agency expertise is required, and the administrative remedy would be futile where the Funds lack the ability to declare a statute unconstitutional. Furthermore, forcing Plaintiffs who are not

yet retired to wait until they retire and apply, or to wait until their benefits are actually diminished, will cause irreparable harm. Accordingly, the Individual Plaintiffs have standing to bring suit and the court has subject matter jurisdiction to adjudicate their claims.

2. Union Plaintiffs have associational standing to sue

LABF and MEABF also allege the three Union Plaintiffs lack direct or associational standing to bring suit. In order to establish direct standing, the Unions must demonstrate they will suffer a direct injury that is: (1) distinct and palpable; (2) fairly traceable to Defendants' actions; and (3) substantially likely to be prevented or redressed by the requested relief. *Chicago Teachers Union Local 1 v. Board of Education of the City of Chicago*, 189 Ill.2d 200, 206-207 (2000). In order to establish associational standing, the Unions must show: (1) their individual members have standing to sue in their own right; (2) the interests the Unions seek to protect are germane to their purpose; and (3) neither the claims asserted, nor the relief requested, requires the individual members to participate in the lawsuit. *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill.2d 37, 47 (2005), citing *Hunt v. Washington State Apple Advertising Commission,* 423 U.S. 333 (1977).

Clearly, the Union Plaintiffs have associational standing. First, as noted above, their individual members have standing to sue. Second, protecting Union members' rights to pension benefits under the Pension Code is clearly germane to the Unions' purpose. *See Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006) ("[T]he requirement of germaneness is undemanding; mere pertinence between litigation subject and organizational purpose is sufficient.").) Third, the claims in this case are not disputed issues of fact, but of law, and do not require the individual members to participate in the lawsuit. Rather, the issues involve declaratory and injunctive relief with no disputed calculation of damages. *See International Union of Operating Engineers, Local 148, AFL-CIO,* 215 Ill.2d at 47, 61 (holding individual participation of union members not necessary where case raises only questions of law).) Accordingly, the Union Plaintiffs have associational standing to sue.

D. Lack of Jurisdiction to Revise Annuities (count XI)

In count XI, Plaintiffs challenge the Funds' jurisdiction to revise the pension annuity calculations for retired participants Carmichael, Mahoney, and Hall based on P.A. 97-0651. Plaintiffs claim the Funds lack jurisdiction to revise the annuities where the decision on their

pension benefits was a final administrative decision and no party filed a complaint within 35 days after the Funds made their final decision. The court agrees.

"Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision." 735 ILCS 5/3-103. To trigger the 35-day rule, there must be a "final administrative decision." An administrative decision is "any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency." 735 ILCS 5/3-101. An administrative agency "lacks jurisdiction to reconsider its final decisions after the expiration of the 35-day period." *Kosakowski v. Bd. of Trs.*, 389 Ill. App. 3d 381, 383-384 (1st Dist. 2009), citing *Sola v. Roselle Pol. Pens. Bd.*, 342 Ill. App. 3d 227, 231 (2d Dist. 2003) ("*Sola I*") (finding police officer's widow entitled to survivor's benefit and 3% cost of living where board lacked jurisdiction to modify earlier offering after 35-day period).

The Funds contend there was no adversarial process and no final and binding decision by an agency to trigger the 35-day rule. However, an adversarial hearing is not a requisite for a final decision in the pension context. *Fields v. Chaumburg Firefighters' Pens. Bd.*, 383 Ill. App. 3d 209, 220 (1st Dist. 2008) (definitive action and communication of decision crucial to "final" action, but not an adversarial hearing). The Funds took definitive action when they calculated and awarded the three Plaintiffs' annuities and communicated this to them, rendering the decisions final. Consequently, the Funds lack jurisdiction to reconsider these decisions after the expiration of the 35-day period.

Relying on 40 ILCS 5/11-192 and *People ex. rel Madigan v. Burge*, 2014 IL 115635, LABF contends it has exclusive jurisdiction to authorize or suspend the payment of Plaintiff Hall's annuity and the 35-day rule does not bar modification. The court is not persuaded by LABF's broad construction of section 11-192, as it is still bounded by the 35-day limitation of section 3-103. *See* 40 ILCS 5/11-231 ("The provisions of the Administrative Review Law, and all amendments and modifications thereof, and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board provided for under this Article.").

Burge is also factually and procedurally distinguishable. In *Burge,* the Illinois Supreme Court sorted the competing jurisdictional claims of the pension board and the Attorney General in a suit involving termination of pension benefits of a pensioner convicted of a felony. The Supreme Court held the Attorney General's suit could not proceed and that the board "rendered a final 'administrative decision' when it ruled on the motion to terminate Burge's pension benefits." 2014 IL 115635, ¶ 36.

Unlike *Burge,* this case does not involve an agency's original jurisdiction to terminate benefits for cause. Rather, it involves the Funds' jurisdiction, or lack thereof, to modify an applicant's pension, which is in pay status, after the 35-day review period expired, as a result of a purported error and misinterpretation of law. Illinois courts have explicitly rejected this argument. *See Kosakowski*, 389 Ill. App. 3d at 386 (police pension board lacked jurisdiction to modify after expiration of 35-day period from service of its annuity calculation); *Rossler v. Morton Grove Pol. Pens. Bd.,* 178 Ill. App. 3d 769, 773-74 (1st Dist. 1989) (pension board lacked jurisdiction to revise annuity 1½ years after giving notice of pension); *Sola I,* 342 Ill. App. 3d at 231 (same).

The supposed mistake in calculating Plaintiffs' annuities was likewise not a type of "misrepresentation, fraud, or error" allowing the Funds to modify the annuities. 40 ILCS 5/8-244(c), 11-223(b) ("The board may retain out of any future annuity, refund, or disability benefit payments such amount or amounts as it may require for the repayment of any moneys paid to any annuitant, pensioner, refund applicant, or disability beneficiary through misrepresentation, fraud or error."). There is no claim of fraud or misrepresentation in this case; rather, the focus is on "error." Yet, as to these three Individual Plaintiffs, there was no inadvertent mathematical error; rather, each was awarded the annuity intended after an individualized calculation. *See Kosakowski,* 389 Ill. App. 3d at 384, citing since-revised similar language at 40 ILCS 5/3-144.2.

MEABF's reliance on *Board of Education v. Board of Trustees*, 395 Ill. App. 3d 735 (1st Dist. 2009) is equally unpersuasive and does not permit modification of Plaintiffs Carmichael and Mahoney's annuities. MEABF argues its pension determinations before P.A. 97-0651 were not "final administrative decisions," but something closer to "systematic miscalculations" that fall outside of the ARL's 35-day rule. *Board of Education,* 395 Ill. App. 3d at 744-45. The parties in *Board of Education* are vastly different, with one entity (the municipal agency)

challenging another (the pension board), claiming the board was miscalculating pensions that would lead to a shortfall in funding the agency would have to cover.

Here, the dispute is between the pensioners and the Funds—the same Funds that calculated Plaintiffs' benefits and could have sought review within the 35-day period. There is no allegation the original calculations for Plaintiffs Carmichael and Mahoney failed to comport with the law prior to P.A. 97-0651. Even construing the original determinations as derived from a misunderstanding of a pre-clarified Pension Code, these calculations did not become less "final" by virtue of a legislative clarification. *See Sola v. Roselle Pol. Pens. Bd.*, 2012 IL App (2d) 100608, ¶ 19 ("*Sola II*") ("[E]ven though the pension board may have erred in calculating the benefits," review past the 35-day period was barred "because the statutory review period had expired.").

Ultimately, as cited above, a change in interpretation of the Pension Code, or overpayment of benefits as a result of an agency's failure to verify information, does not qualify as an error or miscalculation that subverts the 35-day rule. *See Kosakowski,* 389 Ill. App. 3d at 386; *Rossler,* 178 Ill. App. 3d at 773-74; *Sola II,* 2012 IL App (2d) 100608, ¶ 19. To rule otherwise would not only thwart the 35-day rule, "but would leave pension recipients uncertain as to their entitlement to benefits despite the fact they relied on the judgment of the Pension Board." *Rossler*, 178 Ill. App. 3d at 774-75.

Absent an error within the meaning of the Pension Code, the Funds lack jurisdiction to revise or modify the final annuities of Plaintiffs Carmichael, Mahoney, and Hall. Summary judgment on count XI is granted in favor of these three Individual Plaintiffs.

E. Constitutional Challenges

Plaintiffs attack the operative provisions of P.A. 97-0651 through several counts, articulating a variety of constitutional bases. The counts that survived to the instant cross-motions sound in the Illinois Pension Protection Clause and State and Federal Contracts and Takings Clauses.

The Pension Protection Clause states: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. 1970, art. XIII, § 5. "'If something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension

or retirement systems, it cannot be diminished or impaired.'" *Heaton v. Quinn* (*In re Pension Reform Litig.*), 2015 IL 118585, ¶ 45, quoting *Kanerva*, 2014 IL 115811, ¶ 38. This includes all pension benefits that flow directly from membership. *Kanerva*, 2014 IL 115811, ¶ 40.

The benefits protected by the Pension Protection Clause "include those benefits that are 'attendant to membership in the State's retirement systems,' including 'subsidized health care, disability and life insurance coverage, eligibility to receive a retirement annuity and survivor benefits,'" but not legislative funding for pensions. *Jones v. Mun. Emples. Annuity & Ben. Fund of Chicago*, 2016 IL 119618, ¶ 36, quoting *Kanerva*, 2014 IL 115811, ¶¶ 39, 41; *see People ex rel. Sklodowski v. State*, 182 Ill.2d 200, 226, 232 (1998) (rejecting contention that "the Pension Code establishes vested contractual rights to statutory funding levels"); *McNamee v. State of Illinois,* 173 Ill.2d 433 (1996) (same). In *Heaton,* the Supreme Court recognized constitutional protection for the pension benefit calculation formulas. *Heaton,* 2015 IL 118585, ¶ 50, quoting *Fields v. Elected Officials' Ret. Plan,* 320 P.3d 1160, 1166 (Ariz. 2014).

These constitutional protections "attach at the time an individual begins employment and becomes a member of the public pension system." *Jones,* 2016 IL 119618, ¶ 29. Therefore, "once an individual begins work and becomes a member of a public retirement system, any subsequent changes to the Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that individual." *Heaton,* 2015 IL 118585, ¶ 46; *see e.g. Jones,* 2016 IL 119618, ¶¶ 5, 61; *Kanerva,* 2014 IL 115811, ¶¶ 35, 55; *Buddell v. Bd. of Trustees,* 118 Ill.2d 99, 104-05 (1987).

1. Denial of service time for post-January 5, 2012 leaves of absence in Articles 8, 11, and 17 is unconstitutional (counts I-III A)

Using the framework above as a guide, the court cannot square these principles with the amendments to Articles 8, 11, and 17 of the Pension Code, which eliminate counting as periods of service leaves of absence for fulltime union service that did not begin before the effective date of the Act, January 5, 2012. Pub. Act 97-0651 (eff. Jan. 5, 2012) (amending 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4)).

It is uncontested that when Plaintiffs began employment and became members of the public pension system, they were able to count time spent on leaves of absence with their local labor organization in their annuity calculation. Some Plaintiffs have taken advantage of this benefit; many never will. But of critical importance is the right of existing members to exercise this benefit of membership, which vested once they joined. *See Jones,* 2016 IL 119618, ¶ 29;

Heaton, 2015 IL 118585, ¶ 46; *Buddell*, 118 Ill.2d at 103 (rejecting denial of pension credit where "military service credit was part of the applicable pension code at the time that Dr. Buddell was hired"). Because P.A. 97-0651 diminishes this benefit of membership, it is unconstitutional.

The State concedes, as it must, that an employee on a leave of absence does not stop being a public employee; instead, it contends that continued public service is a requisite to conferring constitutional protection for pension benefits. However, provided the employee or the union continues to pay the requisite employer contributions, and the worker pays the employee contributions, he or she remains a public employee and a member of the public pension system, even while engaging in fulltime private employment for a local labor organization. *See* 40 ILCS 5/8-226(c), 11-215(c)(3); *Callahan v. Bd. of Trs. of the Fireman's Pension Fund*, 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.").

Furthermore, the counting of union service time was available to participants regardless of the start date of the leaves of absence. As Judge Mikva framed it, "the right to exercise an option is protected, even before that option has, in fact, been exercised." (Dismissal Order at 8-9.) *See Buddell*, 188 Ill.2d at 105 ("It is the right to purchase the additional credits which plaintiff seeks to enforce, not the payment of additional benefits which are payable only if he is permitted to and does purchase the additional service credits."). The Pension Protection Clause acts to restrict legislative power to unilaterally diminish or impair exactly this type of benefit—a benefit expressly contained within the Pension Code. *See Id.* at 104 (giving weight to the fact the pension rights were contained in the Pension Code, not another statutory provision).

The State claims that the pre-amendment statutory leaves of absence benefit did not establish vested contractual rights, arguing the leaves of absence provision allowed participants merely to engage in private work with unions to no aid of taxpayers. The State draws support for its public/private work distinction from pension funding cases (*Sklodowski*, 182 Ill.2d at 220; *McNamee*, 173 Ill.2d 433), instances where city ordinance rather than State statute affected pension benefits (*Peters v. Springfield*, 57 Ill.2d 142 (1974)), and cases outside the Pension Protection Clause entirely (*Fumarolo v. Chicago Bd. of Educ.*, 142 Ill.2d 54 (1990)).

None of these authorities support the public/private distinction the State seeks to insert into the Pension Protection Clause. These cases establish that not every portion of the Pension

Code, such as funding provisions, garners constitutional protection. Likewise, benefits originating somewhere outside the Pension Code, such as a municipal code or ordinance, might not rise to the level of constitutional protection. The cases do not establish that vested pension rights, seated in the Pension Code, are somehow contingent on continued public work. Participants are entitled to Pension Protection Clause protection not because they performed public work, but because they are public employees with vested rights flowing from membership in the public pension systems.

The State would have this court rule, for the first time and contrary to Supreme Court precedent, that benefits codified in the Pension Code and flowing directly from membership in the public pension system are not entitled to constitutional protection. The court declines to do so. The provisions of P.A. 97-0651 amending Articles 8, 11, and 17 to deny members the benefit of counting leaves of absence for union service time in their annuity calculation unconstitutionally diminishes benefits protected under the Pension Protection Clause. Summary judgment is granted for Plaintiffs on counts I-III A.

2. Expansion of the "any pension plan" proviso in Articles 8 and 11 is unconstitutional (counts VI-VII A)

Much of the same case law cited above applies with equal force to Plaintiffs' second constitutional challenge to P.A. 97-0651. This challenge centers on expansion of the phrase "any pension plan" to now include union affiliate pension systems, rather than only those of the local labor organization.

Before P.A. 97-0651, the Pension Code allowed public employees on leaves of absence to count union service time toward their pension calculation, provided "the participant does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." 40 ILCS 5/8-226(c), 11-215(c)(3)(C). P.A. 97-0651 expands this proviso by defining "any pension plan" to now include "any pension plan in which a participant may receive credit as a result of his or her membership in the local labor organization, including, but not limited to, the local labor organization itself and its affiliates at the local, intrastate, State, multi-state, national, or international level." Pub. Act 97-0651 (eff. Jan. 5, 2012) (amending 40 ILCS 5/8-226(e), 11-215(e)).

Judge Mikva determined already that this expansion of "any pension plan" is "an amendment to, rather than a clarification of, the second pension plan proviso." (Reconsideration Order at 5-6.) The court is now called upon to decide whether this amendment to Articles 8 and

11 violates the Pension Protection Clause. The answer is yes. Expansion of this phrase to a multitude of affiliate plans diminishes a benefit that existed in the Pension Code when Plaintiffs in counts VI and VII began working and participating in the Funds. These are vested rights protected by the Pension Protection Clause. *See Jones*, 2016 IL 119618, ¶¶ 5, 29, 61 (holding unconstitutional a statute that jettisoned benefits of annual annuity increases and replaced with increases tied to Consumer Price Index, resulting in diminished annuities); *Heaton*, 2015 IL 118585, ¶¶ 45-50 (holding unconstitutional a public act that utilized five different mechanisms to reduce annuity benefits for participants); *Kanerva,* 2014 IL 115811, ¶¶ 35, 55 (holding State-subsidized health insurance plan is a benefit of membership in a pension or retirement system that could not be diminished or impaired); *Buddell,* 118 Ill.2d at 104-05 ("[U]pon the effective date of article XIII, section 5, of our 1970 Constitution, the rights conferred upon the plaintiff [to purchase military service pension credit] by the Pension Code became contractual in nature and cannot be altered, modified or released except in accordance with usual contract principles.").

Whereas before, participants in LABF or MEABF would find their time for union service excluded in the annuity calculation if they partook in only one other pension plan—the plan established by the local labor organization—P.A. 97-0651 expands the number of exclusionary plans to include not only the local labor organization itself, but its affiliates at the local, intrastate, State, multi-state, national, or international level. The impact on members is measurable. The following example is demonstrative.

Plaintiff Oscar Hall enrolled in LABF as a City of Chicago employee. When he took his leave of absence to work for Laborers' Local 1001, he enrolled in the affiliate International and District Council pension funds, rather than the pension plan established by Laborers' Local 1001. (Pl.'s Memo, Hall Aff. ¶¶ 2-13.) The ability to earn service time toward a State pension while simultaneously earning time toward a union affiliate's pension plan was a benefit that existed prior to passage of P.A. 97-0651. The amendment to Article 11 clearly diminishes this benefit to the detriment of Plaintiff Hall, and other similarly-situated participants, who are now stripped of time for years of service to which they were entitled, provided they did not enroll in any plan established by the local labor organization.

The State argues the original "any pension plan" exclusion was intended to bar all double counting of service time, whether earned from the local labor organization or any one of its affiliates, and it would be "absurd" to follow the plain meaning of the text. Plaintiffs respond

that the court must not substitute its judgment for a legislature's judgment, no matter how unwise the legislation, unless it exceeds constitutional limits. *See Hoffmann v. Clark*, 69 Ill. 2d 402, 424 (1977). Moreover, had the legislature wanted to all bar double counting of service time, it easily could have done so by using different language. The court agrees with Plaintiffs. The legislature could have drafted the original exclusion far more broadly to forestall the amendments in P.A. 97-0651. It did not. It specifically limited double counting of union service time where the participant receives credit in "any pension plan established by *the* local labor organization based on his employment by *the* organization." 40 ILCS 5/8-226(c), 11-215(c)(3)(C) (emphasis added).

Even the State concedes Plaintiffs' plain and narrow reading of the text is the natural one, albeit purportedly absurd. (Oral Argument Trans. at 46:1-10, "We don't dispute that the immediate natural reading of that is, 'only the local chapter of the union that employs you.'") However, the State cites no precedent, "legislative history[,] or other reliable indicia of legislative intent" (Reconsideration Order at 5) to support its proposed broad interpretation, which negatively affects pensioners. "Under settled Illinois law, 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.

Given the plain language and natural reading of the "any pension plan" proviso, the lack of legislative history, and the clear diminishment of vested rights through P.A. 97-0651, the court grants summary judgment to Plaintiffs on counts VI-VII A.

3. Contracts and Takings Clauses (counts I-III B-E and VI-VII B-E)

The court's rulings above on the Pension Protection Clause avoids the need to address Plaintiffs' State and Federal Contracts Clause and Takings Clause claims, which derive from the same cloth. As the Supreme Court held in *Kanerva,* 2014 IL 115811, ¶ 58, "[b]ecause plaintiffs have obtained all the relief that they seek, any comment on their other claims would be advisory and in conflict with traditional principles of judicial restraint." Following this directive, the court does not address Plaintiffs' counts I-III B-E and VI-VII B-E.

F. Declaratory and Equitable Relief (counts X and XII-XIV)

In counts X and XII-XIV, Plaintiffs seek declaratory and injunctive relief based on the court's powers of equity. In counts X and XII, they seek a declaration that the "any pension plan" proviso does not cover defined contribution plans, but only defined benefit plans. In counts

XIII and XIV, they ask the court to avoid the effect of Judge Mikva's ruling on the "highest average annual salary" calculation on theories of contract and estoppel.

1. Plaintiffs are not entitled to the declarations they seek regarding defined contribution plans (counts X and XII)

In count X, Plaintiffs Carmichael and Lopez seek a declaration that the "any pension plan" proviso does not preclude them from counting their union service time in the MEABF where they took part in the CTU's defined contribution plan, as opposed to a defined benefit plan. In count XII, Plaintiffs Mahoney and Notaro seek the same declaration against the MEABF based on their participation in IBEW Local 9's defined contribution plan. Plaintiffs' claims for declaratory relief exist independent of the court's ruling on the new definition in P.A. 97-0651, expanding the "any pension plan" proviso (section E 2 *supra*), and relates purely to the original language of section 8-226(c)(3). 40 ILCS 5/8-226(c)(3).

As a threshold matter, Plaintiffs have established the basic elements for a declaratory judgment regarding the declaration sought in counts X and XII, namely: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests. 735 ILCS 5/2-701; *Beahringer v. Page*, 204 Ill.2d 363, 372 (2003). However, Plaintiffs are not entitled to summary judgment in their favor on these counts.

Plaintiffs argue that, unlike the MEABF, the defined contribution plans at issue in counts X and XII are based on the workers' and their employers' contributions, not any formula factoring years served and highest salary earned. (*See* Sharkey Aff., Exs. E (CTU000365-67), F (CTU001169-71); Notaro Aff. (for IBEW Local 9), Ex. H (JN001638-39).) They contrast these plans with the language in section 8-226(c)(3), which counts leaves of absence time spent at a local labor union toward the annuity calculation, provided "the participant does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." 40 ILCS 5/8-226(c)(3). Plaintiffs latch on to the phrase "receive credit," claiming it makes no sense to say a participant could be credited under a defined contribution plan the way time spent on union leaves of absence is credited to the annuity calculation.

Plaintiffs' reading cannot be squared with the plain language of section 8-226(c)(3). The phrase "any pension plan" is not defined in the Pension Code, and the plain and ordinary meaning of "any pension plan" does not refer exclusively to defined benefit plans. "Any" means

any, and pensions come in all shapes and sizes, ranging from defined benefit to defined contribution to hybrid plans in between.

MEABF draws the court's attention to Webster's New World Dictionary and federal ERISA definitions of "pension," both of which broadly cover plans beyond the defined benefit category. *See* 29 U.S.C.A. § 1002(2)(A). Black's Law Dictionary likewise defines "pension" broadly as "[a] fixed sum paid regularly to a person (or to the person's beneficiaries), esp. by an employer as a retirement benefit." Black's Law Dictionary 531 (3rd pocket ed. 2006). The broad utility of the term "pension" is borne-out by Plaintiffs' own plans predicating counts X and XII, which expressly refer to themselves as "pensions" on plan documents and statements of participants. (*See e.g.* Notaro Aff., ¶ 22, Ex. G (referring to "Local 9, IBEW and Outside Contractors Defined Contribution Pension Fund"); MEABF Memo, Exs. C at 4, D at 6.)

The court rejects Plaintiffs' narrow reading of the word "credit" as exclusively applied to crediting time spent employed by a union. "Credit" is undefined in the Pension Code, and section 8-226 uses the term "credit" only twice—once in the quoted provision above at 8-226(c)(3) and again in the section 8-226(e) added by P.A. 97-0651. Outside of section 8-226, the Pension Code uses the term "credit" in a variety of ways—some indicating credit for time served, others indicating credit for monetary contributions or interest credit to an account.

MEABF correctly notes that the Local 9 Pension Summary Plan Description (Memo at 18, Ex. E at 2) references investment gains "credited," amounts in an account "credited," and employer contributions "credited." In the absence of a clear legislative intent to equate "credit" exclusively with factoring years of service in a pension calculation, the court is loath to unnaturally narrow the meaning of this undefined term, given the broad spectrum of pension options available and the plain language "any pension plan."

Finally, MEABF correctly notes that the legislature distinguishes between defined benefit and defined contribution plans throughout the Pension Code, but tellingly not at section 8-226. *See* 40 ILCS 5/2-165, 2-166, 14-156, 15-155, 15-200, 15-201, 16-205, 16-206, 20-124. The legislature is clearly capable of distinguishing the two types in legislation and did not do so, even when clarifying other provisions through P.A. 97-0651, which took effect in 2012. The court's decision today may prompt the legislature to take a different view and amend the Pension Code again, but it is a stretch to think the legislature was unaware of defined contribution plans in 2012 or 1987, for that matter. While 401(k) plans may not have been commonplace in 1987,

they first surfaced in the Revenue Act of 1978, which added permanent provisions to the Internal Revenue Code authorizing them, and major corporations began using them.

The court is mindful of the directive from *Kanerva* to "liberally construed in favor of the rights of the pensioner" on matters of statutory interpretation. 2014 IL 115811, ¶ 55. However, Plaintiffs are not seeking a mere liberal construction of an ambiguous provision, but the outright insertion of limiting terms to the otherwise clear and general phrase "any pension plan." This is beyond the court's powers of construction. Therefore, Plaintiffs are not entitled to the declaration they seek. Summary judgment is granted for Defendants on counts X and XII.

In the alternative, Plaintiffs seek three limiting declarations, asking the court to declare that section 8-226(c)(3) does not bar MEABF allowance of union service where the participant: (1) retroactively waived or forfeited contributions to a defined contribution plan; (2) did not receive employer contributions to such a plan; or (3) enrolled in a plan where employer contributions are not accepted. The court declines to do so.

First, this relief does not appear in the Original or Supplemental Complaints. Second, MEABF is correct that this court is prohibited from issuing advisory opinions, and the controversy regarding the three limiting declarations is not yet ripe. Third, even if the declaratory judgment elements were shown, the limiting language Plaintiffs would have the court declare has no textual support in the statute. The terms "waive" and "forfeit" appear nowhere in section 8-226, nor do the concepts feature as a brake to that section's operation. Although "employer contributions" are a prerequisite under section 8-226(c)(2) to counting union service time, the absence of such contributions does not necessarily nullify the disqualification found in the "any pension plan" proviso. Section 8-226(c)(3) bars the counting of union service time where the participant "receive[d] credit in any pension plan established by the local labor organization…," without any caveat that "establishing" the pension plan means "establishing and contributing to" that plan. Thus, Plaintiffs are not entitled to the limiting declarations they seek.

2. Plaintiffs do not have a contractual right to apply their union salaries to annuity calculations (count XIII)

As noted above, Judge Mikva dismissed counts IV and V, ruling that the changes in P.A. 97-0651 to the "highest average annual salary" calculation were valid legislative clarifications, and constitutional. (Reconsideration Order at 6-10.) In count XIII, Individual and Union Plaintiffs seek a declaration that application of this "new interpretation" of Articles 8 and 11 against Plaintiffs would breach their contractual rights to use their union salaries, where: (1) for

20 years, the Funds offered annuities based on union salaries; (2) Plaintiffs accepted this offer; and (3) all Plaintiffs paid consideration in the form of, respectively, employee and employer contributions based on the higher union salaries.

Plaintiffs recognize that courts have held contracts entered into by government entities, which are contrary to statute, are unenforceable. (Memo at 30, citing *McMahon v. City of Chicago,* 339 Ill. App. 3d 41, 48 (1st Dist. 2003).) They claim, however, Judge Mikva's ruling represents a "new interpretation," which was not contrary to statute, as evidenced by the Funds' 20-year unbroken practice of interpreting the Pension Code to apply the union salaries as the "highest average annual salary" in the annuity formula.

At the outset, Judge Mikva's decision that the change in P.A. 97-0651 was a clarification, not an amendment, forestalls Plaintiffs' claim of a "new interpretation." Under this analysis, Judge Mikva's interpretation is the only viable one. Moreover, Plaintiffs' theory that past practice creates contractual rights, runs afoul of the general rule that, "laws do not create private contractual or vested rights, but merely declare a policy to be pursued until the legislature ordains otherwise." *Sklodowski,* 182 Ill.2d at 231. An exception to this rule is in the Pension Protection Clause context, where rights found in the Pension Code and flowing from membership in the public pension system, create vested contractual rights. However, Judge Mikva's ruling already addressed whether Plaintiffs have vested contractual rights to apply union salaries in the annuity calculations. She held they do not.

This bears emphasizing, given the Supreme Court's pronouncement in *Sklodowski* that "[t]here is no vested right in the mere continuance of a law." 182 Ill.2d at 232. If there is no vested right in the continuance of a law, there certainly cannot be a vested contractual right in the continued application of a since-clarified law. Stripped from the "offer, acceptance, consideration" framework, count XIII is really a faint echo of the estoppel theory found in count XIV, discussed below. Defendants are granted summary judgment on count XIII.

3. The Funds are not estopped from limiting the "highest salary" calculation to public salaries (count XIV)

Plaintiffs' count XIV seeks a declaration that the Funds are equitably estopped from retroactively applying Judge Mikva's ruling regarding the "highest average annual salary" clarification, barring annuities calculated based on union salaries. They further ask the court to use principles of fairness and equity to apply the "highest average annual salary" decision prospectively only. Neither claim prevails.

"[G]enerally a finding of equitable estoppel against a public body is not favored." *Rossler*, 178 Ill. App. 3d at 775. "Illinois courts have consistently held that the doctrine of equitable estoppel will not be applied to governmental entities absent extraordinary and compelling circumstances." *Matthews v. Chi. Transit Auth.*, 2016 IL 117638, ¶ 94. A plaintiff invoking equitable estoppel against a government entity must plead specific facts that show: (1) an affirmative act by either the public body or an official with express authority to bind the public body; and (2) reasonable reliance upon that act by the plaintiff that induces the plaintiff to detrimentally change its position. *Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40. The party asserting estoppel must prove it by "clear, precise, and unequivocal evidence." *Chemical Bank v. American Nat'l Bank & Trust Co.*, 180 Ill. App. 3d 219, 227 (1st Dist. 1989).

Plaintiffs claim the Funds, as administrators of the pension systems under Articles 8 and 11, maintained a 20-year practice of granting annuities based on union salaries. During this time, the Funds gave Plaintiffs estimates of pension annuities predicated on union salaries. This, according to Plaintiffs, amounts to an inducement of reliance by agents with authority to bind the State. Next, Plaintiffs argue they reasonably relied on this 20-year practice in arranging their contribution and retirement plans, given the uniform interpretation of Articles 8 and 11 of the Pension Code prior to P.A. 97-0651. Plaintiffs submit affidavits and exhibits to support the detrimental nature of their reliance on this reading. The court is not persuaded.

It is true the Funds can act as agents of the State. *See Pisani*, 2017 IL App (4th) 160417, ¶ 26 ("Pisani has a pension contract not with defendant [municipal employer], but with the State—or with the Fund's eight-member board, which is an agency or instrumentality of the State.") (quotations omitted). However, in the estoppel context, "[t]he affirmative act which prompts a party's reliance must be an act of the public body itself . . . rather than the unauthorized acts of a ministerial officer or a ministerial misrepresentation." *Halleck v. Cty. of Cook*, 264 Ill. App. 3d 887, 893-94 (1st Dist. 1994); *see also Patrick Eng.*, 2012 IL 113148, ¶ 37 ("[E]quitable estoppel may apply against a municipality only based on statements and conduct by municipal officials who possess actual authority.").

Simply put, the Funds do not have express authority to contravene the law as articulated by the State in the Pension Code. *Matthews*, 2016 IL 117638, ¶ 98 ("[A] municipal corporation cannot be obligated under a contract implied in fact that is *ultra vires*, contrary to statutes, or contrary to public policy."). Notwithstanding Plaintiffs' reading, *Matthews* is not inapposite to

this case. (*See* Pl. Reply at 25-26.) There, the Supreme Court ruled the Chicago Transit Authority ("CTA") could only be contractually bound by official action taken by the Chicago Transit Board ("Transit Board"). As the Transit Board made no inducements to provide benefits, a CTA employee could not act to bind the Transit Board in a manner contrary to its official actions or policies. *Matthews*, 2016 IL 117638, ¶ 99.

According to Plaintiffs, the CTA and Transit Board in *Matthews* cannot be analogous to the Funds and the State in the instant case where the Funds sit in the same benefit-dispersing position as the Board, not the CTA. (Pl. Reply at 25.) This is incorrect. *Matthews* is analogous because the Funds cannot act to bind the State in a manner contrary to the Pension Code, just as the CTA could not bind the Transit Board to the contravention of the Transit Board's policies. Thus, Plaintiffs' estoppel theory falters for lack of express authorization, in that, the Funds are unable to confer a benefit beyond what the law permits.

As with their jurisdictional limits (section D *supra*), the Funds' authority to administer annuities also begins and ends with the Pension Code. They cannot award an annuity greater than what the Code permits, and Judge Mikva's ruling made clear that the salary calculation clarified by P.A. 97-0651 mandates what the Code permits. Even if Plaintiffs were able to show an inducement analogous to the inducement in *Rossler*, such an inducement would be *ultra vires*, given the limits of the Pension Code. Defendants are therefore entitled to summary judgment on count XIV.

Lastly, Plaintiffs contend fairness and equity require this court to apply Judge Mikva's ruling on the "highest average annual salary" prospectively only. "Generally, judicial decisions are given retroactive as well as prospective effect." *Exelon Corp. v. Dep't of Revenue*, 234 Ill.2d 266, 285 (2009). "However, this court has the inherent power to conclude that a decision will not apply retroactively, but prospectively." *Id.* "[W]here an amendment merely clarifies existing law . . . the amendment applies retroactively." *Falato v. Teachers' Ret. Sys.*, 209 Ill. App. 3d 419, 425 (1st Dist. 1991) (finding amendment to the Pension Code was merely a definitional clarification that applied retroactively).

Whether a decision will be applied prospectively only depends on if: (1) the decision establishes a new principle of law, either by overruling past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) given its purpose or history, the decision's operation will be impeded or

promoted by prospective or retroactive application; and (3) a balance of the equities mandates prospective application. *Exelon*, 234 Ill.2d at 285.

Plaintiffs contend Judge Mikva's ruling was a new interpretation that "overruled 20 years of administrative agency precedent." (Pl. Memo at 26.) In actuality, Judge Mikva held that P.A. 97-0651's changes to the "highest average annual salary" calculation are a constitutional clarification establishing the sole permissible interpretation of this provision of the Pension Code. Her decision did not establish a new principle of law, nor did it overrule past legal precedents. It may have deflated Plaintiffs' expectations, but this is insufficient to apply it prospectively only.

Ultimately, the State is correct that the court does not have unrestricted equitable powers to make judgments on legislative enactments prospective only. In *Exelon*, the Supreme Court tellingly referred to its own supreme power to shape new rulings of law, stating "[g]enerally, judicial decisions are given retroactive as well as prospective effect . . . [h]owever, this court has the inherent power to conclude that a decision will not apply retroactively, but prospectively." 234 Ill.2d at 285, citing *Deichmueller Constr. Co. v. Industrial Com.*, 151 Ill.2d 413, 416 (1992) (finding appeal bond insufficient on new interpretation of law, to be applied prospectively only), and *Elg v. Whittington*, 119 Ill.2d 344, 356 (1987) (affirming dismissal for untimely notice of appeal, but applying rule prospectively to appeals filed or due to be filed after the date of its decision).

In short, Plaintiffs' claim for prospective-only application fails for the same reason its equitable estoppel theory is unsound—the court cannot order the Funds to disburse annuities in a manner contravening the letter of the Pension Code. *Matthews*, 2016 IL 117638, ¶ 98. Judge Mikva's decision deemed the "highest average annual salary" provisions of P.A. 97-0651 a legislative clarification, which, under the general rule, warrants retroactive application. *Exelon*, 234 Ill.2d at 285; *Falato*, 209 Ill. App. 3d at 425. Although Plaintiffs have presented evidence of the potential hardship flowing from the General Assembly's clarification, this court does not have unrestrained power to lighten that burden.

G. Severability of Unconstitutional Provisions

The severability of unconstitutional provisions turns on a question of statutory construction, which "primarily involves ascertaining and giving effect to the intent of the legislature." *Heaton*, 2015 IL 118585, ¶ 91. "In determining whether a statutory provision

containing an unconstitutional portion may be severed from the rest of a statute, we look first at the statute's own specific severability provision, if it has one." *Id.* The severability provision "creates a rebuttable presumption of legislative intent." *Jones*, 2016 IL 119618, ¶ 57. To rebut the presumption, the court must "determine whether the legislature would have passed the law without the invalid parts," considering whether the legislative purpose in passing the Act is "significantly undercut or altered" by eliminating the invalid sections. *Id.* (affirming circuit court finding that legislature would not have enacted P.A. 98-0641 without invalid annuity provisions, where clause dictated they were "inseverable" and analysis of the statutory mechanisms confirmed); *Heaton* 2015 IL 118585, ¶ 96 (same).

Applying these principles, the court notes the sole severability provision is at section 98 of P.A. 97-0651, which states: "The provisions of this Act are severable under Section 1.31 of the Statute on Statutes." Pub. Act 97-0651 (eff. Jan. 5, 2012). This creates a rebuttable presumption, which is confirmed by the operation of the provisions at issue in P.A. 97-0651.

The provisions denying counting of service time for leaves of absence that did not begin before January 5, 2012, and expanding the "any pension plan" proviso, are severable from the constitutional provisions in the Act. These two mechanisms end the counting of time for leaves of absence while working fulltime for a local labor organization, and expand the number of pension plans triggering the exclusion of such service in the pension annuity calculation. The constitutional "highest average annual salary" clarification does not meaningfully intersect or depend on the two voided mechanisms. Unlike *Jones* and *Heaton*, which involved interdependent statutory provisions buttressed by a legislative statement of inseverability, the unconstitutional provisions can stand on their own and ought to be severed from the remainder of P.A. 97-0651.

CONCLUSION

IT IS ORDERED:

1. Plaintiffs' motion for summary judgment is granted on count XI.
2. Plaintiffs' motion for summary judgment is denied on counts X and XII-XIV, and summary judgment is granted for Defendants on these counts.
3. Plaintiffs' motion for summary judgment is granted on counts I-III A and VI-VII A. The court declares the following two provisions of P.A. 97-0651

unconstitutional because they diminish or impair pension benefits in violation of the Pension Protection Clause, Ill. Const. 1970, art. XIII, § 5:

(a) Denial of service time for leaves of absence that did not begin before the effective date of the Act during which a participant is employed fulltime by a local labor organization in Articles 8, 11, and 17; and

(b) Expansion of the "any pension plan" proviso to cover union affiliate plans in Articles 8 and 11.

4. Defendants and the State are enjoined from enforcing or implementing the two provisions of P.A. 97-0651 (specified above in ¶3).

5. In accordance with Supreme Court Rule 18, the court makes the following findings:

(a) Two provisions of P.A. 97-0651 (specified above in ¶3) are declared unconstitutional as applied to the case *sub judice*; the parties stipulate that the claims in this case do not include any challenge to the validity of the Act as applied to individuals who were not public employees and members of any of the Defendant Pension Funds before the Act took effect;

(b) These two provisions cannot reasonably be construed in a manner that would preserve their validity;

(c) A finding of unconstitutionality is necessary to the judgment rendered, and the court's judgment cannot rest upon an alternative ground;

(d) These two unconstitutional provisions can be, and are hereby, severed from the remainder of the statute; and

(e) The State of Illinois was notified of the action and has intervened and participated in the proceedings.

6. Because the court's rulings on counts I-III A and VI-VII A gives Plaintiffs all the relief they seek, the court makes no comment on counts I-III B-E and VI-VII B-E.

7. Plaintiffs' claim and petition for attorney's fees is entered and continued.

8. Pursuant to Supreme Court Rule 304(a), there is no just reason to delay enforcement or appeal or both of the court's judgments with respect to the following claims in Plaintiffs' complaint and April 29, 2016 first supplemental complaint, which are resolved by this Final Amended Order and Judge Mikva's November 27, 2013 and September 29, 2014 Orders:

(a) Counts I F-G, II F-G, III F-G, IV A-H, V A-H, VI H, VIII A-B, and IX A-B, which were dismissed with prejudice, pursuant to the November 27, 2013 and September 29, 2014 Orders; and

(b) Counts X, XII, XIII, and XIV, granting summary judgment in favor of Defendants and against Plaintiffs, and Counts I-III A, VI-VII A, and XI A-B, granting summary judgment in favor of Plaintiffs and against Defendants, pursuant to this Amended Final Order.

9. The relief contained in the court's March 14, 2013 interlocutory Order is terminated in light of entry of this Amended Final Order on the claims listed in paragraph 8 above. Termination of that relief is without prejudice to any individual's right under applicable law to request a transfer to this court, or to Chancery Calendar 6, of any action seeking administrative review of any final administrative decision by any of the Defendant Pension Funds that involves any issue relating to the Act's application or to any question addressed in this case.

10. In accordance with paragraphs 8 and 9 above, the Clerk of Court is directed to disburse the funds in the escrow account created pursuant to the court's March 14, 2013 Order (the "Escrow Account") at the request of the parties and in accordance with the provisions of that Order and the court's judgments set forth in this Amended Final Order and Orders entered November 27, 2013 and September 29, 2014.

11. In anticipation of appeal, pursuant to the court's inherent authority and as contemplated by Supreme Court Rule 305, the court orders a stay pending any appeal, without bond, of enforcement of paragraph 10 above and the court's judgment to the extent it requires the Clerk of Court to remit monies in the Escrow Account to the Defendant Pension Funds or contributing parties. During any such appeal or until further order of this court, the parties and the Clerk of Court shall continue to make deposits into, and hold such deposits in, the Escrow Account in the same manner as provided in the March 14, 2013 Order. The parties agree to the form of this stay.

Judge Celia Gamrath

JUL 14 2017

Circuit Court

ENTERED:

Judge Celia Gamrath, #2031
Circuit Court of Cook County, Illinois

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12/14/15	Notice of Filing	C 1620
12/14/15	Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago's Opposition to Plaintiffs' Motion to Compel	C 1621-1626
	9/3/13 Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago's Reply In Support of Its Supplemental Motion To Dismiss	C 1627-1634
	11/3/15 Rule 206(a)(1) Deposition Transcript of Joan Newman	C 1635-1643
	LABF Exhibit D: 8/4/05 Ltr To Hall Re: Accruing Service Credit, Enclosing Contribution Rate Schedule	C 1644-1647
	Certificate of Service	C 1648
12/18/15	Order: Motion To Compel Granted; Cupasso Dep To Be Held Before Close of Discovery, Limited To 3 Hrs	C 1649
1/21/16	Notice of Filing Certificates of Service	C 1650
1/21/16	Certificates of Service	C 1651-1654
1/29/16	Order: Discovery Completed By 3/4/16; Status 3/9/16	C 1655
3/8/16	Agreed Order: 3/9/16 Status Date Stricken; Status 3/31/16	C 1656
4/4/16	Order: Parties May File Suppl Pleadings In Lieu of Entire Amended Complaints, Due 4/22/16	C 1657-1658
4/22/16	Notice of Motion	C 1659-1661
4/22/16	Plaintiffs' Motion For Leave To File 1st Supp. Complaint Injunctive Relief Requested	C 1662-1667
	Exhibit A: 1st Supp. Complaint	C 1668-1690
	4/4/16 Order	C 1691-1692
	10/10/14 Order	C 1693-1694
	3/29/16 Letter To Mahoney Re: Spousal Annuity	C 1695-1696
	11/29/11 Transcription Debate	C 1697-1718
	4/22/16 Notice of Death of Plaintiff Mahoney	C 1719-1720
4/29/16	Notice of Filing Plaintiffs' 1st Suppl Complaint	C 1721-1722
4/29/16	1st Suppl Complaint Injunctive Relief Requested	C 1723-1746

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4/29/16	Order: Plaintiff's Motion To File, Granted; Answers To Suppl Complaint Due 5/27/16; Brief In Support of Motions May Be Up To 25 Pages; Status 7/13/16	C 1747
5/27/16	Notice of Filing Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago's Answer to 1st Supplemental Complaint	C 1748
5/27/16	Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago's Answer to 1st Supplemental Complaint	C 1749-1775
5/31/16	Notice of Filing Retirement Board of Municipal Employees Answer To Plaintiffs' 1st Suppl Complaint	C 1776-1778
5/31/16	Notice of Filing Retirement Board of Municipal Employees Answer To Plaintiffs' 1st Suppl Complaint	C 1779-1810
6/15/16	State's Answer to Plaintiffs' 1st Suppl Complaint	C 1811-1829
7/6/16	Agreed Order: 6/30/16 Dispositive Motion Deadline Stricken; 7/13/16 Status Hearing Stricken; Status 7/26/16	C 1830
7/26/16	Agreed Scheduling Order Re Motions for Summary Judgment	C 1831-1832
7/26/16	Stipulation Re Scope of Claims to be Adjudicated	C 1833-1834
10/28/16	Notice of Filing MEABF's Cross Motion For Summary Judgment Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment And In Support of MEABF's Cross Motion For Summary Judgment And Exhibits A-G	C 1835-1838
10/28/16	MEABF's Cross-Motion For Summary Judgment	C 1839-1844
10/28/16	MEABF's Memorandum In Opposition To Plaintiffs' Motion For S/J And In Support of MEABF's Cross Motion For Summary Judgment	C 1845-1874
10/28/16	Exhibits A-G (cover page) Exhibit A: HB 3813 Exhibit B: 9/27/14 Opinion Exhibit C: 7/1/95-6/30/99 Agreement Between Chicago Teachers Union And The Professional Staff of Chicago Teachers Union Exhibit D: 7/1/06-9/30/06 AIG Retirement Account Statement Exhibit E: Summary Description of Defined Contribution Pension Plan	C 1875- C 1876-1882 C 1883-1892 C 1893-1900 C 1901-1907 C 1908-1911

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	Exhibit F: 2007 Summary Plan Description No. 9 IBEW And Outside Contractor Pension Fund	C 1912-1915
	Exhibit G: Combined Profit Sharing/Money Purchase Plan Basic Document	C 1916-1917
10/28/16	Notice of Filing Laborers' & Retirement Board Employees' Annuity and Benefit Fund of Chicago's Cross-Motion for Summary Judgment and Memorandum in Support of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago's Cross-Motion for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment	C 1918-1919
10/28/16	Laborers' & Retirement Board Employees' Annuity and Benefit Fund of Chicago's Cross-Motion for Summary Judgment	C 1920-1921
10/28/16	Memorandum In Support of Laborers' & Retirement Board Employees' Annuity and Benefit Fund of Chicago's Cross-Motion for Summary Judgment And In Opposition To Plaintiffs' Motion for Summary Judgment	C 1922-1942
	5/9/13 Report of Proceedings	C 1943-1947
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	Webster's Definitions	C 1954-1956
	9/29/14 Opinion	C 1957-1966
10/28/16	State's Memorandum In Support of Motion For Summary Judgement And In Opposition To Plaintiffs' Cross-Motion For Summary Judgment	C 1967-1989
10/28/16	State's Motion For Partial Summary Judgment	C 1990-1991
12/2/16	Affidavit of Luscombe III	C 1992-1995

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	Exhibit A: 5/9/13 Order	C 1996-1998
	Exhibit B: 5/9/13 Report of Proceedings	C 1999-2108
	Exhibit C: Notice of Filing	C 2109-2112
	12/2/16 Retirement Board's Motion To Join Motion To Dismiss, Memorandum, Reply Brief And All Oral Agmts Made On 5/9/13	C 2113-2162
12/8/16	Agreed Scheduling Order	C 2163-2165
12/21/16	Agreed Scheduling Order on Parties' Motions for Summary Judgment	C 2166-2168
1/27/17	Notice of Filing MEABF's Reply In Support of Its Cross-Motion For Summary Judgment	C 2169-2172
1/27/17	MEABF's Reply In Support of Its Cross-Motion For Summary Judgment	C 2173-2187
	Exhibit A: Summary Description of Defined Contribution Pension Plan	C 2188-2197
	Exhibit B: Combined Profit Sharing/Money Purchase Plan Basic Document	C 2198-2209
	Exhibit C: 2007 Summary Plan Description No. 9 IBEW And Outside Contractor Pension Fund	C 2210-2226
1/27/17	Notice of Filing Laborers' & Retirement Board Employees' Annuity And Benefit Fund of Chicago's Reply In Support of Its Motion For Summary Judgment	C 2227
1/27/17	Laborers' & Retirement Board Employees' Annuity And Benefit Fund of Chicago's Reply In Support of Its Motion For Summary Judgment	C 2228-2242
	Exhibit 1: 12/21/16 Letter From LABF To Torres	C 2224-2245
	Exhibit 2: 12/8/16 Letter From LABF To Torres Re: Annuity Estimate	C 2246-2248
	Exhibit 3: 3/14/13 Order	C 2249-2253
	Exhibit 4: 7/26/16 Stipulation	C 2254-2255
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1/31/17	Hearing Date Order	C 2270
4/6/17	Parties Cross-Motions Taken Under Advisement; Supplemental Briefs Due 4/20/17, Limited To 5 Pages	C 2271
4/20/17	State's Memorandum Re: Recent Precedent	C 2272-2275
4/20/17	Plaintiffs' Supplemental Brief Re: Pisani In Support of Their Motion For Summary Judgment And In Opposition To Defendants' Cross-Motions For Summary Judgment	C2276-2280
6/7/17	Order and Opinion on Motions for Summary Judgment	C 2281-2305
6/16/17	Agreed Order: Status Set For 6/19/17	C 2306
	Spindled Motion Form	C 2307
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6/19/17	State's Unopposed Section 2-1203 Motion To Amend 6/7/17 Judgment	C 2311-2313
6/19/17	Continuance Order: Continued On 7/14/17	C 2314
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6/30/17	Notice of Motion	C 2317-2320
6/30/17	Plaintiffs' Motion For Attorney's Fees, IL Sup. Ct. Rule 304 Clarification, Modification of Escrow Order & Stay of Enforcement of Order Modifying Escrow Order Pending Appeal	C 2321-2328
	Exhibit A: 3/14/13 Order	C 2329-2334
7/14/17	Final Amended Memorandum Opinion And Order On Motions for Reconsideration	C 2335-2359
7/26/17	Agreed Order: Clerk To Correct Appearance List	C 2360-2364
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8/31/17	Letter To Dowd, Block Re: Transcripts Are Completed, Ready To File	C 2381
9/8/17	Amended Notice of Cross-Appeal	C 2382-2384
9/13/17	Letter To Clerk Requesting Correction of Notice of Cross-Appeal	C 2385
9/27/17	Notice of Direct Appeal	C 2386-2387
8/22/17	Letter To Luscombe Re: 4/6/17 Transcript of Proceedings Completed, Ready To File	C 2388

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10/2/13	Motions to Dismiss	R 110-235
8/20/14	Motions for Reconsideration	R 236-315
4/6/17	Motions for Summary Judgment	R 316-468

Verified Certificate of Filing and Service

On February 20, 2018, I electronically filed this Brief of Intervenor Appellant, State of Illinois *ex rel.* Lisa Madigan, Attorney General ("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 February 20, 2018, I also served this Brief on each of them by e-mail to their e-mail addresses of record, listed below.

Peter Dowd, *jpdowd@laboradvocates.com*
George Luscombe, *gluscombe@laboradvocates.com*
Cary E. Donham, *cdonham@taftlaw.com*
Vince Pinelli, *vpinelli@bpp-chicago.com*
David Huffman-Gottsching, *davidhgajbosh.com*

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.

/s/ *Richard S. Huszagh*

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