Nos. 122793 & 122822 (consol.)

IN THE SUPREME COURT OF ILLINOIS

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

COMBINED APPELLEE/APPELLANT BRIEF OF PLAINTIFFS-APPELLEES/APPELLANTS

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

POINTS AND AUTHORITIES

Response to State's Appeal Case No. 122793

NATURE OF THE CASE

Most of the issues in these consolidated appeals arise from new restrictions imposed in 2012 by Illinois Public Act (P.A.) 97-0651 (the "Act") on the plaintiff retirement system members' rights to contribute to the funds for pension service credit during leaves of absence to work for local labor organizations representing public employees, and the calculations of pensions based on such service credit.

For decades, members in the three defendant pension funds had the right to contribute to the funds for such "union service credit" on leaves of absence from their City of Chicago ("City") or Chicago Board of Education ("Board of Education") jobs. Dozens of employees and retirees, including the individual plaintiffs and their unions, contributed to the funds for this union service credit. But following negative articles in the press, in 2012 the General Assembly enacted P.A. 97-0651 which made multiple changes to these union service credit benefits, two of which are at issue in these appeals.

First, the Act eliminated members' right to contribute to the funds and earn union service credit for leaves of absence beginning after the effective date of the Act, January 5, 2012. Plaintiffs alleged that this elimination of the option to earn union service credit, even if not yet exercised before the Act, diminished the retirement system benefits of current members in violation of Ill. Const. art. XIII, § 5 (the "Pension Clause"). The State of Illinois, as intervenor-defendant (the "State"), defended the Act's elimination of benefits as permissible, arguing that the Pension Clause should not be construed to protect benefits based on "private employment." The circuit court rejected that argument holding that the union service credit benefit was protected by the Pension Clause because it was provided for in the Pension Code and derived from membership in the three defendant retirement systems. The court granted plaintiffs summary judgment on their

Pension Clause counts challenging these amendments (and denied the defendants' cross motions). Pursuant to Rule 302(a), the State appealed that judgment to this Court.

Second, applicable to the Municipal Employees Annuity & Benefit Fund of Chicago ("MEABF") and the Laborers' and Retirement Board Employees Annuity & Benefit Fund of Chicago ("LABF"), the Act's amendments stated that only a salary paid by one of the defined public employers could be used to calculated members' "highest average annual salary," which is the salary base for members' pensions. As a result, LABF and MEABF members with union service credit could not calculate their pensions based on the salaries they earned from their unions and upon which they contributed to the funds during leaves of absence. This upset decades of practice by the LABF and MEABF granting pensions calculated using union salaries under the previous provisions of Articles 8 and 11 of the Pension Code. The Act's amendments further stated that for members with union service credit, the highest average annual salary should be calculated based on the highest four years in the 10 years before their leaves of absence, rather than the 10 years before their retirements like all other LABF and MEABF members. Plaintiffs alleged that these new limitations on their pensionable salary base were also unconstitutional diminishments of their retirement system benefits.

Again defending the Act's amendments, the State argued that the Pension Code never permitted LABF and MEABF members to calculate their pensions based on a union salary, and therefore, the Act was a permissible "clarification" of the law and not a diminishment in benefits. The circuit court initially agreed with plaintiffs, finding that the prior legislative language and intent was to allow contributions and benefits based upon the salaries paid by the unions to the employees on leaves of absence and that the Act

was not a "clarification." Upon the State's motion for reconsideration the court reversed position and accepted the State's argument that the word "salary" in Articles 8 and 11 of the Pension Code could only refer to a salary paid by a public entity. The court, therefore, dismissed plaintiffs' constitutional claims relevant to these amendments on the pleadings pursuant to 735 ILCS 5/2-615. Plaintiffs appealed the dismissal of these counts.

Plaintiffs also requested declaratory judgments from the circuit court that (1) LABF and MEABF members who had contributed to the funds for union service credit had contractual rights to calculate their pensions based on union service credit and (2) the LABF and MEABF should be estopped from departing from their decades-long practice of calculating pensions based on union salaries earned by members during leaves of absence working for local labor organizations. The circuit court granted the defendants' motions for summary judgment on those counts (denying plaintiffs' cross-motion). Plaintiffs appealed those judgments of the circuit court as well.

Finally, unrelated to the Act's amendments, but related to whether union service would be credited at all, plaintiff MEABF members and their unions asked the circuit court for a declaratory judgment that 40 ILCS 5/8-226(c)(3) does not apply to defined contribution plans. That section permits MEABF participants to earn union service credit only if "the participant does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." Section 8-226(c)(3) plainly applies to traditional defined benefit pension plans. Plaintiffs argued that, construed in favor of the pensioners as it must be, Section 8-226(3) does not however, apply to defined contribution plans which (1) do not provide a pension as traditionally understood as a guaranteed regular payment at retirement based on years of

service and (2) have the effect of reducing a participant's salary for MEABF pension purposes resulting in a lower MEABF pension.

Moreover, since Section 8-226(c)(3) was adopted in 1987, the MEABF had never provided any guidance to members that the prohibition would apply to defined contribution plans as well as defined benefit pension plans. In fact the MEABF first took the position that this provision should apply to defined contribution plans in the summary judgment briefing below. The State took no position on this issue. The circuit court rejected plaintiffs' argument and held that the term "pension plan" unambiguously applied to defined contribution plans. The court granted summary judgment to MEABF on these counts and denied plaintiffs' cross-motion. Plaintiffs appealed that judgment.

Following the State's direct appeal to this Court under Rule 302(a) (No. 122793), this Court granted the plaintiffs' motion for a direct appeal under Rule 302(b) (No. 122822) and consolidated the cases.

ISSUES PRESENTED FOR REVIEW

1. Whether the P.A. 97-0651 amendments to 40 ILCS 5/8-226(c), 11-215(c)(3) & 17-134(4) violate the Pension Clause of the Illinois Constitution by eliminating, for any leave of absence beginning after the effective date of the Act, the retirement system benefit of contributing to the system for pension service credit during leaves of absence to work full-time for a local labor organization that represents public employees.

2. Whether the P.A. 97-0651 amendments to 40 ILCS 5/8-138(g-1), 8-233(e), 11-134(f-1) & 11-217(e) violated the Pension Clause and the Contracts and Takings Clauses of the Illinois and U.S. Constitutions, by reducing the pensionable

salary base of plaintiff retirement system members with service credit pursuant to 40 ILCS 5/8-226(c) or 11-215(c)(3) for leaves of absence during which the member worked full time for a local labor organization.

3. Whether the LABF and MEABF defendants should be estopped from departing from their decades-long application of Articles 8 and 11 of the Pension Code as permitting a member's "highest average annual salary" for pension purposes to be calculated using the union salary earned by the member, and upon which the member made both the "employee" and "employer" contributions to the retirement system, during his or her last 10 years of service on a 40 ILCS 5/8-226(c) or 11-215(c)(3) leave of absence.

4. Whether LABF and MEABF members have an enforceable contractual right to calculate their "highest average annual salary" for pension purposes under Articles 8 and 11 of the Pension Code using union salaries earned during a union leave of absence permitted by 40 ILCS 5/8-226(c) or 11-215(c)(3) based on the facts that (1) for decades the LABF and MEABF offered to members that they could have pensions based on such union salaries if the members contributed to the systems based on those union salaries and (2) members accepted and provided consideration for that offer by making both the "employer" and "employee" contributions to the funds based on those union salaries for years.

5. Whether 40 ILCS 5/8-226(c)(3), which permits MEABF members to contribute to the MEABF for service credit during a leave of absence working full-time for a local labor organization only if "the participant does not receive credit in

any pension plan established by the local labor organization based on his employment by the organization," applies to defined contribution plans.

JURISDICTION

The State accurately sets forth the Court's jurisdiction of the State's appeal pursuant to Rule 302(a). (State Br. 2.) With regard to plaintiffs' appeal, the circuit court's July 14, 2017, Final Amended Opinion and Order on Reconsideration also entered Rule 304(a) findings with regard to the judgments that plaintiffs appeal. Those include the circuit court's September 29, 2014, dismissal of plaintiffs' constitutional challenges to the P.A. 97-0651 amendments to the highest average annual salary calculations in Articles 8 & 11 of the Pension Code, Counts IV.A to IV.E and V.A to V.E. (*See* A 24-25, 35; C 960, 2358-59.) They also include the circuit court's July 14, 2017, denial of plaintiffs' motions for summary judgment (and grant of defendants' cross-motions) on Counts X, XII, XIII, and XIV. (A 23-25; C 2357-59.) Plaintiffs timely filed a notice of appeal to the First District Appellate Court on August 9, 2017. (A 209; C 2365.) In a November 2, 2017, order, this Court granted plaintiffs' motion for a direct appeal pursuant to Rule 302(b), consolidating plaintiffs' appeal (No. 122822) with the State's appeal (No. 122793).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional and statutory provisions are included in the appendix. (*See* A 217.)

STATEMENT OF FACTS

Defendants Municipal Employees' Annuity & Benefit Fund of Chicago (the "MEABF"), Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago (the "LABF"), and Public School Teachers' Pension & Retirement Fund of

Chicago (the "CTPF) are three of the public pension systems for employees of the Chicago Board of Education and City of Chicago, respectively governed by Pension Code Articles 8, 11, and 17. (*See* A 66-67; C 61-62.) The defendant CTPF, LABF, and MEABF Boards administer the systems. *See* 40 ILCS 5/8-112, 8-197, 11-109, 11-186, 17-104, 17-141. The trustees of the Boards have the fiduciary duty to administer the funds "solely in the interest of the participants and beneficiaries." 40 ILCS 5/1-109.

As defined benefit pension plans, retirement annuities in the three funds are based on a member's years of service credit in the system and final average salaries. *See, e.g.,* 40 ILCS 5/8-138(g-1), 11-134(f-1), 17-116. All other things being equal, the more years of service credit and the higher the final average salary, the greater the member's pension will be. (*See* SUP C 954, 1204.) Generally a member earns an additional year of service credit for each year working for the City or Board of Education. *See* 40 ILCS 5/8-226, 11-215, 17-114. In each of the systems, members may also elect to receive certain optional service credit by making the required contributions to the funds. *See, e.g.,* 40 ILCS 5/8-226, 8-230, 11-215, 11-221, 17-133, 17-134. These include, for example, time working for a private school (40 ILCS 5/17-133(6)) or time in military service (40 ILCS 5/8-230, 11-221, 17-134).

The Right Before P.A. 97-0651 to Earn Optional Service Credit if CTPF, LABF, or MEABF Members Contributed to the Funds During Leaves of Absence Working Full-Time for a Local Labor Organization

In each of the three systems, members could contribute to the funds for such optional service credit during a leave of absence from their public jobs to work full-time for a local labor organization representing Board of Education or City employees. 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4) (2010). Such union service credit existed in the

CTPF since at least the enactment of the Pension Code in 1963 and in the LABF and MEABF since 1987. *See* 1963 Sess. Laws, p. 652 (Ill. Rev. Stat. Ch. 108 1/2, § 17-134(4)) (CTPF); P.A. 85-964 (eff. Dec. 9, 1987) (enacting 40 ILCS 5/8-226(c) (MEABF) & 40 ILCS 5/11-215(c)(3) (LABF)).) The legislature granted a comparable benefit in at least eight of the other Pension Code retirement systems. *See* 40 ILCS 5/3-110(c); 4-108(c)(3); 5-214(b); 6-209; 9-219(2)(c); 14-104(l-5); 15-107(i); 15-113.2; and 16-106(8).

This optional union service credit allowed experienced public employees to serve as officers or staff of their unions representing other public employees without sacrificing valuable years of service credit toward their pensions. This serves to promote experienced, tenured teachers or career service employees familiar with public contracts, policies, and labor relations to lead in negotiations and in the resolution of employees' disputes with their counterparts in management. (*See* SUP C 298, 1749.) Among other things, this furthers the State's public policy of managing its workforce through a system of collective bargaining. *See* 5 ILCS 315/2 ("It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection."); 115 ILCS 5/1 ("It is the public policy of this State and the purpose of [the Illinois Educational Labor Relations Act] to promote orderly and constructive relationships between all educational employees and their employers."). Dozens of members have contributed to one of the respective funds for union service credit over the years. (*See* SUP C 938, 961-62, 1022, 1225.)

Before the P.A. 97-0651 amendments in 2012, the requirements for earning union service credit in the respective retirement systems were as follows. In the CTPF, the

teacher had to receive a leave of absence from the Board of Education to work for a teacher or labor organization. 40 ILCS 5/17-134(4) (2010). The teacher was also required to make the statutory employee contributions to the CTPF based on a percentage of the teacher's salary earned from the labor organization. *Id.* If the teacher's union salary exceeded the salary he or she would have earned in his or her Board of Education position but for the leave of absence, the labor organization was also required to contribute "to the [CTPF] the employer's normal cost as set by the [CTPF] Board on the increment." *Id.* There was no limitation as to when the teacher had to begin his or her union leave of absence to earn union service credit. *See id.*

The requirements for earning union service credit in the LABF and MEABF differed somewhat from the CTPF. Before the Act, LABF and MEABF participants could receive service credit for "leaves of absence without pay during which a participant is employed full-time by a local labor organization that represents municipal employees." 40 ILCS 5/8-226(c) & 11-215(c)(3) (2010). To do so, the participant, or the labor organization on the participant's behalf, had to make all of the "employee" and "employer" contributions to the funds. 40 ILCS 5/8-226(c)(1) & (2), 11-215(c)(3) (A) & (B) (2010). Those contributions were "based on his current salary with such labor organization." *Id.* The participant could also earn union service credit only if "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) & 11-215(c)(3)(C) (2010). As in the CTPF, there was no restriction regarding when the LABF or MEABF participant began his or her leave of absence in order to earn union service credit. *See* 40 ILCS 5/8-226(c) & 11-215(c)(3) (2010).

P.A. 97-0651, Passed in Response to Negative Media Reports, Effective January 5, 2012, Substantially Reduced and Impaired Union Service Credit Benefits

This remained the decades-long status quo until the 97th General Assembly enacted P.A. 97-0651, effective January 5, 2012. (*See* A 239.) Responding to negative press coverage regarding Illinois' underfunded pension systems and alleged abuses of union service credit benefits, the legislature passed the Act with the stated intent to reduce and eliminate those benefits. (*See* 97th Gen. Assembly, House of Representatives, Transcription Debate, 86th Leg. Day, Nov. 29, 2011 ("House Trans. Nov. 29, 2011"), at 38-43 (Statements of Rep. Cross).)

First, P.A. 97-0651 eliminated the right to contribute to the CTPF, LABF, or MEABF to earn union service credit unless the participant had already begun his or her leave of absence before the effective date of the Act, January 5, 2012. *See* P.A. 97-0651 (amending 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4))). As noted, before the Act, there was no restriction on when a participant had to begin a leave of absence in order to contribute to the funds to earn union service credit.

Second, the Act amended the LABF and MEABF articles to state that only a salary paid by one of the defined public employers could be used to calculate the "highest average annual salary" upon which participants' pensions were based. Applicable to the LABF, P.A. 97-0651 enacted a new subsection (e) to 40 ILCS 5/11-217 providing: "This Article shall not be construed to authorize a salary paid by an entity other than an employer, as defined in 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." The Act made a materially identical amendment applicable to the MEABF enacting a new subsection (e) for 40 ILCS 5/8-233. As defined

in Articles 8 & 11, an "employer" includes only public employers such as the City or Chicago Board of Education. *See* 40 ILCS 5/8-110, 11-107.

The legislature's stated intent for these amendments was to end the LABF and MEABF Boards' decades-long practice of calculating pensions using the union salaries earned by the participants on leaves of absence and upon which their contributions to the funds were based. *See* House Trans. Nov. 29, 2011, at 39, 42 (Statements of Rep. Cross). In both systems, pensions are generally calculated by multiplying the participants' years of service credit by a statutory multiplier (2.4%) and by the participants' "highest average annual salary for any 4 consecutive years in the last 10 years of service." 40 ILCS 5/8-138(g-1), 11-134(f-1) (2010); *see also* 40 ILCS 5/8-138(b) & 11-134(a). If a participant's union salaries from a leave of absence during which he contributed to the funds for union service credit were among his highest consecutive 4 years in the last 10 years of service before retirement, the LABF and MEABF Boards calculated that "highest average annual salary" using those union salaries. (A 76-83; C 71-78; SUP C 834, 959-60, 969, 978, 1114, 1208, 1210, 1224-25.)

The Act's new subsection (e) for 40 ILCS 5/8-223 & 11-217 requiring that only a salary paid by a defined public employer could be used to calculate a highest average annual salary changed, rather than "clarified," the pensionable salary base for participants with union service credit at the end of their careers. It also created an unresolveable conflict with 40 ILCS 5/8-138(g-1) and 11-134(f-1) as those provisions existed before the Act. A member on a leave of absence working for a union in his last years of service before retirement does not earn a salary from a public employer upon which a pension could be calculated under those amendments. In an attempt to resolve this conflict, and

create the appearance of a "clarification" rather than a cut in benefits, P.A. 97-0651 also amended 40 ILCS 5/8-138(g-1) and 11-134(f-1) to change the calculation of pensions based on union service credit. The amendment to 40 ILCS 5/8-138(g-1) provided:

> Nothwithstanding [sic] any provision of this subsection to the contrary, the "final average salary" for a participant that received credit under subsection (c) of Section 8-226 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.

P.A. 97-0651 (amendment to 40 ILCS 5/8-138(g-1)).The legislature made an equivalent amendment to the LABF article. P.A. 97-0651 (amendment to 40 ILCS 5/11-134(f-1)).

Thus, when the participant had union service credit, his pension would not be based upon the salaries he actually earned and upon which he contributed to the fund in his last 10 years of service. Instead, at least for a participant who retired at age 60 or older, the pension would be calculated based on the salaries he earned before the leave of absence began plus an inflation adjustment.[1] In cases where the participant had been on

[1] P.A. 97-0651 left in place the conflict created by the new Subsections 8-233(e) and 11-217(e) when calculating pensions under other sections for participants with union service credit. For example, when a participant retires before age 60, the calculation of his or her pension is governed by 40 ILCS 5/8-138(b) or 11-134(a), not sections 8-138(g-1) or 11-134(f-1). It is unclear what public employer salary the LABF or MEABF should use to calculate pensions based on union service credit under those sections following the Act's amendments. Would it be the salary earned by the participant before the leave of absence or would it be the salary attached to the participant's public job that he would have earned in the years before retirement had he not taken a leave of absence to work for his union? Or some other public salary altogether?

an extended leave, these salaries from before the leave of absence began would have been earned by the participant years or even decades before his actual retirement. (*See* A 80; C 75; SUP C 641-44, 768-71.) Those pre-leave of absence salaries, therefore, would be substantially less than the union salary the participant earned, and upon which he contributed to the funds, immediately before retirement.[2]

P.A. 97-0651 Substantially Diminishes the Plaintiffs' Retirement System Benefits

The plaintiffs here are CTPF, LABF, and MEABF participants, who joined their respective retirement systems before the Act, and their local union employers. (A 62-65, 188-94; C 57-60, 1726-32; SUP C 275, 293, 641, 651, 654, 768, 1260, 1269, 1486, 1745, 1749, 2160.) The individual plaintiffs worked for the City or Board of Education for years, or even decades, before taking leaves of absence to work for their unions to represent their coworkers in collective bargaining. *Id.* The Act's amendments substantially diminish the retirement system benefits they were entitled to before the Act. *Id.* The union plaintiffs represent members who are similarly impacted by the Act's amendments to the CTPF, LABF, and MEABF. Plaintiffs Chicago Teachers Union

[2] P.A. 97-0651 also enacted a new definition for sections 40 ILCS 5/8-226(c)(3) & 11-215(c)(3) which, before the Act, permitted union service credit only if "the participant does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." The Act's new definition greatly expanded the scope of this proviso to cover pension plans established by any entity related to a local labor organization, such as an international union. Again the Act asserted that the new definition was a "declaration of existing law." In its July 14, 2017, order the circuit court correctly held that the new definition from the Act was not a clarification of existing law and, therefore, diminished participants' retirement system benefits in violation of Ill. Const. art XIII, § 5. (A 13-15; C 2347-49.) Neither the State nor any other defendant appealed that judgment which is not now before the Court. The Act also made certain other changes such as to provisions of the Teachers Retirement System of the State of Illinois ("TRS") that had purportedly permitted a lobbyist to earn a TRS pension by substitute teaching for one day. *See* P.A. 97-0651 (amendment to 40 ILCS 5/16-106); House Trans. Nov. 29, 2011, at 57-58 (Statements of Rep. Cross). Those changes to other retirement systems are not at issue in this case.

("CTU") and Local 1001, Laborers' International Union of North America ("Local 1001") also contributed to the funds on behalf of their employees for union service credit. (*See* A 104-05; C 99-100; SUP C 298-301, 1490-91, 1750-51.)

For example, plaintiff and CTPF member Zeidre Foster taught in the Chicago Public Schools for about 10 years before taking a leave of absence to work for plaintiff CTU in August 2012, after the effective date of the Act. (A 63; C 58; SUP C 651-52.) Plaintiff and LABF member Michael Senese worked as a laborer in the Chicago Department of Streets and Sanitation for about 17 years before taking a leave of absence in August 2012 to work for his union, plaintiff Local 1001. (A 64; C 59, SUP C 1745-47.) Following a union election at Local 1001, Senese ended his leave of absence and returned to work for the City as a laborer in 2014. (SUP C 1745-47.) Because their leaves of absence began after January 5, 2012, the Act bars them from contributing to their retirement systems for union service credit. As a result they will not be able to earn the service credit towards their pensions that they would have been permitted to earn before the Act. (SUP C 651-52, 1745-47.)

80-year-old Plaintiff and MEABF member June Davis began working for the Chicago Public Schools in 1966 where she worked for almost 25 years before taking a leave of absence in 1991 from her job as a school community representative to work for the CTU. (A 188-90; C 1726-28; SUP C 641-47.) Except for a break in service between 2002 and 2004 because of a change in CTU leadership, she worked for the CTU on a leave of absence until she retired from the Board of Education at the end of 2011. (*Id.*) During that time she and the CTU made the employee and employer contributions to the MEABF for Davis's union service credit based on her CTU salary, equaling as much as

22% of her salary per year. (*See id.*; SUP C 649.) Davis retired from the Board of Education and submitted her application for a pension to the MEABF in December 2011 in the hope of avoiding the impact of P.A. 97-0651, but she was too late. (*See id.*)

Following the Act's amendments barring the use of her CTU salary for calculating her pension, Davis' pension would be based on her Board of Education salaries of approximately $20,000 per year she last earned in 1991, twenty years before her retirement. (*Id.*) Now at age 80, Davis would likely be left with a MEABF pension of only about $1,333 per month, or $16,000 per year. *See* 40 ILCS 5/8-138(g-1) (maximum pension of 80% of highest average annual salary). This is a small fraction of what her MEABF pension would be based on the CTU salaries she was earning and contributing to the MEABF upon during her leave of absence which, by her retirement, averaged more than $100,000 per year. (A 188-90; C 1726-28; SUP C 641-46.) Those higher CTU salaries recognized her extensive professional responsibilities including negotiating and enforcing collective bargaining agreements, organizing and advocating for policies to benefit students and educators, and supervising the department she eventually managed at the union. (*Id.*) Despite contributing approximately 20% of her CTU salaries to the MEABF for 17 years, she will be left at age 80 with a poverty-level pension and too old to do anything to make up for her lost retirement security. (*Id.*)

Plaintiff and MEABF member Anthony Lopez, now 68, also worked for the Board of Education for 16 years before taking a leave of absence from his job as a guidance counselor in 2002 to work for the CTU. (A 64; C 58, SUP C 768-73.) He worked for the CTU on a leave of absence for the next nine years before retiring in December 2011, also in the hope of avoiding the impact of P.A. 97-0651. (*Id.*) He also

was too late. For his entire leave of absence, Lopez and the CTU contributed to the MEABF approximately 20% of his CTU salary every year. (*See id.*; SUP C 775.) Nonetheless, based on the Act's amendments requiring his pension to be based on his Board of Education salary last paid prior to his leave of absence 9 years before his retirement, his pension is estimated to be just under $2,000 per month, or $24,000 per year. (*See id.*) That, too, is a small fraction of the $7,200 per month annuity the MEABF estimated he would receive based on the CTU salaries he was earning and contributing to the fund upon before his 2011 retirement. (*Id.*)

Plaintiff and MEABF member Joseph Notaro worked for the City as an electrical lineman from 1982 until about July 2009 when he took his leave of absence to work for his union, plaintiff Local 9 of the International Brotherhood of Electrical Workers ("Local 9"). (A 65; C 60; SUP C 1269-83.) His leave of absence working for Local 9 continued for the next two-and-a-half years until he retired from the City at the end of January 2012. (*Id.*) To earn union service credit for those two-and-half years, Notaro made all the employee and employer contributions to the MEABF based on his Local 9 salary, contributing almost 20% of his salary to the MEABF. (*See id.*; SUP C 1286-87.) He even took out a mortgage on his home to help cover that loss to his income during his leave of absence. (SUP C 1271.) The MEABF has estimated that, based on the Act's amendments limiting his pension to his City salaries from before his leave of absence, his pension would be approximately $2,000 less per month than it would be if his Local 9 salaries were included in his pension calculation. (SUP C 936.)[3]

[3] The LABF and MEABF warned that the Act's amendments required similar reductions in the pensions of plaintiffs Rochelle Carmichael and Oscar Hall who had retired and been awarded pensions before the Act. (A 62-64; C 57-59; SUP C 275-80;

Plaintiff and LABF member David Torres worked as a laborer in the Chicago Department of Streets and Sanitation from 1984 until 2008 when he took a leave of absence to work for Local 1001. (A 64-65; C 59-60; SUP C 2160-66.) He then began contributing to the LABF for union service credit until he returned to his City job in 2013 following officer elections at Local 1001. (SUP C 2160-66.) But for the Act's amendments Torres would have had sufficient service credits to have already retired from the City with a pension that could be calculated including his Local 1001 salaries from his leave of absence. (SUP C 2160-66.) The uncertainty created by those amendments has caused Torres to delay that retirement. (*Id.*)

Before the Act, plaintiffs decided to make the substantial contributions to the LABF or MEABF based on their union salaries in reliance on the funds' interpretation of the Pension Code and the expectation that they could earn a pension calculated using those same salaries. (*See* A 76-77; C 71-72; SUP C 645-46, 772, SUP C 1270-71, 1282; 2161.) As noted, for two decades before the Act, the LABF and MEABF Boards repeatedly decided that a union salary from a leave of absence under 40 ILCS 5/8-226(c) or 11-215(c)(3) could be used in the highest average annual salary calculation. They granted to every single retiree with union service credit in his or her last ten years of service pensions calculated based on the same union salaries upon which the participants' contributions were also based. (A 76-83; C 71-78; SUP C 834, 959-60, 969, 978, 1114,

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654-58.) The MEABF and LABF, respectively, had awarded them pensions when they retired calculated using their union salaries from their leaves of absence working for the CTU and Local 1001. (*Id.*) The circuit court's July 14, 2017, order saved these retirees from the Act's devastating "clarifications" by holding that the Administrative Review Law's 35-day period for reviewing administrative decisions barred the reopening of Carmichael's and Hall's pensions. (A 7-10; C 2341-44.) That decision similarly saved the surviving spouse Kathleen Mahoney from the large benefit cuts prescribed by the Act. (*Id.*) No party appealed the circuit court's judgment on this issue.

1208, 1210, 1224-25.) The LABF and MEABF also gave annuity estimates based on those same union salaries to participants making decisions about whether or not to contribute to the funds for union service credit and about when to retire. (SUP C 954, 977-78, 1104-05; 1204, 1208, 1210, 1217, 1248-50.) For two decades, there is no suggestion that anyone, including the City of Chicago appointed trustees, had any doubt that they were applying the Pension Code correctly and in good-faith. *See* 40 ILCS 5/8-192, 11-181 (describing composition of LABF and MEABF Boards).

Plaintiffs' Constitutional Claims Challenging the P.A. 97-0651 Amendments

Plaintiffs' Complaint alleges that the P.A. 97-0651 amendments discussed above unconstitutionally diminish and impair their retirement system benefits in violation of Ill. Const., art. XIII, § 5 (the "Pension Clause") as well as the Contracts Clauses and the Takings Clauses of the Illinois and Federal Constitutions.[4] (Counts I.A to I.E, II.A to II.E, III.A to III.E (amendments to 40 ILCS 5/8-226(c), 11-215(c)(3) & 17-134(4)) (A 106-26; C 101-121); Counts IV.A to IV.E (amendments to 40 ILCS 5/8-138 (g-1) & 8-233(e)) (A 129-34; C 124-29); Counts V.A to V.E (amendments to 40 ILCS 5/11-134(f-1) & 11-217(e) (A 140-45; C 135-140); *see also* A 190, 193-94; C 1728, 1731-32 (plaintiffs Davis and Kathleen Mahoney joining MEABF counts through First Supplemental Complaint).

The State, through the Attorney General, intervened in the litigation to defend the constitutionality of the Act's amendments and, joined by the LABF, MEABF, and CTPF, moved to dismiss plaintiffs' constitutional claims. The circuit court's order, dated November 27, 2013 (A 36-56; C 690-710), denied the motions as to plaintiffs' Pension Clause, Contracts Clause, and Taking Clause claims challenging the Act's elimination of

[4] Plaintiffs also alleged Equal Protection and Separation of Powers violations that were dismissed by the circuit court and are not at issue on this appeal. (*See* A 56; C 710.)

the right to earn union service credit for leaves of absence beginning after the Act. The Court held that the right to earn union service credit was a retirement system benefit protected by the Pension Clause even if the participant had not exercised the option to take a leave of absence and earn union service credit before the Act. (A 41-45; C 695-99.)

The November 27, 2013, order also denied the defendants' motions to dismiss as to the Pension Clause, Contracts Clause, and Takings Clause claims challenging the Act's amendments to the LABF and MEABF highest average annual salary calculations. (A 47-51; C 701-705.) The State defended the amendments arguing that the Act did not change the law. Rather, the State insisted that the pre-existing statutory definitions of "salary" (40 ILCS 5/8-117 & 11-116) had always limited a "salary" to one paid by a public employer. Rejecting that argument, the circuit court held that the "salary" definitions did not foreclose the use of a local labor organization salary. (A 48-49; C 702-703.) The court further concluded that, before the Act, the language of the statutes established that the legislature intended that LABF and MEABF members could calculate a pension based on the union salary that the participant actually earned during the leave of absence and upon which he or she contributed to the funds. (*Id.*) Thus, the Act's amendments changed the law, unconstitutionally diminishing plaintiffs' retirement system benefits. (A 50-51; C 704-705.)

The State moved the court to reconsider those rulings. In a February 14, 2014, order, the circuit court denied the State's motion to reconsider its ruling regarding the Act's amendments to 40 ILCS 5/8-226(c), 11-215(c)(3), and 17-134(4) eliminating the right to earn union service credit for leaves beginning after the Act. (C 751.)

In a September 29, 2014, order (A 26-35; C 951-60), the circuit court granted the

State's motion to reconsider with regard to the Act's amendments to the LABF and MEABF highest average annual salary calculations (40 ILCS 5/8-138(g-1), 8-233(e), 11-134(f-1) & 11-217(e)). The circuit court reversed its decision in the November 27, 2013, order and held that the Article 8 and 11 "salary" definitions before the Act did limit a "salary" to one paid by a public employer. (A 34-35; C 956-60.) Thus, despite decades of application of the statutes by the LABF and MEABF before the Act to the contrary, the court concluded a highest average annual salary could not be calculated using a salary paid by a local labor organization. (*Id.*) In the court's view, because the legislature had not previously amended the definition of "salary" to include a salary paid by a local labor organization, the Act's 2012 amendments did not change in the law. The court, therefore, dismissed plaintiffs' counts challenging those amendments, Counts IV.A to IV.E and V.A to V.E. (*Id.*) Plaintiffs appeal the dismissal of those counts. (A 211-12; C 2367-68.)

Following discovery and plaintiffs' filing of a First Supplemental Complaint (A 187; C 1721), plaintiffs, the State, LABF, and MEABF filed cross-motions for summary judgment. In a Final Amended Memorandum Opinion and Order on Reconsideration, dated July 14, 2017, the circuit court ruled on the parties' motions. (A 1; C 2335.) The court granted summary judgment to plaintiffs on Count I.A, II.A, and III.A, plaintiffs' Pension Clause challenges to the Act's amendments to 40 ILCS 5/8-226(c)(3), 11-215(c)(3), and 17-134(4), eliminating the right to earn union service credit for leaves of absences beginning after the Act. (A 11-13; C 2345-47.) The court again rejected the State's argument that the union service credit benefits in the Pension Code should not be protected by the Pension Clause because they were based on employment with a private labor union. (*Id.*) As the circuit court wrote, "[t]he 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." (A 13; C 2347.) The State appealed the judgment for plaintiffs on Counts I.A, II.A, and III.A. (C 2386.)[5]

Plaintiffs' Declaratory Judgment Counts Seeking to Bar the Retroactive Application of the Circuit Court's New Interpretation of the LABF and MEABF Highest Average Annual Salary Calculation Rules

Following the September 29, 2014, order, plaintiffs' First Supplemental Complaint alleged two new declaratory judgment counts seeking to bar retroactive application of the court's new interpretation of the LABF and MEABF highest average annual salary calculation rules as barring the use of a union salary. (A 202-06; C 1740-44 (Counts XIII & XIV).) Plaintiffs alleged that, given members' reasonable detrimental reliance on the LABF and MEABF Boards' decades-long application of those statutes to allow pensions calculated using union salaries, equity required a prospective-only application of the court's new and unanticipated interpretation of the Pension Code prohibiting that practice. (A 196-200; C 1734-38.) Thus, plaintiffs asked the court to declare that this decades-long practice combined with participants' contributions to the funds based on their union salaries created an enforceable contractual right. The LABF and MEABF would breach those enforceable contractual rights by applying retroactively the circuit court's new, restrictive interpretation of the highest average salary calculation rules (Count XIII). (A 202-04; C 1740-42.) Plaintiffs also asked the circuit court to declare that the LABF and MEABF were equitably estopped from applying that new

[5] Finding that its rulings on the Pension Clause counts granted plaintiffs all the relief they sought on this issue, the circuit court did not address plaintiffs' Contracts Clause and Taking Clause claims (Counts I.B to I.E, II.B to II.E, and III.B to III.E). (A 15; C 2349.) Those Counts are not at issue on this appeal.

interpretation to individuals who were members of the systems before the Act (Count XIV). (A 204-06; C 1742-44.)

The court's July 14, 2017, order granted summary judgment for defendants on Counts XIII & XIV, denying plaintiffs' cross-motion. (A 18-22; C 2352-56.) The court held that the relief requested was barred by the court's interpretation of the highest average annual salary calculation rules, despite the LABF and MEABF's 20-year practice to the contrary. (*Id.*) The circuit court then rejected plaintiffs' arguments premised on *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 285 (2009), for prospective-only application of the court's ruling. (A 21-22; C 2355-56.) The court concluded that "[a]though 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." (A 22; C 2356.) The plaintiffs appeal those rulings. (A 211; C 2367.)

Plaintiffs' Counts Seeking Declaratory Judgment that the 40 ILCS 5/8-226(c)(3) Proviso Does Not Apply to Defined Contribution Plans

Unrelated to the P.A. 97-0651 amendments, plaintiffs also sought a declaratory judgment that the 40 ILCS 5/8-226(c)(3) proviso did not apply to defined contribution plans, in contrast to defined benefit pension plans. (A 173-75; C 168-70 (Count X); A 201-02; C 1739-40 (Count XII).) Section 8-226(c)(3) provides that a participant may only earn union service credit in the MEABF if "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). In a defined benefit plan, such as the MEABF, a participant receives a fixed regular payment of a pension based on the participants' years of service credit and other factors such as salary and age. *See, e.g., Jones v. Mun. Ee's Annuity & Benefit Fund of Chi.*, 2016 IL 119618, ¶ 4. In a defined contribution plan, the

participant is not guaranteed a fixed and regular pension based on years of service. Rather, the participant receives only the value of contributions and investment returns in his individual account in the plan. *See, e.g., LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008).

Before this litigation, the MEABF had never decided whether Section 8-226(c)(3) applied to defined contribution plans. It was not until filing its summary judgment brief in the circuit court below that the MEABF took the position that it did. (C 1860; SUP C 1221-22.) As noted, the members of the MEABF Board are fiduciaries charged with administering the MEABF "solely in the interest of the participants and beneficiaries." 40 ILCS 5/1-109. Nonetheless, since 1987 when Section 8-226(c)(3) was first enacted, neither the MEABF Board nor anyone else at the MEABF ever advised members or unions that participation in a defined contribution plan could disqualify them from earning union service credit. (SUP C 1221-22, 1491-92, 1757.) Rather than give members any guidance, the MEABF's written communications to members and unions outlining the requirements for union service credit only paraphrased or quoted the Section 8-226(c)(3) text. (*See* SUP C 835-36, 839-45; *see also* SUP C 1210, 1218, 1240-41.)

In fact, for years the MEABF Board could not, or would not, decide whether Section 8-226(c)(3) applied to defined contribution plans. Before filing this lawsuit, in 2012, some of the CTU plaintiffs wrote to the MEABF Board requesting such guidance. (SUP C 796-97, 941-47.) The MEABF Board never responded to that request. (*Id.*) As noted, the MEABF never adopted a policy, provided any guidance to participants, nor even stated any position on the issue until filing its summary judgment brief below more than 25 years after Section 8-226(c)(3) was adopted and four years after its participants

requested guidance from the MEABF Board. (C 1835, 1860; SUP C 1221-22.)

Without any guidance from the MEABF fiduciaries, CTU and Local 9 employees on union leaves of absence historically participated in defined contribution plans established by the unions. In some of these defined contribution plans, the unions contributed to the employees' accounts in the plans for most or all of the years that employees worked for the unions. Other plans had no employer contributions. In those plans, participants contributed to their accounts solely through their own salary deferrals. The unions and participants never understood such participation in a defined contribution plan would be deemed to equate to receiving credit in a pension plan barred by Section 8-226(c)(3). (SUP C 645, 771-71, 1279-80, 1490-92, 1752-53, 1757-58.)

Application of the Section 8-226(c)(3) proviso to these defined contribution plans would result in dramatic reductions in the pensions of these MEABF members, who would retroactively lose most, if not all, of their union service credit. (*See* SUP C 644-47, 771-73.) For example, if plaintiff Davis, now 80 years old, were to lose her entire 17 years of union service credit because of her participation in a CTU defined contribution plan, her MEABF pension would be based only on her 24 years of Board of Education service and her salaries from 1991 and before. (*See* SUP C 641, 644-45.) She would be left with an MEABF pension of only about $1,000 per month ($12,000 per year), and she would receive no benefit from her 17 years of contributions to the MEABF during her leave of absence. (*Id.*) This is a fraction of the pension Davis paid for and counted on for her retirement security based on her 41 years of contributions to the MEABF, including 17 years of contributions to the fund based on her CTU salaries before her 2011 retirement. (*See* SUP C 644-46.)

Similarly, if because of his participation in a CTU defined contribution plan plaintiff Lopez, now 68-years old, were to lose his 9 years of union service credit he would be left with a MEABF pension of only about $1,000 per month based on his 17 years of Board of Education service before his leave of absence. (SUP C 770.) As with Ms. Davis, this is a small fraction of the pension he had paid for and counted on for his retirement security based on his total 17 years of Board of Education service and his 9 years of contributions to the MEABF based on his CTU salary. (SUP C 770, 772.)

At age 80 and 68, respectively, it is too late for Davis and Lopez to make up for such a dramatic loss to their expected retirement income. They would be left unable to afford their necessary living expenses in retirement including housing and out-of-pocket health care costs. (SUP C 645-47, 772-73.) If the MEABF had given them guidance before their union leaves of absence that they could not participate in a defined contribution plan, they and their unions could have acted on that guidance. They either could have opted out of participating in the union defined contribution plan, or, if that were not possible, opted out of contributing to the MEABF for union service credit and made other plans to save for retirement. (SUP C 645, 772.)

The consequences for Plaintiff Notaro are different but also severe. Because of the age at which he retired in 2012, only with his two-and-a-half years of union service credit was he eligible for a pension upon retirement. (*See* SUP C 1281-82.) Without those two-and-a-half years, his pension would not only be smaller, it would also have not become payable until 2016. Thus, if he loses his union service credit because of his participation in a Local 9 defined contribution plan, he will lose four whole years of pension payments. (*See id.*) As with Davis and Lopez, if he had been advised by the

MEABF against participating in a defined contribution plan, he could have opted out of the Local 9 defined contribution plan. Or he could have worked for the City for two-and-a-half more years to earn his 30 years of service credit and be eligible for a pension upon retirement without union service credit.

Despite the extreme consequences for the MEABF participants, the circuit court's July 14, 2017, order held that Section 8-226(c)(3) applied to defined contribution plans. (A 16-18; C 2350-52.) The court, therefore, granted summary judgment for the MEABF and denied plaintiffs' cross-motion on Counts X & XII. (*Id.*) If the court so held, plaintiffs had also asked the court to clarify whether Section 8-226(c)(3) applied to defined contribution plans with only employee salary deferrals and no employer contributions. Plaintiffs also asked the court to clarify if Section 8-226(c)(3) applied to the years in which the plaintiffs did not receive any contributions to their defined contribution plans. And finally plaintiffs asked the court to clarify if plaintiffs could conform to the court's ruling by forfeiting (if possible) the past contributions to the defined contribution plans. (SUP C 269-70.) The court rejected plaintiffs' requested clarifications holding that the issues were not ripe for judicial decision. (A 18; C 2352.) The court nonetheless went on to state admittedly advisory opinions on plaintiffs' questions. (*Id.*) Plaintiffs appealed the court's grant of summary judgment in favor of MEABF (and denial of plaintiffs' cross-motion) on Counts X and XII. (A 210; C 2366.)

ARGUMENT

I. Standard of Review

The circuit court's September 29, 2014, dismissal pursuant to 735 ILCS 5/2-615 of plaintiffs' constitutional counts challenging the Act's amendments to the LABF and

MEABF highest average annual salary calculation rules is subject to *de novo* review. *See Kanerva v. Weems*, 2014 IL 115811, ¶ 33 (the Court's "review of an order granting a section 2-615 motion to dismiss is *de novo*, as is [the Court's] review of a determination as to the constitutionality of a statute." (citations omitted)).

The court's July 14, 2017, rulings on the parties' cross-motions for summary judgment are also subject to *de novo* review. *See Jones v. Municipal Ees. Annuity & Ben. Fund of Chi.*, 2016 IL 119618, ¶ 26 ("When parties file cross-motions for summary judgment, they mutually agree that there are no genuine issues of material fact and that only a question of law is involved. Thus, our review is *de novo*." (citation omitted)).

Response to State's Appeal Case No. 122793

II. The Optional Union Service Credit Benefit in the CTPF, LABF, and MEABF Is Protected by the Pension Clause Because It Derives from Membership in Those Retirement Systems, and Therefore, the Act's Amendments Diminishing That Benefit Violate the Pension Clause.

As discussed, before P.A. 97-0651, one of the benefits of membership in the CTPF, LABF, and MEABF was the option to contribute to the funds for additional pension service credit while on a leave of absence from a City or Board of Education job to work for a local labor organization. 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4) (2010). (*See also* A 11; C 2345.) The terms of the Pension Code placed no restriction on when a member had to exercise that option, *i.e.*, by when the member had to take the leave of absence and begin contributing to the fund for the service credit. *Id.* In 2012, the Act placed a new restriction on that benefit, eliminating the option to contribute to the funds for union service credit for any leave of absence beginning after the effective date of the Act, January 5, 2012. P.A. 97-0651 (amendments to 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4)). This new restriction diminished the benefits of participants who

were already members of one of the three retirement systems before the Act. (SUP C 298, 651-52, 1490-91, 1745-47, 1750-51.)

Pursuant to well-established precedent, this diminishment of a benefit derived from membership in the LABF, MEABF, or CTPF violates the Pension Clause, Ill. Const. art. XIII, § 5. *See Buddell v. Bd. of Trs., State Univ. Ret. Sys.*, 118 Ill. 2d 99, 105-06 (1987) (Pension Clause barred statutory change imposing new time limit on the purchase of optional military service credit from being applied to current pension system member). Thus, the court correctly granted summary judgment for plaintiffs holding that the Act's amendments to 40 ILCS 5/8-226(c), 11-215(c)(3) & 17-134(4) violated the Pension Clause and could not be applied to current members. (A 13; C 2347.)

A. The Pension Clause protects all benefits derived from membership in one of Illinois' governmental retirement systems, and union service credit is one of those benefits.

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. "[T]he clause means precisely what it says: '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). "Whether a benefit qualifies for protection under article XIII, section 5, turns simply on whether it is derived from membership in one of the State's public pension systems." *Kanerva*, 2014 IL 115811, ¶ 54. "If it qualifies as a benefit of membership, it is protected. If it does not, it is not." *Id.*

"The protections afforded to such benefits by article XIII, section 5 attach once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires." *Heaton*, 2015 IL 118585, ¶ 46. "Accordingly, 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." *Id.* The Court has further emphasized that "[a]dditional benefits may always be added, of course, and the State may require additional employee contributions or other consideration in exchange. However, once the additional benefits are in place and the employee continues to work, remains a member of a covered retirement system, and complies with any qualifications imposed when the additional benefits were first offered, the additional benefits cannot be unilaterally diminished or eliminated." *Id.*, at ¶ 46 n.12 (citations omitted).

As a preliminary matter, the State mischaracterizes the Acts' amendments as a prospective-only elimination of benefits because they eliminate the opportunity to earn service credit for leaves of absence beginning after the Act. (*See* State Br. 10.) That is not the relevant framework under the Pension Clause. The benefit plaintiffs seek to enforce is their right that existed in the Pension Code before the Act to purchase, if they so choose, service credit during a leave of absence in the future to work for a local union. If that benefit is part of the contractual relationship resulting from membership in a retirement system it is protected by the Pension Clause, even if the participant had not yet exercised the option before the Act. *See Buddell*, 118 Ill. 2d at 105-06 (under Pension Clause, statute creating new deadline for purchasing military service credit could not be applied

to current participant who had not yet exercised option to purchase service credit by the time of amendment). As the circuit court put it, "the right to exercise an option is protected, even before that option has, in fact, been exercised." (A 44; C 698.)

The only question presented by the State's appeal is whether the right here to earn service credit on a leave of absence from a public employer to work for a local labor organization is a "benefit" within the meaning of the Pension Clause. It is.

The benefit plaintiffs seek to protect is clearly "derived from membership" in the CTPF, LABF, or MEABF. *Kanerva*, 2014 IL 115811, ¶ 54. It is set forth in the terms of the Pension Code, and an individual only gained a right to the benefit because of his or her membership in one of those retirement systems. 40 ILCS 5/8-226(c), 11-215(c)(3), 17-134(4) (2010). That is the end of the inquiry. *See Kanerva*, 2014 IL 115811, ¶ 54 ("If it qualifies as a benefit of membership, it is protected.").

B. There is no support for the new limitation that the State asks the Court to write into the terms of the Pension Clause.

Hardly acknowledging the Court's dispositive holdings, the State posits a new, unwritten limitation on the scope of Pension Clause protections. The State would have this Court write into the Constitution a limitation that the clause does not protect "the accrual of public pension benefits for private employment," as it characterizes the union service credit benefit. (State Br. 1.) The circuit court succinctly rejected that argument: "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." (A 13; C 2347.) This Court should decline to do so as well.

1. There is no textual support for the State's theory.

There is no textual support for the limitation the State asks this Court to graft onto the language of the Pension Clause. The State argues that the Pension Clause "plainly applies only to *public* pensions." (State Br. 13.) That is no doubt true, but the three retirement systems here are, of course, retirement systems "of the State, any unit of local government or school district, or any agency or instrumentality thereof." Ill. Const., art. XIII, § 5; *see also Jones*, 2016 IL 119618, ¶ 4 ("The City pension funds are all subject to the pension protection clause of the Illinois Constitution.").

The State then argues that the Pension Clause "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." (State Br. 14.) But here the participants are members of their retirement systems only due to their government employment. (*See* SUP C 641, 651, 768, 1269, 1745, 2160.) Moreover, each plaintiff was either working in his or her public job when the option to earn union service credit was added as a benefit or started public employment and joined the retirement system after the benefit was already in place. (*Id.*) Indeed, the participants most impacted by the Act's elimination of the right to earn union service credit on leaves of absence in the future are those who were still working in their public jobs, not on a leave of absence, when the Act went into effect. (*See* SUP C 651-52, 1745-47.)[6]

Where the State's argument goes astray and loses any textual support is its insistence that the "benefits" protected by the Pension Clause must be "based on their

[6] Moreover, while on a leave of absence to work for their unions, the participants remain public employees. The purpose of a leave of absence is to retain their status as employees of their public employers. *See Callahan v. Bd. of Trs. of the Fireman's Pension Fund, Bloomington, Ill.*, 83 Ill. App. 2d 11, 17 (4th Dist. 1967) ("The general purpose of a leave of absence is to preserve the status of the employee.").

public service." (State Br. 14.) Equally without support is the State's argument that the Pension Clause protects only pensions as "commonly understood" and not "benefits in a public pension system based on private employment." (State Br. 14.)

Kanerva held that the text of the Pension Clause places no limit on the kind of "benefit" that is protected by the Pension Clause so long as the benefit is part of the contractual relationship "derived from membership" in the retirement system. *Kanerva*, 2014 IL 115811, ¶ 54. Thus, it is irrelevant that the "benefit" of the retirement system may be based on time spent on a leave of absence working for a union and making contributions to the pension fund. *See id.* ("How the benefit is actually computed plays no role in the inquiry.").

The Court rejected the State's attempt in *Kanerva* to graft an unwritten limitation on the type of "benefit" that is protected by the Pension Clause. The Court should reject the State's attempt to do the same thing again here. *See Kanerva*, 2014 IL 115811, ¶ 41 ("We may not rewrite the pension protection clause to include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve.").

Notably, as with the health benefits at issue in *Kanerva*, the option to earn service credit during a leave of absence to work for a labor organization was among the benefits of Illinois retirement systems when the 1970 constitution was adopted. That benefit was part of the CTPF since at least the enactment of the Pension Code in 1963. *See* Ill. Pension Code, 1963 Ill. Laws p. 652 (§ 17-134(4)). The State's assertion to the contrary is mistaken. (*Cf.* State Br. 4, 17 n.3.) The convention delegates could have excluded such benefits, but they did not. *See Kanerva*, 2014 IL 115811, ¶ 41 ("Rather, the drafters chose expansive language that goes beyond annuities and the terms of the Pension Code,

defining the range of protected benefits broadly to encompass those attendant to membership in the State's retirement systems. Then, as now, subsidized health care was one of those benefits.").

2. The constitutional debates do not support the State's theory.

Lacking any textual support, the State attempts, but fails, to find support in the constitutional debates. That detour is not only fruitless, it is unnecessary where, as here, the language of the Constitution is unambiguous. *See Kanerva*, 2014 IL 115811, ¶ 42 ("Because we find that this issue can be decided based on the plain language of the provision, the debates can have little or no bearing or effect with respect to how we construe that language." (quotation marks omitted).).

In any event, the constitutional debates provide no support for the State's proposed limitation on the scope of benefits protected by the Pension Clause. The Court has noted on multiple occasions the limited use of those debates to interpret the Pension Clause. *See Kanerva*, 2014 IL 115811, ¶ 44 ("Accordingly, we must be circumspect in attempting to draw conclusions based on what was said during the course of the debates."). Indeed, the Court stated that the only conclusion to be divined from those debates is "that the provision was aimed at protecting the right to receive the promised retirement benefits, not the adequacy of the funding to pay for them." *Kanerva*, 2014 IL 115811, ¶ 48. "To infer more," the Court stated "would require more than the reports of the floor debate reasonably support." *Id.*

Here, the option to earn service credit on a leave of absence working for a union was one of those "promised retirement benefits." Thus, the constitutional debates fully support the same conclusion mandated by the unambiguous text of the Pension Clause. Those benefits, just like all the other benefits derived from membership in the retirement

system, are protected by the Pension Clause.

The State's reference to the number of times the delegates referred to public employees or civil servants does not support its argument. As discussed, the plaintiffs here are public employees. And their entitlement to the benefit of earning service credit on a leave of absence working for their unions derives solely from their status as members of their retirement systems. A status they obtained only because of their public employment. This also distinguishes the case here from the Arkansas case cited by the State in which the individuals granted public pension benefits were not and had never been public employees. *See Chandler v. Bd. of Tr. of the Teacher Ret. Sys. of Ark.*, 365 S.W.2d 447, 449 (Ark. 1963).

The State is wrong to insist that the delegates and voters could not have intended that the benefits here would be protected by the Pension Clause. Other than speculation, it has no support for that assertion. As noted, the right to earn service credit on a leave of absence working for a union was one of the retirement system benefits when the Pension Clause was adopted, just like the right to purchase credit for past military service (*see* State Br. 17 n.3).[7] The delegates and voters chose to protect all such "benefits" of membership in a retirement system.

3. This Court's precedent does not support the State's theory.

The State's attempt to find support for its argument in this Court's Pension Clause

[7] The State's focus on military service as being "public" service also elides an important distinction. Military service is public service, but it is not service for an Illinois public employer. The State's asserted notion of the purpose of public pensions is to encourage employees to provide service to their public employer, not the "public" in the abstract. (State Br. 14-15.) The granting of pension credit for past military service shows that the legislature may choose to use retirement system benefits to further other public purposes, such as rewarding military service or promoting public collective-bargaining relationships.

precedent fares no better. The State relies entirely on the statement from *Buddell* that: "The consideration for that contractual right [enforceable by the Pension Clause] was the same as for any other right conferred by the Pension Code, his employment and continued employment by the public body, and, in addition, his prior military service." *Buddell*, 118 Ill. 2d at 105-06. But, of course, the same is true here for the right to the option of earning service credit on a leave of absence to work for a labor organization. The plaintiffs accrued the right to that benefit as consideration for the public employment that resulted in their membership in their retirement systems.

What the State ignores is the repeated holdings from this Court's Pension Clause precedent that the clause protects all benefits, of whatever kind, so long as they are derived from membership in the retirement system. *See Jones*, 2016 IL 119618, ¶ 29 ("[T]he clause prohibits the General Assembly from unilaterally reducing or eliminating the pension benefits conferred by membership in the pension system."); *Heaton*, 2015 IL 118585, ¶ 46 (citing *Buddell*, 118 Ill. 2d at 105-06, "pension protection clause barred statutory change in Pension Code which prevented current pension system member from purchasing service credit for time spent in military"); *Kanerva*, 2014 IL 115811, ¶ 52 ("Because an employee's eligibility for subsidized health care following retirement, as well as his or her eligibility for an annuity, disability coverage and survivor benefits, is conditioned on membership in one of the State's various public pension systems, all of the benefits that flow from that relationship are constitutionally protected under article XIII, section 5.").

4. The State's policy argument does not justify its theory.

Boiled down to its essence, the State presents only a policy argument that the leave of absence service credit here is inconsistent with the State's asserted traditional

notion of public pension benefits and actually frustrates the purpose of such benefits. That policy argument, too, is both irrelevant and mistaken.

The Court may not read into the Constitution a limitation which the language does not contain simply to prevent some feared, unwanted policy outcome. *See Hoffman v. Clark*, 69 Ill. 2d 402, 424 (1977) ("We cannot read into the Constitution a limitation which it does not contain solely to prevent some possible future abuse."). The State may now believe the constitutional delegates and voters should have adopted the limitation the State's lawyers argue for here, but they did not do so.

The language of the Pension Clause bars the diminishment of all "benefits" of the contractual relationship formed by membership in a retirement system. It was for the General Assembly to decide what those benefits were to promote the public policy of the State. *See State v. AFSCME, Council 31*, 2016 IL 118422, ¶ 43 ("Illinois public policy is shaped by our statutes, through which the General Assembly speaks."). The General Assembly in 1963, in 1987, and when adopting comparable benefits in at least eight of the other Pension Code retirement systems, deemed union service credit as a benefit of retirement system membership to further the public policy of the State. *See* Ill. Pension Code, 1963 Ill. Laws p. 652 (§ 17-134(4)); P.A. 85-964 (enacting § 8-226(c)(3) & 11-215(3); *see also* 40 ILCS 5/3-110(c); 4-108(c)(3); 5-214(b); 6-209; 9-219(2)(c); 14-104(l-5); 15-107(i); 15-113.2; and 16-106(8) (2010).

There are multiple legitimate public policies supporting the benefit granted by the legislature here. All are fully consistent with the guarantee, enshrined in the Pension Clause, that retirement system benefits once promised by the legislature cannot be diminished or impaired. For example, the right to continue to earn service credit in their

public pension systems while on a leave of absence encourages experienced public employees to take positions as union officers and staff. This furthers the State's labor relations policies by promoting experienced public employees, familiar with public services, contracts, and priorities, to serve as management's counterparts in collective bargaining matters. (SUP C 298, 1490-91, 1750.) The State has chosen collective bargaining as a means to manage its workforce, and therefore, it was entirely legitimate for the legislature to use retirement system benefits to further that policy. *See* 5 ILCS 315/2 ("It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection."); 115 ILCS 5/1 ("Recognizing that harmonious relationships are required between educational employees and their employers, the General Assembly has determined that the overall policy may best be accomplished by (a) granting to educational employees the right to organize and choose freely their representatives; (b) requiring educational employers to negotiate and bargain with employee organizations representing educational employees . . ..").

Moreover, it bears repeating that the right to earn service credit on a leave of absence in the future to work for a labor organization was a benefit granted to these public employees in consideration for their public employment. It was for the legislature to decide that it was beneficial to offer that optional benefit, as part of the overall compensation package to public employees, along with all the other retirement benefits.

The union service credit benefit also encourages public employees who do go to work for their unions to take a leave of absence rather than quitting their public jobs

altogether. This increases the likelihood that when they choose to leave their union jobs (or are voted out of office), they return to their public jobs providing service to the public employer. Contrary to the State's mistaken assertion in its brief that employees on such leaves do not return to work for their public employers (*cf.* State Br. 5), two of the plaintiffs here, Senese and Torres, did just that, returning to their City jobs following a union election after the filing of the Complaint. (SUP C 1746, 2161.)

In sum, there can be no doubt that the retirement system benefit here is protected by the Pension Clause even though it is calculated based on time on a leave of absence during which contributions are paid to the pension fund. But even if any doubt remained regarding the relevant construction of the Pension Clause, this Court is "obliged to resolve that doubt in favor of the members of the State's public retirement systems." *Kanerva*, 2014 IL 115811, ¶ 55. The Court should, therefore, affirm the circuit court's grant of summary judgment in favor of plaintiffs on Counts I.A, II.A, and III.A.

Issues Presented By Plaintiffs' Appeal Case No. 122822

III. The Act's Amendments to the LABF and MEABF Highest Average Annual Salary Calculation Rules Violate the Pension Clause.

A. The Act's limitation on the plaintiffs' salary base for calculating pensions violates the Pension Clause.

Before P.A. 97-0651, both the LABF and MEABF calculated pensions based on the participants' "highest average annual salary for any 4 consecutive years in the last 10 years of service." 40 ILCS 5/8-138(g-1), 11-134(f-1) (2010); *see also* 40 ILCS 5/8-138(b) & 11-134(a) (2010). Commonly, as with multiple plaintiffs here, when members took leaves of absence to work for local unions and contributed to the funds for union service credit, they did so for years and ultimately retired while still on leave of absence. In that

event, when the salaries earned by the member from the union were among his or her highest four consecutive years in the last 10 years of service, the LABF and MEABF used those salaries to calculate the highest average annual salary. (A 76-83; C 71-78; SUP C 834, 959-60, 969, 978, 1114, 1208, 1210, 1224-25.) This was consistent with the union service credit provisions which required that the contributions for credit during the leave of absence also be "based on his current salary with such labor organization." 40 ILCS 5/8-226(c)(1) & (2), 11-215(c)(3)(A) & (B) (2010). In other words, the salary base for contribution purposes and for pension purposes was the same, as with every other pension calculation formula in the Pension Code.

The Act eliminated this possibility of using a salary paid to the member by the union on a leave of absence to calculate the highest average annual salary for pension purposes. P.A. 97-0651 (amendments to 40 ILCS 5/8-138(g-1), 8-233(e), 11-134(f-1) & 11-217(e)). Instead, the Act directed that only salary amounts paid by one of the defined public employers could be used to calculate the highest average annual salary. *Id.* The contributions to the pension funds to earn union service credit continue, however, to be based on the participant's "current salary with such labor organization." 40 ILCS 5/8-226(c)(1) & (2), 11-215(c)(3)(A) & (B).

The Act's amendments substantially diminished the plaintiffs' preexisting retirement system benefits by limiting the salary base for their pensions. (A 80-84, 101-03; C 75-79, 96-98; SUP C 644-45, 770-71, 1281-82, 2162.) This Court has repeatedly held that such statutory amendments reducing the salary base upon which pensions may be calculated violate the Pension Clause. *See Heaton*, 2015 IL 118585, ¶¶ 27, 46 (amendment creating new cap on the maximum salary that may be considered when

calculating annuity violated Pension Clause); *Felt v. Bd. of Trs. of Judges Ret. Sys.*, 107 Ill. 2d 158, 162-63 (1985) (amendment adversely impacting salary base that could be used to calculate pensions violated Pension Clause).

B. The Act's amendments changed the law to diminish pre-existing benefits and, therefore, cannot be defended and applied as mere "declarations of existing law."

Legislators recognized the constitutional infirmity of the reduction in pension benefits they were trying to implement through the Act. *See* House Trans. Nov. 29, 2011, at 43-46, 50-54 (Statements of Reps. Currie, Cross, and Mautino). Thus, in a transparent attempt to make an end-run around the Pension Clause's protections, the 97th General Assembly asserted that its new limitation on the pension salary base was not a change in law. Instead, the legislature proclaimed it was only "a declaration of existing law and shall not be construed as a new enactment." P.A. 97-0651 (enacting 40 ILCS 5/8-233(e) & 11-217(e)). In other words, the 97th General Assembly purported to direct that courts could not interpret these amendments as a diminishment of benefits. (*See* A 28, C 953 ("The legislative clarifications at issue are an obvious attempt by the General Assembly to overcome this [Pension Clause] limitation by declaring or clarifying that these perceived benefits were never, in fact, provided for in the Pension Code.").)

The circuit court first rejected this effort, denying the State's motion to dismiss which defended the Act's amendments as a constitutional clarification of law that LABF and MEABF members had never been permitted to use a union salary in the highest average annual salary calculation. (A 45-51; C 699-705.) On the State's motion to reconsider, however, the circuit court accepted the State's argument that the Act was only a "clarification" of existing law and, therefore, did not diminish plaintiffs' benefits. (A 31-35; C 956-960.) The court, therefore, dismissed plaintiffs' constitutional claims

challenging the Act's amendments to the LABF and MEABF highest average annual salary calculation rules. (A 35; C 960 (dismissing Counts IV.A to IV.E & V.A to V.E).)

That decision was in error because the Act's amendments did change the law diminishing plaintiffs' retirement system benefits. The Act's requirement to use salaries paid during the 10 years before a leave of absence directly contradicted the statutes before the Act that required pensions to be calculated based on a participant's "highest average annual salary for any 4 consecutive years in the last 10 years of service." This Court should reject the legislature's attempt to "circumvent" the Pension Clause's protections by repackaging a diminishment of benefits as a clarification of pre-existing statutes enacted by previous General Assemblies. *See Heaton*, 2015 IL 118585, ¶ 84 ("Even with the protections of that provision [the Pension Clause], the General Assembly has repeatedly attempted to find ways to circumvent its clear and unambiguous prohibition against the diminishment or impairment of the benefits of membership in public retirement systems.").

1. A later General Assembly cannot retroactively change the meaning of a law through the guise of legislative clarification.

The law is well established that a subsequent legislature through the guise of legislative clarification cannot retroactively change the meaning of a law enacted by a previous General Assembly. "[T]he legislative intent that controls the construction of a public act is the intent of the legislature which passed the subject act, and not the intent of the legislature which amends the act." *O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 421, 441 (2008); *Roth v. Yackley*, 77 Ill. 2d 423, 428 (1979) ("The General Assembly's subsequent declaration of prior intent cannot alter the clear import of the prior statutory language."). Courts, therefore, reject legislative attempts to declare the

meaning of preexisting statutes when the amendments are not consistent with the text and intent of the prior laws. *See People ex rel. Ryan v. Agpro, Inc.*, 214 Ill. 2d 222, 230 (2005) ("We conclude the recent amendment is not a retrospective 'clarification' of existing law, but is instead a change in the law."); *People ex rel. Orland Hills v. Orland Park*, 316 Ill. App. 3d 327, 336 (1st Dist. 2000) (legislative amendment purporting to be "declaratory of existing law and shall not be construed as a new enactment" was "contrary to both a logical interpretation of the statute as it existed prior to the amendment, and to the judicial interpretation of the" law before the amendment); *People v. Clemons*, 275 Ill. App. 3d 1117, 1121 (1st Dist. 1995) ("The legislature cannot now say it meant to allow multiple convictions all along simply by amending the statute.").

This rule is only more important in the pension statute context. If future legislatures could retroactively "clarify" ambiguities in the Pension Code, they could circumvent the Pension Clause's protections by, as here, "clarifying" the pension statutes against the rights of participants. The Act's purported clarifications were clearly fabricated for the purpose of rewriting the Pension Code to satisfy the 2012 General Assembly's intent to diminish pensions of employees on leave of absence to their unions, the opposite of the intent of the prior General Assemblies who enacted those laws. Allowing such subterfuge would nullify the Pension Clause's protections and counter the established rule that "where there is any question as to legislative intent and the clarity of the language of a pension statute, it must be liberally construed in favor of the rights of the pensioner." *See Kanerva*, 2014 IL 115811, ¶ 55.

2. Before the Act, the text of Pension Code Articles 8 & 11 permitted a union salary to be used in the highest average annual salary calculation.

Thus, whether or not the Act diminished members' benefits turns on the meaning

of the statutes as they existed before Act, not on the 2012 Act's purported declaration of existing law. "The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent." *Bank of N.Y. Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *Id.* As discussed, before the Act, the Pension Code provisions here permitted a union salary earned on a leave of absence to be used to calculate the highest average annual salary for pension purposes. The Act, therefore, did change the law diminishing plaintiffs' benefits.

Sections 8-226 and 11-215(c) both included as "periods of service" leaves of absence to work for local labor organizations so long as the member made the contributions for that service based on his or her union salary. With regard to calculating pensions, before the Act 40 ILCS 5/8-138(g-1) & 11-134(f-1) (2010) provided that the salary base for pension purposes was "the highest average annual salary for any 4 consecutive years *in the last 10 years of service*." (emphasis added). Thus, when the union salaries earned by the member on a leave of absence (a "period of service") were among the highest four in the participant's last 10 years of service, they were properly part of the pension calculation. Sections 8-138(b) & 11-134(a)made this only more clear by stating that the pension would be based on "the highest average annual salary for any 4 consecutive years *within the last 10 years of service immediately preceding the date of withdrawal*" (emphasis added). 40 ILCS 5/8-138(b) & 11-134(a) (2010).

Nothing in those sections stated that a union salary paid to an employee during his or her last 10 years of service could not be used in the calculation. *See People v. Casas*, 2017 IL 120797, ¶ 18 ("If possible, the court must not depart from the statute's plain

language by reading into it exceptions, limitations, or conditions the legislature did not express."). To the contrary, the text strongly suggests that the salary actually being paid to the participant (whether by the union or by the public employer) during the last 10 years of service *should* be the salary used in that calculation.

The union service credit provisions themselves further support that inference. Sections 8-226(c)(1) & (2) and 11-215(c)(3)(A) & (B) (2010) provided that union service credit contributions had to be "based on his current salary with such labor organization." As with every other pension salary base calculation in the Pension Code, it is only logical that the salary base for contribution purposes be the same as that for pension purposes. *Cf.* 40 ILCS 5/8-234 ("The total of salary deductions for employee contributions for annuity purposes to be considered for any 1 calendar year shall not exceed that produced by the application of the proper salary deduction rates to the highest annual salary considered for annuity purposes for such year."); 11-218 (substantially the same).

3. 40 ILCS 5/8-117 & 11-116 do not limit the term "salary" to one paid by a public employer.

To overcome the clear import of this statutory language before the Act, the circuit court accepted the State's argument that 40 ILCS 5/8-117 & 11-116 limited the term "salary" to one paid by a public employer, thus, excluding the use of a union salary to calculate a pension. That is mistaken.

The circuit court focused on Sections 8-117(b) & (c) which provide:

> "Salary": Annual salary of an employee as follows
>
> . . .
>
> (b) If appropriated, fixed or arranged on an annual basis, beginning July 1, 1957, the actual sum payable during the year if the employee worked the full normal working time in his position, at the rate of

> compensation, exclusive of overtime and final vacation, appropriated or fixed as salary or wages for service in the position.
>
> (c) If appropriated, fixed or arranged on other than an annual basis, beginning July 1, 1957, the applicable schedules specified in Sections 8-233 and 8-235 shall be used for conversion of the salary to an annual basis.

40 ILCS 5/8-117(b) & (c). Sections 11-116(a) & (b) materially include the same language but with reference to the 40 ILCS 5/11-217 schedules for converting salaries paid on other than an annual basis to an annual salary. The court also relied on those schedules for converting workers' hourly wages into an annual salary. *See* 40 ILCS 5/8-233 & 11-217 (2010). Nothing in any of those sections before the Act, however, stated that the four highest salaries in the last 10 years of service should be used to calculate a pension only if those salaries are paid by a public entity. The circuit court's reading of those statutes to the contrary was mistaken for multiple reasons.

First. Those statutes do not define a limited class of payors of a "salary." Rather, those sections are clearly intended to give rules for how to calculate the amount of an "annual salary." For example, the sections instruct to exclude overtime pay and final vacation payments from the calculation. 40 ILCS 5/8-117(b) & 11-116(a). And they direct to follow the applicable schedules to convert an hourly wage into an annual salary, by multiplying the hourly wage by 2080. 40 ILCS 5/8-233(b), 11-217(b). The entirety of these sections is dedicated to these types of calculation rules, with no provision directed at defining by whom the salary must be paid in order to count. *See Casas*, 2017 IL 120797, ¶ 18 (when construing a statute "court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another").

The legislative intent of these sections to set rules for calculating the amount of a salary rather than to limit the class of payors of a salary is further supported by the fact that these provisions have not been materially changed since the 1963 Pension Code. *See* 1963 Sess. Laws, pp. 345-46, 385-86, 440, 472-73. That was more than 20 years before 1987 when the legislature passed P.A. 85-964 adopting union service credit in the LABF and MEABF. In 1963, there was also no other service credit for any period of time during which a participant would be being paid by an entity other than a public employer. Thus, there would have been no reason for the legislature in 1963 to have contemplated or intended these provisions to limit the payor of a "salary" to public employers. *See People v. Reese*, 2017 IL 120011, ¶ 30 ("A reviewing court may also consider the circumstances existing when the statute was enacted, contemporaneous conditions, and the goals sought to be achieved."). Any intent to exclude a union salary paid to an employee while on leave of absence would have been pointless at the time. *See Bd. of Govs. of State Coll. & Univ. v. Ill. Educ. Labor Rel. Bd.*, 170 Ill. App. 3d 463, 475 (4th Dist. 1988) ("The fact that a statute does not address alternative methods to contest discharges does not imply the legislature intended the provisions set forth in the statute to be the employee's exclusive option when contesting a discharge. The Civil Service Act, prior to the [Illinois Educational Labor Relations] Act, was the only method for contesting a discharge in Illinois. Therefore, it is logical the legislature did not mention alternative paths of review."). If the legislature had intended with these sections to limit the payor of a "salary" to a public employer, it would not have done so in such an opaque, roundabout fashion, when it could have easily expressed such an intent simply and directly.

Second. Ignoring this context and the obvious intent of these provisions, the

circuit court erred by selecting certain phrases from the sections out of context to reason that the phrases could only refer to a salary paid by a public employer. *See Gruszecka v. Ill. Workers' Comp. Comm'n*, 2013 IL 114212, ¶ 12 ("Words and phrases must not be viewed in isolation but must be considered in light of other relevant provisions of the statute."). For example, the court pointed to the Section 8-117(b) & 11-116(a) use of the phrase "actual sum payable during the year if the employee worked the full normal working time in his position." (A 31; C 956.) The court apparently accepted the State's argument below that the "position" must refer to the employee's public position from which he or she has taken a leave of absence.

But the text of the statute does not say that or give any reason why that would be so. It is perfectly consistent with the text that the "position" be the employee's "position" at a local labor organization in which he or she was actually working and earning a salary. Once again, in context, that provision is intended to define how much the salary is, not who is paying it. For example, in his or her final year before retirement on a union leave of absence, an employee could be paid by the union both his normal annual salary for his union position and a payout for unused vacation time. Sections 8-117(b) & 11-116(a) direct that the salary considered for pension purposes would exclude that final vacation payout and include only the actual amount payable for a normal, full-time year in his union position.

Third. The circuit court also cited the phrase in Section 8-117(b) and 11-116(a) referring to the sum to be included as salary as the amount "appropriated or fixed as salary or wages for service in the position" as suggesting a salary must be paid by a public employer. That is also wrong. As noted, the "position" can just as well be the

employee's union position. Moreover, a union may "appropriate or fix" a salary just like a public employer can. Not just public entities "appropriate" money. For example, Black's defines "appropriate" as meaning: "To prescribe a particular use for particular moneys; to designate or destine a fund or property for a distinct use or for the payment of a particular demand." Black's Law Dictionary 93 (5th Ed.) (1979). Webster's similarly defines "appropriate" to mean: "To set apart for or assign to a particular purpose or use in exclusion of all others." Webster's Third New Int'l Dictionary 106 (1986). A union's budget or bylaws may set apart or assign funds for an officer's salary to be paid out of union membership dues just as a municipality may set apart or assign funds. Similarly, a union's members can "fix" the amount of a salary for its officers in its budget or bylaws just as well as a municipality's ordinance can "fix" the amount of salary for its employees.

Fourth. The circuit court similarly erred in its reliance on Sections 8-233 and 11-217. The court pointed to the language stating: "For the purpose of this Article, the annual salary of an employee whose salary or wage is appropriated, fixed, or arranged in the annual appropriation ordinance upon other than an annual basis shall be determined as follows . . .." 40 ILCS 5/8-233 & 11-217 (2010). This, too, is not exclusionary language, nor is it focused on excluding wages not set forth in an annual appropriation ordinance of a public entity. A salary paid by a union is, of course, not "arranged in the annual appropriation ordinance." But if only salaries from an "annual appropriation ordinance" were consistent with that language, as the circuit court appeared to believe, all that would mean is that those rules for converting an hourly, daily, or monthly salary in Sections 8-233 and 11-217 would not apply to union salaries. It would not mean that the

word "salary" anywhere else in the statutes was so limited.

Such an unnecessarily exclusionary interpretation of that language would also result in salaries paid by one of the defined public employers in the Pension Code, the Chicago Board of Education, being excluded from the definition of "salary." *See* 40 ILCS 5/8-110(2) & 11-107. The City of Chicago may detail salaries in an annual appropriation ordinance. *See* City of Chi. Annual Appropriation Ordinance for Year 2018, available at www.cityofchicago.org/content/dam/city/depts/obm/supp_info/2018Budget/2018_Budget_Ordinance.pdf. The Chicago Board of Education, however, does not. The Board of Education, which acts by resolution not ordinance, instead passes resolutions adopting a budget that does not include position-by-position salaries. *See* Chi. Bd. of Educ., Resolution Adopting the Annual School Budget for Fiscal Year 2018, dated Aug. 28, 2017, available at www.cpsboe.org/content/actions/2017_08/17-0828-RS1_Final.pdf.[8] This Court should not permit such an absurd reading of the statutes that would bar not only salaries paid by unions to be counted toward members' pensions but also the salaries paid by the Board of Education to presumably hundreds or thousands of LABF and MEABF members. *See Bank of N.Y. Mellon*, 2018 IL 121995, ¶ 12 ("[A] court also will presume that the legislature did not intend absurd, inconvenient, or unjust results. Consequently, where a plain or literal reading of a statute renders such results, the literal reading should yield." (citation omitted)). In this case, the statutory language should be applied only as the legislature intended it to be as the method of calculating the amount of an "annual salary."

The circuit court's apparent reading of Section 8-233 and 11-217 is also not

[8] The Court may take judicial notice of these public documents. *See, e.g., Young-Gibson v. Bd. of Educ. of the City of Chi.*, 2011 IL App (1st) 103804, ¶ 52.

grammatically required. Under the last-antecedent rule the limiting phrase "in the annual appropriation ordinance" need only apply to the word "arranged." It need not also apply to the words "appropriated" or "fixed". *See People v. Phyllis B. (In re E.B.)*, 231 Ill. 2d 459, 467 (2008) ("The last antecedent doctrine, a long-recognized grammatical canon of statutory construction, provides that relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote, unless the intent of the legislature, as disclosed by the context and reading of the entire statute, requires such an extension or inclusion."). Because both the Chicago Board of Education and a union may "appropriate" or "fix" a salary, this reading would cure the inconvenience, absurdity, and injustice created by the circuit court's mistaken interpretation.

Fifth. The circuit court repeated similar errors in its reading of the Section 233(b) and 11-217(b) reference to the "rate of compensation or wage appropriated and payable" as contemplating only a salary paid by a public employer. As noted, there is nothing about the words "appropriated and payable" that limits their meaning to public entities.

Thus, there is nothing in the text cited by the circuit court and dating from 1963 that reveals a legislative intent to limit the salary for pension purposes to a salary paid by a public employer. The circuit court's discussion of whether the General Assembly in enacting union service credit and making contributions based on the union salary implicitly amended Sections 8-117 and 11-116 is, therefore, inapposite. Because neither those sections nor any other section limited the highest average annual salary calculation to public salaries, there was no need for a later amendment, implicit or explicit, to allow for the use of a union salary in the context of union service credit.

Sixth. The union service credit provisions themselves establish that the word "salary" in Articles 8 & 11 is not used exclusively to refer to a salary paid by a public entity. *See Casas*, 2017 IL 120797, ¶ 18 ("A court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation."). As noted, those sections refer to the "salary with such labor organization" as the base salary for calculating contributions. 40 ILCS 5/8-226(c)(1) & (2), 11-215(c)(3)(A) & (B) (2010). Thus, the word "salary" necessarily may refer to a union salary when the context requires. The Pension Code expressly states that the terms defined in the code must be interpreted in context. *See* 40 ILCS 5/8-102 ("The terms used in this Article have the meanings ascribed to them in Sections 8-103 to 8-125, inclusive, except when the context otherwise requires."); 11-102 (comparable Article 11 provision). The circuit court ignored the clear intent of earlier General Assemblies to allow public employees to take leaves of absence to work for their local unions and, if they contributed to the funds based on their union salaries, to continue to participate in the LABF and MEABF plans based on those same union salaries.

Seventh. If "salary" in 40 ILCS 5/8-117 & 11-116 could refer only to a salary paid by a public entity, those rules for calculating the amount of a "salary" could not apply to the salary base for union service credit contributions, which is the union salary. As a result there would be no rules in Articles 8 & 11 for calculating the amount of "salary" that such contributions should be based on. That, too, would be an impermissibly "absurd" or "inconvenient" result. *Bank of N.Y. Mellon*, 2018 IL 121995, ¶ 18.

Eighth. Finally, if the language in Sections 8-117, 8-233, 11-116, or 11-217 before the Act created any ambiguity as to whether it was permissible to use a union

salary for the highest average annual salary calculation, that ambiguity must be resolved in favor of the rights of the participants. *See Kanerva,* 2014 IL 115811, ¶ 55. The circuit court wrongly believed that ambiguity in those pension statutes left room for a subsequent legislature "to clarify that 'salary' is a participant's public salary." (A 32; C 957.) As stated in *Kanerva,* ambiguity in pension statutes must be resolved in favor of participants, not by a retroactive legislative "clarification" that implements a hostile legislative intent not shared by the prior General Assemblies.

C. The legislative history and decades-long administrative interpretation of Articles 8 & 11 further support that, before the Act, union salaries could be used to calculate a highest average annual salary.

The decades-long administrative interpretation of the pre-Act statutory language by the LABF and MEABF Boards is further reason to conclude that, before the Act, a union salary could be appropriately used in the highest average annual salary calculation. *See County of Du Page v. Ill. Labor Rel. Bd.*, 231 Ill. 2d 593, 608-09 (2008) ("[C]ourts afford considerable deference to the interpretation of an ambiguous statute by the agency charged with its administration."). Since at least the 1991 amendments (P.A. 86-1488) requiring union service credit contributions to be based on the union salary, the LABF and MEABF Boards uniformly granted pensions based on union salaries when those salaries were among the members' highest four years in their last ten years of service. (*See* A 79-82; C 74-77; SUP C 834, 959-60, 969, 978, 1114, 1208, 1210, 1224-25.)

That long-standing and consistent administrative interpretation is made more compelling by the legislative history of the public acts that created LABF and MEABF union service credit. That legislative history shows that the legislature's intent was to enact the terms negotiated and agreed to by the relevant public employers and unions. *See* 85th Ill. Gen. Assem., House Proceedings, Nov. 6, 1987, at 124-26 (statements of

Representatives Cullerton & Hoffman discussing P.A. 85-964); 86th Ill Gen. Assem., House Proceedings, Jan 8, 1991, at 61-62 (statements of Representatives Parke and Wolf discussing P.A. 86-1488). Those parties were, therefore, well positioned to understand the intent of the negotiated bills. Representatives of those parties sat on the pension fund boards that understood and applied the provisions to allow for union salaries to be used in the highest average annual salary calculation. *See* 40 ILCS 5/8-192 & 11-181 (detailing composition of LABF and MEABF Boards, respectively). There is no suggestion, for example, that in the decades since those negotiated bills were passed before the Act that the City of Chicago's appointed trustees ever objected that the LABF and MEABF Boards were not following the intent of the laws the City had agreed to. The circuit court was unable to point to any statutory language or legislative history to support the conclusion that the General Assemblies before 2012 had any intent to not allow the union salaries on which employees on leave contributed to the funds used to calculate their highest average annual salary for pension purposes. Only the 97th General Assembly in 2012 had such intent.

D. Interpreting "salary" to refer only to a salary paid by a public employer would lead to additional absurd, inconvenient, and unjust results.

As noted, if before the Act the salary base for union service credit contributions were divorced from the salary base for pension purposes, it would have created a unique anomaly in the whole of the Pension Code. No party has been able to identify any other example where the salary for pension purposes and contribution purposes was different. (*See* A 49; C 703.) This is with good reason. Divorcing the salary base for contribution purposes from that for pension purposes would result in significant absurd, inconvenient, and unjust results. *See Bank of N.Y. Mellon*, 2018 IL 121995, ¶ 18.

Most importantly here, if before the Act the highest average annual salary could not be calculated using the union salary the participant was actually earning during his or her leave of absence, it would have created a conflict with Sections 8-138 and 11-134. When members retire while still on leaves of absence lasting more than six years, they would not have four years of (or any) salaries paid by a public entity in the last ten years of service from which to calculate a pension. *See* 40 ILCS 5/8-138(b), 8-138(g-1), 11-134(a), 11-134(f-1) (2010). Thus, for participants such as Davis and Lopez, limiting the "salary" for the highest average annual salary calculation to a public salary would result in an absurd, unjust result. They would have no eligible salaries for calculating their pensions.[9] *See People v. Fort*, 2017 IL 118966, ¶ 35 ("The process of statutory interpretation should not be divorced from consideration of real-world results, and in construing a statute, courts should presume that the legislature did not intend unjust consequences.").

Given this obviously absurd and unjust result, the Act's amendments to Sections 8-138(g-1) and 134(f-1) created a new rule for calculating the highest average annual salary only applicable to participants with union service credit. Instead of using salaries from within the last 10 years of service as with every other LABF and MEABF member,

[9] Or if, as the State suggested below, some public salary was to have been theoretically attributed to the participant's last ten years of service it would only beg the question of what public salary to use. Would it be the last annual salary the participant earned before his leave of absence theoretically attributed to each of the last 10 years of service? Or as P.A. 97-0651 provided would you average the highest 4 out of the last 10 years before the leave of absence? Or would it be the public salary the participant would have earned in her public job title during her last 10 years of service if she had not taken the leave of absence. For a participant such as plaintiff Lopez, it would make a big difference to calculate his pension based on the salary he was earning before his leave of absence in 2002 rather than the salary he would have earned in his job title in 2011 before his retirement if he had not taken his leave of absence.

for members with union service credit, the highest average annual salary was to be calculated based on salaries from before the leave of absence, no matter how long ago. The amendments then ameliorated that gross injustice to some extent by including the inflation adjustment. But none of that was stated anywhere in Articles 8 or 11 before the Act. That omission adds further support to the conclusion that, before the Act, members with union service credit should have their pensions calculated using the salaries they were actually earning and upon which they were contributing to the funds in their last 10 years of service just like everyone else.

Moreover, the General Assembly enacting the Act in 2012 might have thought it good public policy to require contributions for union service credit to be based on a higher salary than the salary used for pension calculations. But what happens when the union salary is *lower* than the member's former public salary? The member's contributions would be based on the lower union salary, and in return he would receive a pension based on the higher public salary. The 97th General Assembly noticed this problem and limited the pensionable salary base to be no higher than the union salary upon which the member had contributed to the fund. *See* P.A. 97-0651 (amendments to 40 ILCS 5/8-138(g-1) & 11-134(f-1)). There is, however, no way to construe the pre-Act statutes as including such a cap. This, too, supports the conclusion that the legislature before the Act could not have intended to divorce the salary base for pension purposes from that for contribution purposes. Neither the State nor the circuit court could identify any statutory language that explicitly indicated a legislative intent before 2012 to base a union employee's salary for pension purposes on anything other than the union salary that set the level of contributions.

In sum, the Court should reverse the circuit court and hold that, before the Act, LABF and MEABF members with union service credit had a right to use a union salary from a Section 8-226(c) or 11-215(c)(3) leave of absence to calculate the highest average annual salary. That being so, the Act's amendments necessarily changed the law and diminished the plaintiffs' retirement system benefits in violation of the Pension Clause.

E. If the Court were to interpret 40 ILCS 5/8-117 & 11-116 before the Act as precluding the use of a union salary in the highest average annual salary calculation (it should not), the Court should hold that new interpretation applies only prospectively.

If despite all of the above, the Court were to interpret 40 ILCS 5/8-117 & 11-116 before the Act as precluding the use of a union salary in the highest average annual salary calculation (it should not), equity requires the Court to hold that new interpretation applies only prospectively. "Generally, judicial decisions are given retroactive as well as prospective effect," however, "this Court has the inherent power to conclude that a decision will not apply retroactively, but only prospectively." *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 285 (2009); *see id.*, at 286 (holding that new interpretation of tax statute "will apply only prospectively to taxes incurred, or tax credits sought, for the tax year 2009 and thereafter"). "Whether a decision will be applied only prospectively will depend on whether: (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." *Id.*, at 285.

Here, the circuit court's interpretation, if adopted by this Court, would overrule

decades of consistent administrative agency precedent upon which LABF and MEABF members reasonably relied. The circuit court's new principle of law cannot be said to have been reasonably foreshadowed. Based on the administration of the Pension Code by the LABF and MEABF Boards with fiduciary duties to act "solely in the interest of the participants and beneficiaries" (40 ILCS 5/1-109), it was entirely reasonable for the lay LABF and MEABF participants here to expect that if they contributed to the funds based on their union salaries, their pensions as well could be based on those union salaries. *See Long v. Ret. Bd. of the Firemen's Annuity & Benefit Fund of Chi.*, 391 Ill. App. 3d 681, 688 (1st Dist. 2009) ("People are entitled to rely on State statutes when making decisions and in shaping their conduct. Accordingly, our supreme court has shown reluctance in holding parties to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that their actions are proper." (internal citations, quotation and editing marks omitted)). The City, the employer required to fund the retirement plans and responsible for the appointment of employer trustees to the funds, shared those interpretations. Neither the City nor its appointed fiduciaries ever attempted to have the funds adopt a different interpretation.

Given this same history, the purpose of the Court's decision will be appropriately furthered by prospective only application. It would respect the reasonable expectations of members for whom it is too late to make alternate plans to save for retirement and who have for years contributed substantial sums to the LABF or MEABF for union service credit based on their union salaries. A new interpretation of the law applied prospectively only would in turn give the necessary guidance to new LABF and MEABF members *before* they have to make the decision whether to take a union leave of absence and

contribute to the funds for union service credit.

Finally, equity weighs heavily in favor of prospective only application. Two examples suffice to demonstrate the terrible impact of retroactive application of the Court's decision on current LABF and MEABF members. Now 80-year-old MEABF member and plaintiff June Davis worked for the Board of Education from 1966 until 1991 when she took a leave of absence to work for the CTU. (A 188; C 1726; SUP C 641-42.) She retired from the Board of Education and applied for her MEABF pension at the end of 2011 before the effective date of the Act. (*Id.*) Plaintiffs estimate that based only on a highest average annual salary of about $20,000 from her Board of Education salaries from 1991 and before, her MEABF pension would be only about $1,333 per month or $16,000 per year. (*See* SUP C 644-47; 40 1LCS 5/8-138(g-1) (providing maximum pension of 80% of highest average annual salary.) This is a small fraction of the pension based on her union salary upon which she planned for her retirement security and upon which she contributed to the MEABF for 17 years. (*Id.*) Ms. Davis would be left simply unable to meet her necessary living expenses. (*Id.*)

Similarly, now 68-year-old MEABF member and plaintiff Lopez would be left with an MEABF pension of just under $2,000 per month, or $24,000 per year, if his pension were calculated using only his Board of Education salaries from 9 years before his 2011 retirement. (*See* SUP C 770.) That, too, is a fraction of the annuity the MEABF estimated he would receive based on the CTU salaries he was earning and contributing to the fund upon for 9 years. (*See id.*)

There would, presumably, be a financial impact on the funds of awarding larger annuities. For decades, however, the LABF and MEABF were expecting to award those

annuities and should have planned accordingly. Awarding larger annuities to the few dozen participants with union service credit and who contributed based on their union salaries could not possibly have a material impact on the unfunded liability of the funds which have tens of thousands of other participants. (*See* SUP C 1225.) The long-standing underfunding of the LABF and MEABF derives not from these few participants, but from the taxing and funding decisions of the State and City. These self-inflicted funding deficiencies do not justify reducing the pensions promised to public employees. *See Jones*, 2016 IL 119618, ¶ 32.

Thus, any interpretation of Articles 8 and 11 of the Pension Code before the Act as barring the use of a union salary to calculate a highest average annual salary should only be applied prospectively. As a result, pursuant to the Pension Clause, the Act's amendments limiting the salary base for the highest average annual salary may also not be applied to LABF and MEABF members who were hired before the Act.

IV. The Court Should Reverse the Circuit Court's Dismissal of Plaintiffs' Contracts Clause Counts Challenging the Act's Amendments to the LABF and MEABF Highest Average Annual Salary Calculation Rules.

Along with the Pension Clause counts, the circuit court dismissed plaintiff's Contracts Clause counts challenging the Act's amendments to the LABF and MEABF highest average annual salary calculation rules. (A 35; C 960.) For the reasons stated above, that was also in error, and this Court should, therefore, reverse the dismissal of Counts IV.B, IV.C, V.B, and V.C. (*See* A 130-32, 141-42; C 125-27, 136-138.)

Article I, Section 16 of the Illinois Constitution and Article I, Section 10 of the United States Constitution, "which are popularly referred to as the 'contracts clause,' provide that the State shall not pass any 'law impairing the obligation of contracts.'"

Heaton, 2015 IL 118585, ¶ 60. As established above, the Pension Clause made the right to use a union salary from a Section 8-226(c) or 11-215(c)(3) leave of absence in the highest average annual salary calculation an enforceable contractual relationship. Moreover, even before the Pension Clause, this Court held that when a mandatory retirement system offered an optional service credit, like union service credit, in return for additional contributions, an enforceable contract was formed once the contributions were made. *See Gorham v. Bd. of Trs. of the Teachers' Ret. Sys. of Ill.*, 27 Ill. 2d 593, 598 (1963) ("The election by the retired teacher to participate in the increased benefits provided by the acts here in question raises a contractual relation with the State.").

The Act's impairment of plaintiffs' contractual rights is substantial. *See Heaton*, 2015 IL 118585, ¶ 62 ("Changes in the factors used to compute public pension benefits constitute an impairment which is 'obviously substantial.'" (quoting *Felt*, 107 Ill. 2d at 166)). And the State cannot justify the Act's substantial impairment as "reasonable and necessary to serve an important public purpose." *Id.*, at ¶ 64. Indeed, the legislature's only purpose was to eliminate those contractual rights. *See* House Trans. Nov. 29, 2011, at pp. 38-43 (Statements of Rep. Cross). *See also Heaton*, 2015 IL 11585, ¶ 63 ("[T]he United States Supreme Court has held that particular scrutiny of legislative action is warranted when, as here, a state seeks to impair a contract to which it is itself a party and its interest in avoiding the contract or changing its terms is financial.").

V. The Court Should Reverse the Circuit Court's Dismissal of Plaintiffs' Takings Clause Counts Challenging the Act's Amendments to the LABF and MEABF Highest Average Annual Salary Calculation Rules.

The circuit court similarly dismissed plaintiffs' Taking Clause challenges to the Act's Amendments to the LABF and MEABF highest average annual salary calculation

rules. (A 35; C 960.) That decision, too, was in error and this Court should reverse dismissal of Counts IV.D, IV.E, V.D & V.E. (*See* A 132-34, 143-45; C 127-29, 138-40.)

The Takings Clauses of the Illinois and Federal Constitutions (Ill. Const. art. I, § 15; U.S. Const. Amend. V (applicable to the States through U.S. Const. Amend. XIV) prohibit "the taking of private property for public use without just compensation." *Canel v. Topinka*, 212 Ill. 2d 311, 332 (2004). For the reasons discussed above, plaintiffs had an enforceable contractual right before the Act to use a union salary from a Section 8-226(c) or 11-215(c)(3) leave of absence as part of the highest average annual salary calculation. Such a contractual right is a form of property within the meaning of the Takings Clauses. *See U.S. Trust Co. v. New Jersey*, 431 U.S. I, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."). The Act eliminated that right without any provision for just compensation, and, therefore, violated the Takings Clauses.

VI. The Court Should Hold that the LABF and MEABF Are Estopped from Retroactively Departing from Their Decades-Long Practice of Permitting Union Salaries to Be Used to Calculate Highest Average Annual Salaries.

Given the unique harm and reliance interests in this case, the Court should also hold that the LABF and MEABF are estopped from departing from their decades-long practice of using union salaries to calculate highest average annual salaries for participants' who were members of the systems before the Act. Thus, the Court should reverse the circuit court's denial of plaintiffs' motion for summary judgment (and grant

of defendants' cross-motions) on Count XIV in the First Supplemental Complaint.

Courts may bar acts by municipalities through equitable estoppel when (1) an act by the municipality induces reliance by a private party and (2) the private party acted in reasonable reliance upon that act to his or her detriment. *See Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40. This Court holds 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. Nonetheless, given the unique harm and reliance interests in this case, plaintiffs' "claim rises to that level." *Boswell v. City of Chi.*, 2016 IL App (1st) 150871, ¶ 32.

Critically, the LABF and MEABF are not municipal corporations. They are public pension funds administered by boards of trustees with the fiduciary duty to administer the funds "solely in the interest of the participants and beneficiaries." 40 ILCS 5/1-109. They are also the administrative bodies with authority to apply Articles 8 and 11 of the Pension Code. *See* 40 ILCS 5/8-197, 11-186. Given that special status as fiduciaries required to act in the interest of participants and as bodies with authority to apply the Pension Code, it was entirely reasonable for members to rely on the pension boards' administration of the Pension Code as reflecting an accurate and enforceable understanding of their rights.

That is exactly what happened here. For decades before the Act, the LABF and MEABF Boards repeatedly decided that a union salary from a leave of absence under Section 8-226(c) or 11-215(c)(3) could be used in the highest average annual salary calculation. They granted to every single retiree with union service credit in his or her last ten years of service, a pension calculated based on the same union salaries upon which

the members' contributions were based. (SUP C 834, 959-60, 969, 978, 1114, 1208, 1210, 1224-25.) The LABF and MEABF also gave annuity estimates based on those same union salaries to members who were making decisions about whether or not to contribute to the funds for union service credit and about when to retire. (SUP C 954, 977-78, 1104-05; 1204, 1208, 1210, 1217, 1248-50.) For decades, there is no suggestion that anyone, including the City of Chicago appointed trustees, had any doubt that they were applying the Pension Code correctly and in good-faith. *See* 40 ILCS 5/8-192, 11-181 (describing composition of LABF and MEABF Boards).

Members relied on this known and consistent interpretation of the Pension Code by the fiduciaries charged by statute with administering the LABF and MEABF. For years, they contributed substantial sums to the funds based on their union salaries. They planned for their retirement security with the expectation of a pension based on those union salaries. (*See* SUP C 299-300, 642, 646, 977-78, 1104-05, 1217, 1248-1250, 1270-71, 1273, 1751-52, 2161-62.) It should not be forgotten that when they made their decisions to take leaves of absence and contribute to the funds for union service credit, these members were laborers, electrical lineman, and school counselors. (*See, e.g.*, SUP C 642, 768, 1269, 2160.) When making those decisions, such employees do not hire lawyers to canvas the provisions of the Pension Code to second guess (as the State's lawyers did here) the retirement system fiduciaries.

If the Boards were permitted to upset those expectations now based on a new interpretation of the Pension Code, it would be too late for the plaintiffs to go back and reverse their decisions or otherwise save for retirement. The scope of the detrimental reliance and the harm caused by a change in the rules now are also exceptional. Plaintiff

June Davis is a prime example. She was a $20,000 a year school community representative when she took a leave of absence in 1991 to work for the CTU representing other Chicago Public Schools paraprofessionals and school-related personnel. (SUP C 642.) This was after working for the Board of Education for almost 25 years since 1966. (*Id.*) Expecting that she would be able to retire on a MEABF pension based on her CTU salary, she then contributed to the MEABF for more than 17 years based on those CTU salaries. (SUP C 645-46.) To be sure, those CTU salaries, more than $100,000 a year in her last years before retirement, were substantially higher than her Board of Education salary back in 1991. (SUP C 644.) But Ms. Davis also had extensive responsibilities in her CTU position. Those responsibilities included negotiating and enforcing contracts, advocating for policies to benefit students and educators, and supervising the department she eventually managed at the union. (SUP C 642.)

In the expectation of receiving a pension based on those union salaries, Davis and the CTU contributed around 20% of her union salaries every year to the MEABF for more than 17 years. (SUP C 642, 649.) Davis retired from the Board of Education and submitted her pension application to the MEABF at the end of 2011, in the hope of avoiding the impact of P.A. 97-0651. (SUP C 643.) She was too late. After 24 years of Board of Education service and 17 years of contributions based on her union salary, Davis' pension would likely be only about $1,333 per month or $16,000 per year, if calculated only on salaries of around $20,000 she earned back in 1991. *See* 40 ILCS 5/8-138(g-1) (providing maximum annuity of 80% of highest average annual salary). Now, 80 years old, Davis will be left with a poverty-level pension.

If the MEABF fiduciaries had told Davis that her pension would be based only on

her salaries from before her leave of absence it is inconceivable that she would have contributed more than 20% of her CTU salary for 17 years to the MEABF. She could have spent those years using that 20% of her salary to otherwise save for retirement. Now even if she were able to get a refund of all of those contributions she will have lost out on more than twenty-five years of investment returns. The CTU also would have acted differently. It could have set up a defined benefit plan to cover employees on leave from the Board of Education and used employer and employee contributions to fund a pension more substantial than the poverty level pension resulting from the retroactive application of the Act.

Other plaintiffs face similar threats. (*See* SUP C 770, 1281-82.) These are not political insiders who engineered sweetheart deals for themselves. These are not individuals who took advantage of a loophole in the law to work for the City for one day and collect a public pension. These are public employees who contributed decades of public service and followed the law as the fiduciaries of the pension funds applied it for decades. If they were given different rules they would have followed those. Equity cannot turn a blind eye to this injustice.

VII. The Court Should Declare That When Participants Hired Before the Act Contributed to the LABF or MEABF for Union Service Credit Based on Union Salaries, They Have a Contractual Right to Have the Union Salaries Used to Calculate the Highest Average Annual Salary.

The Court should also declare that the LABF and MEABF participants who made union service contributions based on their union salaries have a contractual right to use those same salaries in the highest average annual salary calculation. The Court, therefore, should reverse the circuit court's denial of plaintiffs' motion for summary judgment (and grant of defendants' cross-motions) on Count XIII. (*See* A 202-04; C 1740-42.)

"In Illinois, an offer, an acceptance and consideration are the basic ingredients of a contract." *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 151 (2006). Even before the 1970 Constitution's Pension Clause, this Court held that when a pension system offers a form of optional service credit in consideration for additional contributions, a contractual relationship is formed when those contributions are made. *See Gorham*, 27 Ill. 2d at 598. ("The election by the retired teacher to participate in the increased benefits provided by the acts here in question raises a contractual relation with the State.").

Here, for decades the LABF and MEABF offered members the right to pensions calculated based on union salaries earned during Section 8-226(c) or 11-215(c)(3) leaves of absence if the participant made all of the employee and employer contributions to the funds based on those salaries. (*See* SUP C 834, 959-60, 969, 978, 1114, 1208, 1210, 1224-25.) For years before the Act, plaintiffs such as Davis, Lopez, Notaro, and Torres accepted and provided consideration for that offer by contributing from about 17% to more than 20% of their union salaries to the funds. (*See* SUP C 649, 775, 1286-87.)

The circuit court held that any such contract would be contrary to law and therefore unenforceable based on the erroneous interpretation of the Pension Code as barring a union salary from being used in the highest average annual salary calculation. (A 19; C 2353.) For all the reasons discussed above, that interpretation is wrong, but if the circuit court's acceptance of the clarification argument is correct, it would be grossly inequitable to apply a newly-clarified interpretation to these participants. That clarified interpretation was not the offer accepted by the participants and is inconsistent with both the service and the level of contributions that were the consideration provided by the participants. Thus, the contracts between the LABF and MEABF and the participants

here are not contrary to statute and are fully enforceable.

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

The Court should also reverse the circuit court's order denying plaintiffs' motion for summary judgment, and granting the MEABF's cross-motion, on plaintiffs' Counts X and XII seeking declaratory judgments that 40 ILCS 5/8-226(c)(3) does not apply to defined contribution plans. (*See* A 16-18, 173-75, 201-02; C 168-70, 1739-40, 2350-52.) Section 8-226(c)(3) provides that a MEABF member may contribute to the fund for union service credit only if "the participant does not receive credit in any pension plan established by the local labor organization based on his employment by the organization." The phrase "receive credit in any pension plan" unambiguously applies to a defined benefit pension plan established by the local labor organization. It is, however, ambiguous as to whether the legislature intended to include defined contribution plans within the prohibition. The proviso's restriction on receiving union service credit, therefore, "must be liberally construed in favor of the rights of the pensioner" to apply to defined benefit plans only, and not to defined contribution plans. *See Kanerva*, 2014 IL 115811, ¶ 55. Any other interpretation would wipe out all the years of members' union service credit for which they contributed to the MEABF in reliance on a reasonable interpretation of the statute and with no contrary guidance from the pension fund.

A. Section 8-226(c)(3) is most reasonably interpreted as applying only to defined benefit plans.

Defined benefit plans, such as the MEABF, provide a fixed, regular payment upon retirement determined by a formula giving the participant credit for years of service and other factors such as age and salary. *See* 40 ILCS 5/8-138, 8-226; *Jones*, 2016 IL 119618, ¶ 4 ("[T]he City pension funds provide traditional defined benefit plans under

which members receive specified annuities upon retirement generally based upon the member's salary, years of service, and age at retirement."); *In re Marriage of Blackston*, 258 Ill. App. 3d 401, 402 (5th Dist. 1994) ("Under a defined-benefit plan, as opposed to a defined-contribution plan, the benefits received by an employee are determined by a formula, which generally takes years of service and salary into consideration but which is not correlated with the amount of contribution made by the individual employee.").

By contrast, in a defined contribution plan the participant is not entitled to any fixed, regular payments upon retirement. Instead, the participant is entitled only to the accumulated value of contributions at the time of any withdrawal. *See In re Marriage of Blackston*, 258 Ill. App. 3d at 402 ("Under a defined-contribution plan each participant has a separate account, and the benefit earned by the employee is based on the balance in his or her account."). (*See also* SUP C 1490, 1738-39, 1752-54, 1936-38, 1951-53.) Moreover, even the amount of an employer contribution to such a plan is not guaranteed and may vary at the employer's discretion or with the terms of labor agreements.

Whether Section 8-226(c)(3) applies to defined contribution plans, in addition to defined benefit plans, is a question of statutory interpretation. The Pension Code does not define "pension plan." Where a term is not defined in a statute, the courts "assume the legislature intended the term to have its ordinary and popularly understood meaning." *Landis v. Marc Reality L.L.C.*, 235 Ill. 2d 1, 8 (2009). "It is appropriate to employ a dictionary to ascertain the meaning of an otherwise undefined word or phrase." *Id.* Dictionary definitions of "pension" support the conclusion that the term's ordinary and popular meaning is to refer to a traditional defined-benefit pension plan. This is especially true before 1987 when Section 8-226(c)(3) was enacted by P.A. 85-964.

For example, in 1979 Black's defined "Pension" as a "[r]etierment benefit paid regularly (normally, monthly), with the amount of such based generally on length of employment and amount of wages or salary of pensioner." Black's Law Dictionary 1021 (5th Ed. 1979) (current addition in 1987). It defined "Pension Plan" as "[a] plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees, or their beneficiaries, over a period of years (usually for life) after retirement. Retirement benefits are measured by, and based on, such factors as years of service and compensation received by the employees." Black's Law Dictionary 1021 (5th Ed. 1979). In 1986, Webster's defined "pension" similarly as "a fixed sum paid regularly to a person" including "one paid under given conditions to a person following his retirement from service (as due to age or disability) or to the surviving dependants of a person entitled to such a pension." Webster's Third New Int'l Dictionary 1671 (1986). (*See also* A 17; C 2351 (quoting Black's Law Dictionary 531 (3d pocket ed. 2006) as defining "pension" as "[a] fixed sum paid regularly to a person (or to the person's beneficiaries), esp. by an employer as a retirement benefit.").)

Those are essentially definitions of defined benefit plans which generally guarantee a lifetime annuity comprised of regular, fixed monthly payments based on factors such as years of service and salary. Defined contribution plans, by contrast, do not fit within those definitions. They do not guarantee any fixed, regular payment at retirement, and the benefit is not based on factors such as years of service or salary. As noted, this difference is exactly what distinguishes defined benefit plans from defined contribution plans. *See, e.g., LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248,

250 n.1 (2008) ("As its names imply, a 'defined contribution plan' or 'individual account plan' promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions. A 'defined benefit plan,' by contrast, generally promises the participant a fixed level of retirement income, which is typically based on the employee's years of service and compensation.").

These dictionary definitions are consistent with what a lay City or Board of Education worker would likely understand a "pension plan" to be. Individuals with only a 401(k) defined contribution plan, for example, are unlikely to think of themselves as having a "pension." Much more likely they think of themselves as having retirement savings. Only someone in a defined benefit plan is likely to think he or she has a pension.

B. Definitions of "pension plan" as including defined contribution plans, such as in ERISA, merely create ambiguity that must be resolved in favor of the MEABF members.

Nonetheless, some sources would include a defined contribution plan within the meaning of a pension plan. Most notably, the federal Employee Retirement Income Security Act of 1974 ("ERISA") includes defined contribution plans within its definition of "pension plan." *See* 29 U.S.C. § 1002(2)(A) (including within definition of "pension plan" any plan that "(i) provided retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."). That ERISA definition, however, is not controlling as ERISA does not apply to the governmental pension plans here. *See Matsuda v. Cook Cty. Ees & Officers' Annuity & Benefit Fund*, 278 Ill. App. 3d 378, 384-85 (1st Dist. 1995) (ERISA "has no bearing whatsoever on the issue at hand. (29 U.S.C. § 1001 et seq. (1976).) ERISA expressly states that it does not apply to governmental retirement plans. (29

U.S.C. §§ 1002(32), 1003(b)(1) (1976).)").

Courts have noted that "ERISA's definition of a pension plan is so broad, virtually any contract that provides for some type of deferred compensation will also establish a de facto pension plan" that it is likely to catch parties unaware. *Modzelewski v. Resol. Trust Corp.*, 14 F.3d 1374, 1377 (9th Cir. 1994). That unusually broad and technical definition contrasts with the more common understanding of what a "pension" is from the dictionary definitions above. In any event, that there are competing definitions of "pension" or "pension plan", some that would and some that would not include defined contribution plans, means only that the term as used in Section 8-226(c)(3) "does not have a single plain meaning but is ambiguous." *See Landis*, 235 Ill. 2d at 11.

Supporting the conclusion that Section 8-226(c)(3) is ambiguous in this respect is the fact that the MEABF Board was for years unable or unwilling to give its members any guidance on its meaning. As noted, the MEABF Board is charged with administering the Pension Code "solely in the interest of the participants and beneficiaries." 40 ILCS 5/1-109. Yet, since 1987, neither the MEABF Board nor anyone else at the MEABF ever advised members or unions that participation in a defined contribution plan could disqualify them from receiving union service credit. (SUP C 1221-22, 1491-92, 1757.) The MEABF's written communications to members and unions outlining the requirements for union service credit only paraphrased or quoted the Section 8-226(c)(3) text. (*See* SUP C 835-36, 839-45; *see also* SUP C 1210, 1218, 1240-41.) Moreover, before filing this lawsuit in 2012, MEABF members requested guidance from the MEABF Board regarding whether Section 8-226(c)(3) applied to defined contribution plans. (SUP C 796-97, 941-47.) The MEABF Board never responded. (*Id.*) Not until

filing its summary judgment brief here more than 4 years later did the MEABF ever state a position on whether or not Section 8-226(c)(3) applied to defined contribution plans. (*See* C 1845, 1860; *see also* SUP C 1221-22.)

If even the professional fiduciary board charged with administering Article 8, advised by able legal counsel, could not figure out its position on this question for years, the provision is clearly ambiguous. The lay MEABF participants should not be charged with conjuring the meaning of a statute the MEABF Board itself could not.

Thus, because the term "pension plan" in Section 8-226(c)(3) is ambiguous in this respect, it "must be liberally construed in favor of the rights of the pensioner" to apply to defined benefit plans only, and not to defined contribution plans. *See Kanerva*, 2014 IL 115811, ¶ 55. The fact that Section 8-226(c)(3) applies only if the participant "receive[s] credit" in a "pension plan" supports this construction. Only in a defined benefit plan does a participant receive credit for years of service towards a pension. *See Bandak v. Eli Lilly & Co. Ret. Plan.*, 587 F.3d 798, 801 (7th Cir. 2009) ("The contention in Lilly's brief that the reference in the minutes to years of service 'credited by another affiliate' is a reference to defined contribution plans, not defined benefit plans, makes no sense. Though Lilly does offer a defined contribution plan, benefits generated by such plans are based on the contributions to the employee's retirement account rather than on his years of service.").

The apparent purpose of Section 8-226(c)(3) is to prohibit a member from receiving credit toward a pension for the same period of time in the MEABF and in a local labor organization pension plan. That purpose is fulfilled by barring the receipt of service credit toward a pension in a defined benefit plan. That purpose does not require

barring members from accumulating retirement savings in some other way such as a tax-favored defined contribution plan account. Deterring such other forms of retirement savings would be an unlikely public policy. *See Casas*, 2017 IL 120797, ¶ 18 ("The court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another.").

Further suggesting that it would be unlikely that the legislature intended to bar defined contribution plan participation is the fact that the employer contributions to such plans effectively reduced the employees' MEABF pensionable salary base and thus the MEABF's pension liability. If the MEABF Board had advised participants that Section 8-226(c)(3) applied to defined contribution plans, the unions could have paid the employees a higher current salary, rather than make contributions to the defined contribution plans.

Moreover, this case demonstrates well the purpose of the liberal construction rule to protect retirement system members who relied on a reasonable interpretation of the Pension Code. MEABF members such as plaintiffs Davis, Lopez, and Notaro participated in their local union defined contribution plans believing that by doing so they were not receiving credit in a pension plan established by their unions. (SUP C 644-45, 771-72, 1279-81.) That understanding was wholly reasonable and in accord with the common and popular meaning of receiving credit in a pension plan. This is especially true where for decades the MEABF never gave its member any guidance on the meaning of the law. If the Court nonetheless now rejects that reasonable interpretation and adopts the interpretation of the circuit court that "receive credit in any pension plan" includes defined contribution plans, those individuals' retirement security will be wiped out.

If Davis, for example, were to lose her entire 17 years of union service credit

because of her participation in a CTU defined contribution plan, her MEABF pension would be based only on her 24 years of Board of Education service and her salaries from 1991 and before. (SUP C 641, 644-47.) She would be left with a pension of only about $1,000 per month, a fraction of the MEABF pension she was planning to rely on for her income in retirement. (*Id.*) At age 80, she cannot now go back in time and attempt to opt out of the defined contribution plan or otherwise save for retirement. She will have to choose between trying to continue to work or living in poverty. Lopez and Notaro will similarly have the rug pulled out from under their retirement security now that it is too late for them to make alternate plans. (SUP C 771-72, 1282, 1493.)

C. The other points relied on by the circuit court to interpret Section 8-226(c)(3) as applying to defined contribution plans are unpersuasive.

The other points relied on by the circuit court for interpreting Section 8-226(c)(3) against the interests of the participants are not persuasive. The circuit court correctly noted that the plan documents of multiple of the defined contribution plans here referred to themselves as pension plans and to contributions being "credited" to individual accounts. (A 17; C 2351.) The court, however, failed to acknowledge that those plans are private-sector employee benefit plans governed by ERISA and not the Pension Code. It was appropriate for those plan documents to label the plans consistent with their governing private-sector law. ERISA's broad definition of "pension plan" is consistent with that statute's purpose to provide a comprehensive regulatory framework for employee benefits to protect employees and retirees. *See Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983) ("ERISA is a broad, remedial statute, designed to protect the rights of participants in employee benefit plans and their beneficiaries."). There is no reason to infer that the General Assembly intended that same broad definition in Section

8-226(c)(3) which would have the effect of limiting the rights of pension system members. Moreover, as discussed above, plaintiffs do not contend that the term "credit" cannot be understood to refer to a contribution to an account. Plaintiffs' point is that as "credit" is used in Section 8-226(c)(3) it is more reasonably understood as referring to credit for service time consistent with that section's purpose to prevent the double-counting of service in the MEABF and a local union defined benefit pension plan.

The circuit court also stated that "the legislature distinguishes between defined benefit and defined contribution plans throughout the Pension Code, but tellingly not at section 8-226(c)(3)" citing 40 ILCS 5/2-165, 2-166, 14-156, 15-155, 15-200, 15-201, 16-206, 20-124. (A 17; C 2351.) All of those statutes were enacted in 2012 by P.A. 98-599,[10] except for Section 15-155 which was enacted by P.A. 100-0023 in 2017. That was decades after Section 8-226(c)(3) was enacted in 1987 and after defined contribution plans had become much more common. *See Bandak*, 587 F.3d at 801 ("Nor were defined contribution plans common prior to 1997."). Indeed the very point of P.A. 98-599 was to reduce employees' pension benefits. *See Heaton*, 2015 IL 118585, ¶ 27. One of its tools for doing so was to shift from defined benefit pensions to defined contribution plans. This once again demonstrates the fundamental differences between the two plans. It would, therefore, be wrong to assume that in 1987 the legislature intended to refer to defined contribution plans in Section 8-226(c)(3) without an express statement of that intent.

Thus, this Court should reverse the circuit court and hold that the term "receive credit in any pension plan" as used in Section 8-226(c)(3) does not include defined contribution plans.

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[10] Thus, those sections were struck down by *Heaton*, 2015 IL 118585, ¶ 96, and were largely repealed by P.A. 100-0023.

D. If the Court were to hold that Section 8-226(c)(3) applies to defined contribution plans (it should not), it should clarify the scope of the restriction to give participants clear guidance of their legal rights.

If the Court were nonetheless to conclude that Section 8-226(c)(3) applies to defined contribution plans (it should not), plaintiffs request the following clarifications of the Court's interpretation of that section's application to such plans in the interest of giving guidance to MEABF members. The circuit court rejected plaintiffs' request holding that these additional declaratory rulings were not ripe because they were not pleaded in plaintiffs' Complaint or First Supplemental Complaint. (*See* A 18; C 2352.) The court nonetheless proceeded to give what it acknowledged were "advisory opinions" rejecting plaintiffs' interpretations of the statute. (*See id.*) It is true that plaintiffs did not expressly plead a request for these additional rulings in their declaratory judgment counts. Nonetheless, the issues are ripe because there is "'a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof.'" *Ferguson v. Patton*, 2013 IL 112488, ¶ 23 (quoting *Nat'l Marine, Inc. v. Ill. E.P.A.*, 159 Ill. 2d 381, 390 (1994).) As discussed below, the requested declaratory guidance impacts the factual situations of the plaintiffs here, and will likely forestall future litigation. If, however, this Court agrees that the requested declaratory guidance is not ripe, it should vacate the circuit court's advisory opinions.

If the Court agrees with plaintiffs that the declaratory guidance is appropriate, plaintiffs request the following rulings consistent with the statutory text:

First. The Court should clarify that when a participant has retroactively waived or forfeited contributions to a defined contribution plan account from a leave of absence, Section 8-226(c)(3) does not bar his or her receipt of MEABF union service credit for

that time. For example, in order to receive his MEABF pension during the pendency of this litigation, Notaro forfeited the contributions that were made to his account in the Local 9 defined contribution plan during his leave of absence. (SUP C 1280-81.) The circuit court rejected this argument because the statute does not refer to "forfeiting" or "waiving" credit. It is unnecessary, however, for the statute to use those words. Once the participant forfeits the defined contribution plan contributions (and earnings) he simply has not received credit in any pension plan and Section 8-226(c)(3) is not triggered in the first place. It bears noting, however, that such retroactive forfeitures cannot save everyone. Plaintiff June Davis for example, would not be able to forfeit her CTU defined contribution plan accounts because at age 80 she has already had to take mandatory distributions from those accounts since age 70 1/2. (*See* SUP C 1755, 1954.)

The current situation demonstrates the necessity for this interpretation. If retroactive waivers or forfeitures were not allowed, there would be no way for participants to conform their past actions (made during a period of legal uncertainty) to any new interpretation of Section 8-226(c)(3) as applying to defined contribution plans. *See Bank of N.Y. Mellon*, 2018 IL 121995, ¶ 18 (courts should avoid "unjust results" when interpreting statutes). Allowing forfeitures would also be consistent with the MEABF's practice of allowing multiple retroactive waivers of participants' credit in defined benefit pension plans, even after they had begun receiving pensions from those defined benefit plans. (*See* SUP C 1213-14, 1216-19, 1257-58.)

Second. The Court should clarify that Section 8-226(c)(3) does not bar receipt of union service credit for years when there are in fact no employer contributions to the defined contribution plan for the participant. For multiple years, the CTU did not make

contributions to its defined contribution plans for its employees. (*See* SUP C 1754-55, 2044, 2057-58, 2102.) In those years for which the participants received nothing at all from the CTU, it also cannot be said that they received credit in a pension plan so as to trigger the Section 8-226(c)(3) proviso.

Third. The Court should clarify that Section 8-226(c)(3) does not apply to defined contribution plans, such as one of the CTU plans, with no employer contributions at all. (*See* SUP C 1752-53.) Employees fund their accounts in those plans solely through tax-favored salary deferrals. It simply cannot be said that by saving for retirement in this way a participant is somehow doubling-up on credit in a union pension plan and the MEABF. It would be wrong for the Court to attribute to the legislature such an "absurd" intent that would pointlessly discourage retirement savings. *See Bank of N.Y. Mellon*, 2018 IL 121995, ¶ 18.

E. In the alternative, the Court should hold that any interpretation of Section 8-226(c)(3) as including defined contribution plans should only be applied prospectively.

In the alternative, if the Court were to affirm the circuit court's conclusion that Section 8-226(c)(3) includes defined contribution plans (it should not), equity requires that the Court hold that the interpretation only applies prospectively following the *Exelon Corp.*, 234 Ill. 2d at 285, factors. Before the decision below, no court, nor the MEABF Board, ever interpreted Section 8-226(c)(3) to apply to defined contribution plans. (*See* SUP C 1221-22.) Nor was that interpretation clearly foreshadowed. As noted, even after MEABF members requested guidance in 2012 from the MEABF Board on the question, the MEABF was unable to provide a response. (SUP C 796-97, 941-47, SUP C 1221-22.) Prospective-only application would also further the purpose of a court declaration of the meaning of the statute. MEABF members would have legal clarity of their rights going

forward, without being penalized for participating in defined contribution plans in the past when there was no guidance from the courts or the MEABF. *See Long*, 391 Ill. App. 3d at 688 ("[O]ur supreme court has shown reluctance in holding parties to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that their actions are proper." (internal citations, quotation and editing marks omitted)).

Equity clearly favors prospective only application. As discussed, MEABF members had no guidance from the fiduciaries of the MEABF, leaving them on their own to interpret the meaning of Section 8-226(c)(3). When they made their decisions years or even decades ago, they reasonably believed that they were following the rules set forth in the Pension Code. If a new interpretation of Section 8-226(c)(3) covering defined contribution plans were applied retroactively, it would unfairly change those rules for these participants in the ninth inning. They cannot go back in time and reverse the decisions they made years ago in reliance on a reasonable understanding of the Pension Code. Now in their 60s or even 80s, it is too late for them to make new plans to save for retirement. Davis and Lopez will be left to live on $1,000 per month pensions. (SUP C 641, 645-57. 770, 772-73.) Equity cannot allow that result.

CONCLUSION

For the above reasons, the circuit court's July 14, 2017, judgment granting plaintiffs' motion for summary judgment, and denying the defendants' cross-motions, on Counts I.A, II.A, and III.A should be affirmed. The circuit court's September 29, 2014, dismissal of Counts IV.A to IV.E and V.A to V.E should be reversed. And the circuit court's July 14, 2017, judgment granting defendants' motions for summary judgment,

and denying the plaintiffs' cross-motion for summary judgment, on Counts X, XII, XIII & XIV should also be reversed.

Respectfully submitted,

Dated: March 26, 2018

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

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

Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 80 pages.

Dated: March 26, 2018

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

Verified Certificate of Filing and Service

I, George A. Luscombe III, an attorney, certify that on March 26, 2018, I caused to be electronically filed this *Combined Appellee/Appellant Brief of Plaintiffs-Appellees/Appellants*, together with the *Separate Appendix Vol. I of II of Plaintiffs-Appellees/Appellants*, and the *Separate Appendix Vol. II of II of Plaintiffs-Appellees/Appellants* (collectively "Brief and Appendix"), 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 March 26, 2018, I also caused to be served this Brief and Appendix on each of them by e-mail to their e-mail address of record, listed below.

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

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

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

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

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

Attorneys for Defendants-Appellees:
Public School Teachers' Pension and

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

Attorneys for Defendants-Appellees:

Retirement Fund of Chicago; and Board of Trustees of the Public School Teachers' Pension and Retirement Fund of Chicago	*Municipal Employees' Annuity & Benefit Fund of Chicago and the Retirement Board of the Municipal Employees' Annuity & Benefit Fund of Chicago*

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

Dated: March 26, 2018

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