No. 129471

IN THE
SUPREME COURT OF ILLINOIS

ARLINGTON HEIGHTS POLICE PENSION FUND, *et al.*, Plaintiffs, THOMAS HENDERSON, *et al.*, Plaintiffs-Appellants, v. JAY ROBERT "J.B." PRITZKER, in his official capacity as Governor of the State of Illinois, *et al.*, Defendants-Appellees.	)	On appeal from the Illinois Appellate Court, Second Judicial District, No. 2-22-0198 There on Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois No. 2021 CH 55 HONORABLE ROBERT K. VILLA, Judge Presiding.

(full caption and list of counsel on following pages)

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SUPREME COURT OF ILLINOIS

ARLINGTON HEIGHTS POLICE PENSION FUND, AURORA POLICE PENSION FUND, CHAMPAIGN POLICE PENSION FUND, CHICAGO HEIGHTS POLICE PENSION FUND, CHICAGO RIDGE POLICE PENSION FUND, CICERO POLICE PENSION FUND, DeKALB POLICE PENSION FUND, ELGIN POLICE PENSION FUND, ELMHURST POLICE PENSION FUND, EVANSTON POLICE PENSION FUND, MOKENA POLICE PENSION FUND, PALOS HEIGHTS POLICE PENSION FUND, RANTOUL POLICE PENSION FUND, VILLA PARK POLICE PENSION FUND, WOOD DALE POLICE PENSION FUND, WOODRIDGE POLICE PENSION FUND, MAYWOOD FIREFIGHTERS' PENSION FUND, PLEASANTVIEW FIREFIGHTERS' PENSION FUND, Plaintiffs, and THOMAS HENDERSON, SCOTT MAY, LAWRENCE SUTTLE, DANIEL HOFFMAN, PATRICK SIMONS, PATRICK KELLY, GENE KEELER, STEVEN ANKARLO, LEE MORRIS, DEAN MANN, PAUL MOTT, JIM KAYES, JAMES ROSCHER, THOMAS QUIGLEY, VICTOR VALDEZ, THOMAS TUREK, WILLIAM CZAJKOWSKI, DAVID DELANEY, RICHARD WEIKAL, DAVID FLOWERS, SR., ROBERT MILLER, DAN RANKOVICH, AARON WERNICK, TIMOTHY SCHOOLMASTER, DAVE LOEHMAN, MIKE HERBERT, MATTHEW BROSS, MICHAEL TITTLE, SCOTT SHROEDER, BENJAMIN DEFILIPPIS, JORDAN ANDERSON, DENNIS KOLETSOS, WILLIAM BODNAR, and FRED MALAYTER, Plaintiffs-Appellants, v. JAY ROBERT "J.B." PRITZKER, in his official capacity as Governor of the State of Illinois, CHRISTOPHER B. MEISTER, in his official capacity as Executive Director of the Illinois Finance Authority; DANA POPISH SEVERINGHAUS, in her official capacity as Acting Director of the Illinois Department of Insurance; BOARD OF TRUSTEES FOR THE POLICE OFFICERS' PENSION INVESTMENT FUND; and BOARD OF TRUSTEES FOR THE FIREFIGHTERS' PENSION INVESTMENT FUND, Defendants-Appellees.	On appeal from the Illinois Appellate Court, Second Judicial District, No. 2-22-0198 There on Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois No. 2021 CH 55 HONORABLE ROBERT K. VILLA, Judge Presiding.

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TABLE OF CONTENTS

Page(s)

POINTS AND AUTHORITIES

NATURE OF THE ACTION

In this appeal, 34 active and retired members of local pension funds governed by Articles 3 and 4 of the Pension Code ("Plaintiffs") challenge the constitutionality of Public Act 101-0610 ("Act"), which transferred to two newly created entities the responsibility to invest the assets of all Article 3 and 4 funds, but did not change the power of those funds' local boards to determine the amount of any annuities, disability benefits, or other payments to their members, or change the manner for selecting these local boards. (Plaintiffs were originally joined by 18 local funds, but the circuit court dismissed these funds, and they did not appeal that dismissal.) Plaintiffs challenge the Act under the Pension Protection and Takings Clauses of the Illinois Constitution. The circuit court granted summary judgment against them, and the appellate court affirmed. Relying on this Court's precedent that the Pension Protection Clause protects all promised payments to retirement system members but does not protect the funding for those payments, the appellate court held that the Act does not violate the Pension Protection Clause because it does not reduce the payments Plaintiffs are entitled to receive. The appellate court also held that because the Act does not reduce those payments, and Plaintiffs do not have a property interest in the amount of their local funds' assets, the Act does not affect a property interest protected under the Takings Clause. No issue is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Act does not violate Plaintiffs' rights under the Pension Protection Clause of the Illinois Constitution (art. XIII, § 5) because it does not reduce the pension payments or other financial benefits they are entitled to receive.

2. Whether the Act does not violate Plaintiffs' rights under the Takings Clause of the Illinois Constitution (art. I, § 15) because it does not affect any property right belonging to them and, in any event, does not constitute a "taking" of their local retirement systems' assets.

STATEMENT OF FACTS

Introduction

The Act did not eliminate any of Illinois' approximately 650 local pension funds for police and firefighters governed by Articles 3 and 4 of the Pension Code.[1] Nor did it reduce the annuities, disability benefits, or other payments to active or retired members or beneficiaries of these funds, including spouses and dependents (collectively, "members"), as provided in the Pension Code. *See infra* at 6, 14. The Act also did not change the manner of selecting the persons who serve on these local funds' boards of trustees, who continue to have the exclusive power to determine the amount of all annuities and other benefits payable to their members under the Pension Code. 40 ILCS 5/3-124.3, 4-117.240.

Rather, the Act transfers custody and investment management of the assets of Article 3 and 4 pension funds to two newly created entities: the Police Officers' Pension Investment Fund, and the Firefighters' Pension Investment Fund ("Investment Funds"). Under this system, each local fund maintains a separate account, whose assets are dedicated solely to paying benefits to the local fund's members and covering its operating expenses. 40 ILCS 5/1-109, 22B-118(c), 22C-118(c). This change is designed to reduce

[1] Plaintiffs' Brief asserts that the Act "eliminated the suburban and down-state police and firefighter pension funds, and put in place a plan for the consolidation of those funds into a statewide fund." Pl. Br. 10-11. Their PLA contains a similar assertion. PLA 9. Those assertions are incorrect.

total expenses and increase total investment returns across all funds, thereby lowering the tax burden on local municipalities and their residents, who are ultimately responsible to pay all promised benefits. 40 ILCS 5/22B-114, 22C-114; C137-38. The experience under the Act so far shows that this is what has occurred. C 471-73, 569-71.[2]

Plaintiffs, who are members of a small number of local funds, alleged that the Act violates the Pension Protection and Takings Clauses of the Illinois Constitution. C 75-82, 86-91, 93-94. Plaintiffs did not allege that the Act reduces any of the annuities, disability benefits, or other payments to pension fund members specified in the Pension Code or any other statute. C 73-94. They claimed, however, that the Pension Protection Clause prevents changes in Pension Code provisions that do not affect such financial benefits, including the Code's pre-Act provisions giving local fund boards the authority to invest their funds' assets. C 267-69.

Relying on this Court's precedent holding that the Pension Protection Clause does not apply to Pension Code provisions that relate to retirement system funding but have no effect on the financial benefits received by system members, the circuit court entered judgment against Plaintiffs on this claim. A 19-22. It also entered judgment against them on their Takings Clause claim. A 23-25. The appellate court affirmed. A 1-10. Both courts held that, under

[2] Citations to the Appendix to Plaintiffs' brief begin with the prefix "A," and citations to the common law record begin with the prefix "C."

this Court's precedent, the Pension Protection Clause protects only pension fund members' right to receive monetary benefits. A 5-9, 21-22.

Legal Framework for Public Pension Plans

Originally enacted in 1963, the Pension Code brought together many state laws governing the various retirement systems for public employees in Illinois. Ill. Laws 1963, 161-732. Some Articles of the Pension Code contain general provisions applicable to all or many pension funds (*e.g.*, Articles 1, 1a, 20, 22), and others, including Articles 3 and 4, apply to specific funds. All public pension funds are subject to the Pension Protection Clause, which was added to the 1970 Illinois Constitution and provides that membership in a public pension fund or retirement system is "an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const., art. XIII, § 5.

Article 3 and 4 Pension Funds

Articles 3 and 4 of the Illinois Pension Code govern local police and firefighter pension funds for municipalities with 5,000 to 500,000 inhabitants ("local funds"). 40 ILCS 5/3-101 *et seq.*; 40 ILCS 5/4-101 *et seq*. There are approximately 650 local funds in Illinois, making it one of the States with the highest number of public pension systems in the United States. C 127, 129. Under the current provisions of the Pension Code, each local fund is governed by a five-member board, with two appointed members, two members elected by active members, and one elected by other fund beneficiaries (*e.g.*, retirees).

40 ILCS 5/3-128, 4-121.[3]

Each local fund board is responsible for administering the fund and determining the retirement, disability, and death benefits payable to fund members in accordance with the terms of the Pension Code, subject to judicial review under the Administrative Review Law (735 ILCS 5/3-101 *et seq.*). 40 ILCS 5/3-148, 4-139. The Act does not change those responsibilities. 40 ILCS 5/3-124.3, 4-117.2.

The Pension Code sets eligibility requirements and formulas for the calculation of member pensions and disability benefits. 40 ILCS 5/3-111, 3-111.1, 3-114.1, 3-114.2; 40 ILCS 5/4-109, 4-109.1, 4-110, 4-111. The Code also prescribes contribution requirements for local funds. 40 ILCS 5/3-125, 3-125.1; 40 ILCS 5/4-118, 4-118.1. Member contributions are 9.91% of police officer salaries, and 9.455% of firefighter salaries. 40 ILCS 5/3-125.1, 3-125.2, 4-118.1, 4-118.2. Municipal employers must make separate contributions that are sufficient, when added to member contributions, (i) to cover the fund's "normal cost" (the amount necessary to pay the additional benefits earned each year by active members),[4] and (ii) to fund 90% of the fund's actuarial

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[3] Before 2005, the boards of Article 4 funds were larger and were equally divided between persons elected by active and retired fund members and other persons, including certain municipal officials serving *ex officio*. *See* Pub. Act 94-317, amending 40 ILCS 5/4-121.

[4] *See* Actuarial Standard of Practice No. 4, § 2.15 (www.actuarialstandards board.org/wp-content/ uploads/2013/12/asop004_173-3.pdf). (All internet sites accessed Sep. 13, 2023.)

liabilities by 2040, paying down the unfunded liability by a specified amount each year. 40 ILCS 5/3-125, 4-118.[5] Under this Court's precedent, the municipal employer must pay member benefits when they come due regardless of the amount of its local fund's assets. *See Jones v. Mun. Employees' Annuity & Benefit Fund*, 2016 IL 119618, ¶¶ 42-45. Thus, municipal employers and their taxpayers, not fund members, bear the risks associated with funding levels, investment returns, and fund expenses.

Pre-Act Investment Authority of Local Funds

Section 1-109 of the Pension Code, which the Act did not change, requires all pension fund assets to be managed in accordance with the long-established "prudent person" standard. 40 ILCS 5/1-109. Sections 1-113.1 through 1-113.4a, enacted and amended several times from 1997 to 2012, further prescribed permissible investments for local funds based on the value of their assets: below $2.5 million; at least $2.5 million; at least $5 million; and at least $10 million. 40 ILCS 5/1-113.1 to 113.4a.[6] Local funds with assets below $2.5 million and at least $2.5 million, respectively, could invest up to 10%, and up to 35%, of their assets in mutual funds that hold stocks. 40 ILCS

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[5] At the end of fiscal year 2020, the average funding ratio (assets as a share of accrued liabilities) was 55.81% for police pension funds, and 55.75% for firefighter pension funds, representing approximately $7.7 billion and $5.6 billion in unfunded accrued liabilities, respectively. C 447-48 & n.5.

[6] Before 1997, local fund boards could invest only in government bonds, tax anticipation warrants, and bank deposits. *See* Ill. Rev. Stat. ch. 108½, pars. 3-135, 4-128 (1963). The categories and amounts of permitted investments were broadened in 1997 by Public Act 90-507; in 2000 by Public Act 91-887; and in 2011 by Public Act 96-1495.

5/1-113.2(13), 1-113.3. Local funds with an investment adviser and assets of at least $5 million and at least $10 million, respectively, could invest up to 35%, and up to 55%, of their assets directly in common stocks. 40 ILCS 5/1-113.4, 1-113.4a. These asset allocation limits reflect prudent investor principles because the cash-distribution needs of smaller pension funds call for more predictable income and less short-term volatility in asset values. *See* C 131 (noting "liquidity concerns around smaller plans bearing larger risk").

Under this statutory investment authority, publicly available data back to 2012 shows that larger local funds had significantly higher average investment earnings than smaller funds, as summarized in the following chart.

Average Annual Rate of Return from 2012 through 2020

Assets:	**< $2.5 million**	**$2.5 to $5 million**	**$5 to $10 million**	**≥ $10 million**
Article 3 funds	2.4%	4.1%	4.7%	6.1%
Article 4 funds	3.0%	4.7%	5.1%	6.2%

C 474-76.

Over the years, the General Assembly amended the Pension Code to include various other restrictions on the types of investments made by local funds. For example, from 1987 to 1994, when the investment standards for Article 3 and 4 funds were governed by Section 1-113 of the Pension Code (*see* Pub. Act 90-507), they could not invest in companies with certain activities or dealings in South Africa. *See* Pub. Act 84-1472 (Ill. Laws 1986 at 4532), repealed by Pub. Act 88-535 (Ill. Laws 1994 at 45). And in 2020, the General

Assembly required all public pension funds, including Article 3 and 4 funds, to adopt "sustainability policies" for their investment decisions, as provided under the Illinois Sustainable Investing Act. 40 ILCS 5/1-113.6, 1-113.17; Pub. Act 101-473.[7]

General Assembly's Examination of Consolidated Investments

Since at least 2010, the General Assembly has explored the possibility of consolidating local funds' investment management. Public Act 96-1495, enacted in 2010, commissioned a report on this issue. Pub. Act 96-1495, § 5; 40 ILCS 5/1-165. The report concluded, among other things, that "[i]nvestment-related fee savings represent the greatest potential for savings in a consolidation," and that consolidating all local funds' investments would likely bring an increase in annual earnings from 5.7% to 6.9%, and almost twice that increase for funds with less than $10 million in assets.[8]

Governor's Task Force Report

In February 2019, Governor Pritzker established a Pension Consolida-

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[7] Such policies must take into account corporate governance and leadership factors (*e.g.*, "executive compensation structures, . . . leadership diversity, regulatory and legal compliance, shareholder rights, and ethical conduct"); environmental factors (*e.g.*, "greenhouse gas emissions . . . [and] ecological impacts"); social capital factors (*e.g.*, "human rights, customer welfare, . . . [and] community reinvestment"); human capital factors (*e.g.*, "labor practices, . . . employee health and safety, . . . , diversity and inclusion, and incentives and compensation"); and (5) business model and innovation factors. 40 ILCS 5/1-113.6, 5/1-113.17; 30 ILCS 238/20.

[8] Marquette Assoc., Analysis of Fee Savings and Transaction Costs due to the Potential Consolidation of the Downstate Police and Firefighters' Pension Funds report (Feb. 2012) at 12, 47 (https://cgfa.ilga.gov/Upload/Feb2012MarquetteAssocStudyforCGFA.pdf).

tion Feasibility Task Force to explore the possible consolidation of local pension fund assets and investment management to ensure the funds' long-term health. C 127. Following eight months of data collection and analysis, the Task Force issued its Report. C 125-46.

The Task Force's Report concluded that as a result of the local funds' smaller size compared to other government pension funds, they had both higher expenses and lower investment returns than Illinois' larger public retirement systems. C 127-28, 132-34, 137-38. On the expense side, the Report noted that the local funds' limited size prevented them from obtaining "competitive investment fees," and it concluded that pooling assets would "[d]ramatically reduce the number of asset managers and other service providers to reduce fees and maximize efficiencies," saving tens of millions of dollars annually on investment-related expenses. C 127, 135-36, 138. On the revenue side, the Report noted that, "[d]ue to liquidity concerns around smaller plans bearing larger risk, plans with smaller size generally achieve substantially lower investment returns." C 131. The local funds' smaller size also meant that they were "unable to gain access to investment opportunities that provide the highest returns," with the result that they had significantly lower investment returns than their larger counterparts. C 127, 132-34. The consequence, the Report found, was that "local taxpayers are left with the burden of paying taxes to make up for these lower investment returns, forcing most municipalities to rely on a never-ending cycle of increasing local property

taxes or cutting services to meet their pension obligations." C 127. Based on historical data, the Task Force concluded that if the local funds could achieve returns similar to Illinois' larger public pension plans over the next five years, "they would create an estimated additional $820 million to $2.5 billion in investment returns." C 133. Conversely, the Report concluded, "[u]nless the investment returns of the police and fire plans are improved, substantial additional contributions from employers and/or employees will be required." C 137.[9]

In light of these findings, the Task Force recommended "establishing two new statewide police and fire funds that include all existing suburban and downstate funds, with assets consolidated under their own respective trusts and under the purview of separate governing boards." C 140. The Report called this the "single most impactful step" the State could take to address pension underfunding. C 127.

Public Act 101-0610

Passed with bipartisan support, the Act adopted the Task Force's recommendation and amended the Pension Code by transferring custody and investment responsibility for each local fund's assets to the Investment Funds.

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[9] Plaintiffs' Brief asserts that the Report "analyzed investment returns for Chicago/Cook County and statewide plans from 2012 to 2016 and compared it [*sic*] with the investment returns for the suburban and downstate funds from 2004 to 2013 [and] therefore omitted the losses experienced by the Chicago/ Cook County and statewide plans due to the 2007-2009 Great Recession [and] the gains made by the suburban and downstate funds during 2013-2016 period of economic growth." Pl. Br. 9 (citing C 132, 136)). That is incorrect.

40 ILCS 5/22B-101 *et seq.;* 5/22C-101 *et seq.*[10] The legislation was supported by the Fraternal Order of Police, Independent Firefighters of Illinois, Metropolitan Association of Police, and Illinois Municipal League, as well as many rank-and-file members of local police and fire departments. *See* Ill. House Tran. 2019 Reg. Sess. No. 70 (Nov. 13, 2019) at 26-28.[11]

The Act's declared purpose is to "streamline investments and eliminate unnecessary and redundant administrative costs, thereby ensuring more money is available to fund pension benefits." 40 ILCS 5/22B-114, 22C-114. Under the Act, the Investment Funds operate like mutual funds, investing and administering the pooled assets of all local funds collectively. 40 ILCS 5/22B-118(c), 22C-118(c). With billions of dollars of assets each, they are not subject to the same investment limitations that applied to the local funds, which have average assets of only $22 million. 40 ILCS 5/22B-122, 23C-122; C 130-31.

The Investment Funds' assets are held outside of the State Treasury. 40 ILCS 5/22B-121(c), 23C-121(c). Each local fund retains a separate "account," and "[t]he operations and financial condition of each participating pension fund account shall not affect the account balance of any other participating pension fund." 40 ILCS 5/22B-118(c), 22C-118(c). Investment

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[10] *See* https://www.ilga.gov/legislation/votehistory.asp?GA=101&DocNum=1300&DocTypeID=SB&GAId=15&LegID=117910&SessionID=108.

[11] *See* https://ilga.gov/legislation/Witnessslip.asp?LegDocId=149033&DocNum=1300&DocTypeID=SB&LegID=117910&GAID=15&SessionID=108&GA=101&SpecSess=&Session=&WSType=PROP.

returns are "allocated and distributed pro rata among each participating pension fund account in accordance with the value of the pension fund assets attributable to each fund." *Id.*

Each Investment Fund has a nine-member board. 40 ILCS 5/22B-115(b), 22C-115(b). For the Police Officers' Pension Investment Fund, the board members include three active participants of local funds elected by those participants; two local fund beneficiaries elected by those beneficiaries; three municipal officers or executives elected by the local funds' municipalities; and one member recommended by the Illinois Municipal League and appointed by the Governor, subject to Senate confirmation. 40 ILCS 5/22B-115(b). The composition of the Firefighters' Pension Investment Fund's board is the same, except that one person is a local fund beneficiary elected by those beneficiaries, and one person is recommended by the Associated Fire Fighters of Illinois and appointed by the Governor, subject to Senate approval. 40 ILCS 5/22C-115(b).

The Act established a transition period, ending on June 30, 2022, for the transfer of assets from the local funds to the Investment Funds. 40 ILCS 5/3-132.1, 4-123.240, 22B-120(a), 22C-120(a). Local funds other than the funds originally named as plaintiffs transferred their assets to the Investment Funds in several phases. C 571.[12] To finance the transition process, the Act

[12] *See* FPIF 2022 Annual Report at 64 (https://ifpif.org/wp-content/uploads/2022/12/2022-Annual-Comprehensive-Financial-Report.pdf); IPOPIF 2022 Annual Report, at x (www.ipopif.org/Resources/5a6e7702-376c-4926-8584-7cb3945211c7/Annual%20Report%202022%20-%201/).

authorized the Illinois Finance Authority ("IFA") to lend the Investment Funds up to $7.5 million each, representing approximately one-thousandth of these Funds' more than $14 billion in assets. 40 ILCS 5/22B-120(h), 23B-120(h); C 131. The Investment Funds' costs savings are already much greater than those startup and transition costs. C 471-73, 569-71.[13]

The Act does not reduce pension or disability benefits for any local fund member. The benefit formulas in Articles 3 and 4 of the Pension Code remain the same as before, except that the Act increased benefits for some "Tier II" members (who first became members after January 1, 2011). 40 ILCS 5/3-111(d), 3-112(a), 4-109(c), 4-114(j). The Act specifically states that it does not adjust employee contributions. 40 ILCS 5/3-111, 3-125.1, 4-109, 4-118.1.

The Act also does not change the authority of the local funds' boards to determine the amounts of pensions or other benefits payable to members in accordance with the Pension Code. Instead, the Act provides that local funds retain "exclusive authority to adjudicate and award" retirement and other benefits, and that the Investment Funds "shall not have the authority to control, alter, or modify, the ability to review or intervene in, the proceedings or decisions" of the local funds. 40 ILCS 5/3-124.3, 4-117.2.

[13] *See* https://ifpif.org/wp-content/uploads/2022/12/Report-on-the-Statutory-Transition-Period-12.16.22.pdf., p. 4 ("Total investment fees . . . have been reduced by more than $34 million annually.")

Plaintiffs' Claims

Plaintiffs are 34 members of Article 3 and Article 4 pension funds, out of more than 44,000 active, disabled, and retired members of these funds. C 73, 77-82.[14] Plaintiffs' amended complaint ("Complaint") named as defendants Governor Pritzker in his official capacity; Christopher Meister, in his official capacity as Executive Director of the IFA; Dana Popish Severinghaus, in her official capacity as Acting Director of the Illinois Department of Insurance; the Board of Trustees for the Police Officers' Pension Investment Fund; and the Board of Trustees for the Firefighters' Pension Investment Fund ("Defendants"). C 73-94.[15]

The Complaint alleged that the Act violated Plaintiffs' rights under the Pension Protection and Takings Clauses of the Illinois Constitution, and it requested a declaration that the Act is unconstitutional and an injunction barring Defendants from implementing it. C 89-94. Plaintiffs' claims were based on common allegations that the Act diminishes and impairs Plaintiffs' "pension benefits" because, before the Act took effect, (1) Plaintiffs' local funds could "exclusively manage and control their investment expenditures

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[14] *See* https://insurance.illinois.gov/Applications/Pension/PensionDataPortal.aspx (FY 2021 Annual Detailed Financial Data for Article 3 and Article 4 Funds, sheet 23, reporting number of local funds' members and beneficiaries.

[15] The Complaint also named as plaintiffs 18 local funds. C 77-83. The circuit court dismissed them because, among other things, they are not "members" of a public retirement system. C 102, 111-13, 370. They did not challenge that ruling in the appellate court. A 4 ("[A]ll of the named funds were dismissed as plaintiffs for lack of standing . . . . These rulings are not challenged on appeal."). Nor did they challenge it in this Court.

and income"; (2) Plaintiffs' "voting power and say in the selection of investment managers, investments, risks, rates of return, costs and expenses" was "not diluted" by the participation of members of other local funds; and (3) the local funds must "ultimately bear" the Act's transition costs, including repayment of any IFA transition loans up to $7.5 million for each Investment Fund. C 76-77, 89-94.

Summary Judgment Against Plaintiffs

On cross-motions for summary judgment, the circuit court entered judgment against Plaintiffs. A 29-43. After surveying relevant precedent, the court held that the "benefits" in the Pension Code protected by the Pension Protection Clause are limited to those that affect the "value" of "payments" to members. A 38-39. The court reasoned:

> [A]ll of the cases using the "broad protection" and "all benefits" language when holding that an act of the General Assembly violated the Pension Clause (*Carmichael*, *In re Pension Reform Litigation (Heaton)*, *Kanerva*, *Buddell*, *Jones*) involve Plaintiffs who were denied a "benefit" that could be directly tied to a change in the value of their future retirement payments.

A 38.[16] The court then held that "it cannot extend the term 'benefits' beyond the reach of prior Illinois Supreme Court cases . . . to find the

[16] These cases mentioned by the circuit court are: *Buddell v. Bd. of Trustees, State Univ. Ret. Sys.*, 118 Ill. 2d 99 (1987); *Kanerva v. Weems*, 2014 IL 115811; *In re Pension Reform Litig. (Heaton v. Quinn)*, 2015 IL 118585 ("*Heaton*"); *Jones*, 2016 IL 119618; *Carmichael v. Laborers' & Ret. Bd. Employees' Annuity & Benefit Fund of Chicago*, 2018 IL 122793; and *Williamson Cnty. Bd. of Comm'rs v. Bd. of Trustees of Ill. Mun. Ret. Fund*, 2020 IL 125330.

challenged legislation unconstitutional." A 38-39.

With respect to Plaintiffs' Takings Clause claim, the circuit court, relying on this Court's decision in *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62 (2008), held that the Clause "appl[ies] only to government action against real property," and the Act therefore did not implicate the Takings Clause. A 40-42. After entering judgment for Defendants, the court stayed the Act's implementation pending appeal "as to Plaintiffs." Pl. Br. 13.[17]

Appellate Court Judgment

The appellate court affirmed the circuit court's judgment. A 1-10. It held that the Act did not violate Plaintiffs' rights under the Pension Protection Clause because it did not affect "the payment of benefits" to Plaintiffs, A 8, and that Plaintiffs' Takings Clause claim lacked merit because they do not have a property right in their local funds' assets, A 10.

Addressing the benefits protected by the Pension Protection Clause, the appellate court stated:

> Our supreme court has held that the pension protection clause does not control the manner in which state and local governments fund their pension obligations. . . . Voting for the board members who deal with the funding of the pension fund is no more than a procedure that may have some impact on the funding; it is not a direct impact on the payment of benefits. Where the methods of funding a retirement system are not

[17] This order, entered on June 27, 2022, was omitted from the record on appeal, but the Court may take judicial notice of it, and it is available on the Re:SearchIL website (https://researchil.tylerhost.net/CourtRecordsSearch).

> governed by the pension protection clause, we cannot say that the right to choose who invests the funds of the system is more of a protected benefit.

Id. (citation omitted). Responding to Plaintiffs' contention that this Court's decisions in *Williamson County* and other cases had embraced their interpretation of the Pension Protection Clause, the appellate court ruled that all of these decisions involved laws that "directly impacted the participants' eventual pension benefit." A 7.

Turning to Plaintiffs' claim that the Act violated their rights under the Pension Protection Clause because it required an expenditure of local fund assets to cover the Investment Funds' "startup costs," the appellate court noted that "the level of benefit payments is not determined by the level of funding in the fund," and that "Plaintiffs make no argument as to how the requirement to pay for the administration of the funds would in any way impair or diminish the payment of their pension benefits." A 8-9. The court further observed that "[t]he local funds are already required to pay the costs of administration of the local funds, and plaintiffs do not cite any evidence to show that the costs of administration of the new funds, even including startup costs, would be any greater." A 9.

Finally, the appellate court affirmed the circuit court's judgment on Plaintiffs' Takings Clause claim, but on different grounds than those relied on by the circuit court. A 9-10. The appellate court held that Plaintiffs have a property right, for Takings Clause purposes, in the benefits payable to them,

but not in the amount of their local funds' assets, and that the Act could not constitute a taking because it does not reduce the benefits that Plaintiffs are entitled to receive. A 10. It held:

> [W]hile plaintiffs have a constitutional right to receive pension benefits, they do not have a property right in any particular assets or level of funding. . . . No plaintiff has any right to direct the investment of the monies held by the funds . . . . Simply put, plaintiffs do not own the funds that the Act requires to be transferred to the new statewide police and firefighter pension investment funds. The Act does nothing more than require one type of government-created pension fund to transfer assets to another type of government-created pension fund. Plaintiffs' rights to receive benefit payments are not impacted by these transfers. As the "property" at issue here is not the private property of the plaintiffs, the takings clause is neither relevant nor applicable here.

Id.

ARGUMENT

I. Summary of Argument

The lower courts correctly held that Plaintiffs' claims challenging the Act under the Pension Protection and Takings Clauses lack merit because the Act does not reduce the pension payments or other financial benefits they are entitled to receive, and the Act's provisions relating to the funding of those payments, including the investment of pension fund assets used to pay them, do not implicate Plaintiffs' rights under either constitutional provision.

It is undisputed that the Act does not reduce the pension payments or other financial benefits that Plaintiffs are entitled to receive as members of a public pension fund. Plaintiffs nonetheless contend that the "benefits" protected by the Pension Protection Clause are not limited to such financial benefits, but extend more broadly to anything in the Pension Code that a member might consider a "benefit," including having local fund boards direct the investment of their fund's assets. Pl. Br. 16-22. That contention is unsound. This Court's precedent firmly establishes that although the Pension Protection Clause provides an ironclad protection for payments promised to members of a public retirement system, that is its *only* protection. *McNamee v. State*, 173 Ill. 2d 433, 444, 446 (1996) (the Pension Protection Clause "protects only the right to receive benefits"); *accord People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 226, 231 (1998); *see also Jones*, 2016 IL 119618, ¶¶ 35-38. Thus, the Court has repeatedly held that the Clause does not prevent

changes to Pension Code provisions relating to the *funding* of retirement system payments. *See*, *e.g.*, *Sklodowski*, 182 Ill. 2d at 229-31; *McNamee*, 173 Ill. 2d at 439-47. The investment of local fund assets, which likewise affects the level of local fund assets but has no effect on the payments Plaintiffs are entitled to receive, is constitutionally no different. And because those investments are not constitutionally significant, the Pension Protection Clause cannot lock in a procedure for choosing who makes them. The same is true for the Act's provisions authorizing the initial expenditure of a minute fraction of the local funds' assets for startup and transition costs for the Investment Funds, which the savings from consolidated management have already exceeded. The level of retirement system assets is not a benefit of system membership, and those challenged provisions of the Act will not affect the payments promised to Plaintiffs, which are a constitutionally guaranteed benefit.

Plaintiffs' Takings Clause claim likewise lacks merit. While Plaintiffs have a property right to receive their promised benefits, the Act does not affect those benefits. By contrast, Plaintiffs have no property right in the amount of their local fund assets, how those assets are invested, or who invests them. Further, even if Plaintiffs had a property right for Takings Clause purposes in their local funds' assets, the Act did not effect a "taking" of that property. The Act does not divert local fund assets to the government's use. Instead, it preserves the same basic use for those assets: paying benefits to fund

members. And the changes it makes in the management of those assets, to maximize their value for fund members and taxpayers alike, are typical of economic legislation that does not rise to the level of a constitutional taking.

II. Standard of Review

The judgment under review is subject to *de novo* review. That standard applies to orders granting a motion for summary judgment, *Walker v. Chasteen*, 2021 IL 126086, ¶ 13, as well as decisions regarding the constitutionality of a statute, *id.*, ¶ 30; *see also Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶ 53 (*de novo* review applies to rulings on "the applicability and effect of the pension protection clause"). Under that standard, the Court can affirm a lower court's judgment on any ground supported by the record. *People ex rel. Alvarez v. $59,914 United States Currency*, 2022 IL 126927, ¶ 24.

III. The Act Does Not Violate Plaintiffs' Rights Under the Pension Protection Clause Because It Does Not Reduce the Benefits They Are Entitled to Receive.

Plaintiffs' Pension Protection Clause claim effectively asks the Court to overrule its longstanding precedent that the only benefits protected by the Pension Protection Clause are the pension system payments and other monetary benefits that members have a right to receive based on their membership in a public pension fund. The Court should reaffirm its precedent and hold that the Act does not violate the Pension Protection Clause because it does not reduce the pension payments or other financial benefits that Plaintiffs are entitled to receive as retirement system members.

The Court's precedent respects the plain meaning of the term "benefits" in the context of pension plans, as well as the understanding of the Pension Protection Clause's drafters. And adopting Plaintiffs' novel and unprecedented interpretation of the Clause, which would extend its constitutional protection to administrative provisions of the Pension Code that have no effect on members' financial benefits, would lead to absurd, unexpected, and undesirable consequences.

A. The Act is presumed to be constitutional.

Legislative enactments enjoy a "strong presumption of constitutionality," and courts must resolve all reasonable doubts in favor of a statute's constitutionality. *People v. Dabbs*, 239 Ill. 2d 277, 291 (2010). Accordingly, "[t]he party challenging the statute . . . bears the burden of rebutting the presumption by clearly demonstrating the statute's constitutional infirmity." *In re Marriage of Miller*, 227 Ill. 2d 185, 195 (2007) (cleaned up). Plaintiffs have not met that burden here.

B. This Court has consistently held that the Pension Protection Clause protects only retirement system members' rights to receive financial benefits.

The Pension Protection Clause , which was added to the Illinois Constitution in 1970, states: "Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

Ill. Const., art. XIII, § 5. The Clause created a limited exception to the general principle that laws do not create vested rights protected against legislative changes. See *Sklodowski*, 182 Ill. 2d at 231-32; *see generally Envirite Corp. v. Ill. E.P.A.*, 158 Ill. 2d 210, 215 (1994). The parties' dispute in this case is over whether the Act's amendments to the Pension Code changing the procedures for investing the assets of Article 3 and 4 pension funds, without changing the amount of members' legally guaranteed benefit payments, violate the Pension Protection Clause. The answer to that question depends on whether the Code's pre-Act provisions relating to the investment of local fund assets qualify as "benefits" protected by the Pension Protection Clause. They do not.

The Court's precedent makes clear in multiple ways that the "benefits" protected by the Clause are financial benefits that members of a public pension fund are entitled to receive as a result of that membership. The Court has repeatedly said exactly that. Consistent with the common understanding of the term "benefits" in the context of pension plans, the Court has uniformly used that term to refer only to financial benefits received by pension fund members. It has consistently held that Pension Code provisions that relate to retirement system funding, but that do not reduce the monetary benefits that members are entitled to receive, are not constitutionally protected. And it has invalidated only laws that operate to reduce the financial benefits that retirement system members are entitled to receive.

1. The Court has repeatedly held that the Pension Protection Clause protects only financial benefits received by pension fund members.

The Court's precedent clearly establishes that the Pension Protection Clause secures only the right of pension fund members to receive the monetary benefits promised to them as members in a public retirement system. Drawing a clear distinction in this regard, the Court in *McNamee* held that the Clause's purpose "was to clarify and strengthen the right of state and municipal employees to *receive* their pension benefits, but not to control funding," and that the Clause "protects *only* the right to *receive* benefits." 173 Ill. 2d at 440, 446 (emphasis added); *see also id.* at 444 (Pension Protection Clause created "only a contractual right 'that [pension fund members] would *receive* the money due them at the time of their retirement.'") (quoting *People ex rel. Ill. Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 271 (1975)). Likewise, in *Sklodowski* the Court held that "the pension protection clause creates enforceable contractual rights *only* to receive benefits." 182 Ill. 2d at 231-32 (emphasis added). The Court recently reaffirmed those holdings in *Jones*, 2016 IL 119618, ¶¶ 35-38.

Significantly, in describing these benefits protected by the Pension Protection Clause, the Court has uniformly used the term "benefits" to mean *monetary* benefits received by retirement system members, not something else. That was the case in *McNamee*, 173 Ill. 2d at 440, 444, 446, and in *Sklodowski*, 182 Ill. 2d at 231-32. Likewise, in *Matthews* the Court explained that "[t]he

primary purpose of article XIII, section 5, was to eliminate any uncertainty surrounding the *payment* of public pension *benefits* and to clarify that state and local governments were obligated to provide pension benefits to their employees." 2016 IL 117638, ¶ 57 (emphasis added). Thus, the Court used the term "benefits" to mean payments to pension fund members. And in *Jones*, the Court similarly explained that "[t]he whole purpose of establishing the clause was to eliminate any uncertainty as to whether state and local governments were obligated to *pay pension benefits* to their employees," and that "[*h*]*ow the benefits would be financed* was a matter left to the other branches of government." 2016 IL 119618, ¶ 43 (cleaned up, emphasis added).

In line with this precedent, the Court's decisions describing the types of benefits protected by the Pension Protection Clause have consistently listed only monetary benefits received by members. In *Carmichael*, the Court listed, as examples of "[t]he benefits protected by the pension protection clause," "subsidized health care, disability and life insurance coverage, and eligibility to receive a retirement annuity and survivor benefits." 2018 IL 122793, ¶ 25. The Court listed similar examples, again limited to financial benefits, in *Jones*, 2016 IL 119618, ¶ 36, and in *Kanerva*, 2014 IL 115811, ¶¶ 3, 39, 52.

2. The Court has consistently held that the Pension Protection Clause does not apply to Pension Code provisions that relate to pension plan funding but do not reduce members' monetary benefits.

The Court has also uniformly rejected the contention that Pension Code provisions that relate to retirement system funding, but that do not affect the

monetary benefits received by retirement system members, qualify as "benefits" protected by the Pension Protection Clause. That is true, the Court held, even though pension system members might consider such funding-related provisions, or having a "more secure fund," to be a "benefit." *McNamee*, 173 Ill. 2d at 439; *see also Sklodowski*, 182 Ill. 2d at 226, 230-31; *Jones*, 2016 IL 119618, ¶¶ 35-38. Indeed, each time a party claimed that the Pension Protection Clause secures a right to something besides pension fund members' right to receive their promised monetary benefits, the Court has rejected that claim.

In *Lindberg*, decided a few years after the Pension Protection Clause was adopted, the Court rejected a claim that Pension Code provisions governing state contributions to public pension funds were constitutionally binding. 60 Ill. 2d at 270-72. Reviewing the deliberations at the 1970 Constitutional Convention, the Court observed that "the tenor of the debates was primarily concerned with assuring members of pension plans that they would receive the money due them at the time of their retirement," and that the debates "do not establish the intent to constitutionally require a specific level of pension appropriations during a fiscal period." *Id.* at 271-72.

The Court faced a similar claim in *McNamee*, in which the plaintiffs challenged an amendment to the Pension Code that reduced the level of required public contributions to Article 3 pension funds. The plaintiffs claimed that this amendment "violated their constitutionally protected

contractual right to the '*benefit*' of a more secure fund created by the prior funding method." 173 Ill. 2d at 439 (emphasis added). Rejecting this broad definition of a protected "benefit" under the Pension Protection Clause, the Court reaffirmed its holding in *Lindberg* that the Clause "does not create a contractual basis for participants to expect a particular level of funding, but only a contractual right 'that they would receive the money due them at the time of their retirement.'" *McNamee*, 173 Ill. 2d at 444 (quoting *Lindberg*, 60 Ill. 2d at 271). The Court then held: "Section 5 of article XIII creates an enforceable contractual relationship that *protects only the right to receive benefits*. Plaintiffs do not contend that the amendment to section 3-127 diminished their right to receive pension benefits." *Id.* at 446 (emphasis added).

Sklodowski addressed a similar claim challenging Pension Code amendments that lowered government contributions to several retirement systems. 182 Ill. 2d at 222-24. The Court, citing *McNamee* and *Lindberg*, held that the claim had no merit, and it reaffirmed the principle "that the pension protection clause 'creates an enforceable contractual relationship that protects only the right to *receive* benefits.'" *Id.* at 231 (emphasis added) (quoting *McNamee*, 173 Ill. 2d at 446). That protection, the Court clarified, does not "control funding," *id.* (cleaned up), except in the extreme situation where a retirement system is "'on the verge of default or imminent bankruptcy' such that benefits are in immediate danger of being diminished," *id.* at 232-33

(quoting 4 Record of Proceedings, Sixth Ill. Constitutional Convention ("Proceedings") at 2926, comments of Delegate Kinney). Thus, the Court held: "The framers of the Illinois Constitution were careful to craft in the pension protection clause an amendment that would create a contractual right to benefits, while not freezing the politically sensitive area of pension financing." *Id.* at 233.

Most recently, in *Jones* the Court held that an improved funding formula for retirement system benefits was not a constitutionally protected "benefit" to members. 2016 IL 119618, ¶¶ 35-38. Building on its precedent in *McNamee* and *Sklodowski*, the Court again held that the Pension Protection Clause protects only pension system members' right to receive benefits, not the means to fund those benefits. *Id.*, ¶¶ 35-38. The Court explained that, in *McNamee*, "the plaintiffs claimed that amendments to the statutory scheme 'violated their constitutionally protected right to the *'benefit' of a more secure fund* created by the prior funding method," *id.*, ¶ 37 (quoting *McNamee*, 173 Ill. 2d at 439) (emphasis added), but that the State responded "that the 'pension protection clause creates enforceable contractual rights only to receive benefits, not control funding,' (*Sklodowski*, 182 Ill. 2d at 229), and 'does not encompass how those benefits are funded' (*McNamee*, 173 Ill. 2d at 439)," *id.*, ¶ 37 (emphasis added). The Court in *Jones* then held:

> This court agreed with the State and rejected the plaintiffs' claims. After an exhaustive review of the constitutional convention debates regarding the purpose of the clause, we explained

> that "[t]he framers of our constitution simply did not intend that [the pension protection clause] control the manner in which the state and local governments fund their pension obligations." *McNamee*, 173 Ill. 2d at 446. Rather, "the purpose of the amendment was to clarify and strengthen the right of state and municipal employees to receive their pension benefits, but not to control funding." *Id.* at 440. We held that the clause "creates an enforceable contractual relationship that protects only the right to receive benefits." *Id.* at 446.

Id., ¶ 38.

3. This Court has invalidated only laws that operate to reduce pension fund members' monetary benefits.

The Court's clear precedent regarding the scope of the Pension Protection Clause's protection is also evidenced by its decisions holding that specific statutes did violate the Clause. In particular, *every* decision by this Court finding a violation of the Pension Protection Clause involved a reduction in the monetary benefits that retirement system members are entitled to receive. Indeed, the Court has invalidated every statute that, by any means, would operate to reduce such financial benefits for existing retirement system members. *See McNamee*, 173 Ill. 2d at 445 (surveying cases). But, as noted, it has never invalidated a statute that affected the administration or operation of public retirement systems but did not reduce such financial benefits.

Decisions invalidating laws on the ground that they violate the Pension Protection Clause have involved:

(1) a reduction in retirement annuities due to:

(a) changes in the formula for calculating those annuities, *Heaton*, 2015 IL 118585, ¶¶ 27, 43; *Felt v. Bd. of Trustees of the Judges Ret. Sys.*, 107 Ill. 2d 158, 162-63 (1985);

(b) changes in the right to obtain additional service credits, *Carmichael*, 2018 IL 122793, ¶¶ 10, 23; *Buddell*, 118 Ill. 2d 99, 105-06 (1987); or

(c) changes in the eligibility criteria for continued participation, and corresponding ability to earn service credits, in a public pension fund, *Williamson County*, 2020 IL 125330, ¶¶ 1, 5, 8, 33-36;

(2) a reduction in retirement system disability benefits, *Schroeder v. Morton Grove Police Pension Bd.*, 219 Ill. App. 3d 697, 698-701 (1st Dist. 1991) (cited with approval in *Heaton*, 2015 IL 118585, ¶ 46); and

(3) a reduction in state payments for retired pension fund members' health insurance, *Kanerva*, 2014 IL 115811, ¶¶ 1, 40.

See also Heaton, 2015 IL 118585, ¶ 46 (surveying Pension Protection Clause cases); *McNamee*, 173 Ill. 2d at 445 (same). In each case, the constitutionally protected "benefit" was the retirement system members' monetary benefits under the law in effect during their employment, and the infirmity of the challenged law was that it operated to reduce that benefit.

C. The Pension Protection Clause's plain language limits its protection to monetary benefits that retirement system members are entitled to receive.

The Court's consistent use of the term "benefits" to refer to monetary benefits payable to pension fund members is not surprising, for that use follows the widely understood meaning of the term in the context of pension

plans and other employee benefit plans. That meaning is uniformly reflected in common usage, dictionary definitions, the Pension Code, and the drafters' debates at the 1970 Constitutional Convention.

When Illinois voters approved the 1970 Illinois Constitution, they adopted the commonly understood meaning of the term "benefits" in the context of pension plans. *See Gregg v. Rauner*, 2018 IL 122802, ¶ 23. That meaning, as reflected in multiple sources, corresponds to monetary benefits owed to pension fund members. That meaning is revealed, first, in newspaper articles from before adoption of the 1970 Constitution.[18] *See Muscarello v. United States*, 524 U.S. 125, 129 (1998) (consulting newspaper articles to ascertain common meaning of "carry" in context of firearms). It is also reflected in case law describing pension benefits as a form of "deferred compensation." *See In re Marriage of Hackett*, 113 Ill. 2d 286, 292-93 (1986); *see also People ex rel. Schmidt v. Yerger*, 21 Ill. 2d 338, 344 (1961).

Federal law relating to pension plans, including Internal Revenue Code provisions governing "qualified" retirement plans and the Employee Retirement Income Security Act of 1974 ("ERISA"), similarly uses the term "benefits" to refer exclusively to monetary benefits. *See*, *e.g.*, 26 U.S.C.

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[18] News articles from the 1930s, 1940s, and 1950s stated, for example: "A pension increase . . . raising the monthly benefits of longshoremen and related crafts from $50 to $65, was announced yesterday"; "Jersey Actuary Says Police and Fire Benefits Exceed Revenues"; "The commission found that . . . the benefits promised to members exceeded funds in hand"; and "[T]he low rate of interest paid by high-grade investments make it necessary to reduce somewhat the program of extra benefits for future beneficiaries." C 460, 488-90.

§ 401(a)(4) (stating, as condition for qualified pension trust, that "the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees"); 26 U.S.C. § 401(a)(13)(A) (requiring that "benefits provided under the plan may not be assigned or alienated"); 26 U.S.C. § 401(a)(15) (requiring that, for "a participant or beneficiary who is receiving benefits under such plan, . . . such benefits are not decreased by reason of any increase in the benefit levels payable under title II of the Social Security Act"); 26 U.S.C. § 401(a)(16) (requiring that "benefits or contributions [not] exceed the limitations of [26 U.S.C.] section 415"); *see also* 26 U.S.C. §§ 401(a)(33), (34), 431, 432; 29 U.S.C. §§ 1002(19), (23), (25), (33) to (36), 1053 to 1056, 1391. Indeed, Defendants have not found, and Plaintiffs have not cited, a single use of the word "benefits" in the context of pension plans that refers to anything other than monetary benefits to fund participants.

To determine the meaning of a term used in the Constitution, it is also appropriate to consult dictionary definitions applicable to the relevant context. *See*, *e.g.*, *Rowe v. Raoul*, 2023 IL 129248, ¶¶ 31-32; *Ill. Rd. & Transp. Builders Ass'n v. Cnty. of Cook*, 2022 IL 127126, ¶ 47; *see also People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶ 17; *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 12. And the dictionary definition of the term "benefits" in the context of pension plans and other employee benefit plans refers to monetary benefits to plan participants. *See Webster's Third New International Dictio-*

nary 204 (2002) (defining "benefit" as "a cash payment or service provided for under an annuity, pension plan, or insurance policy"); *American Heritage Dictionary* (5th ed., 2020) (defining "benefit" as "[a] form of compensation, such as paid vacation time, subsidized health insurance, or a pension, provided to employees in addition to wages or salary as part of an employment arrangement"). These definitions are directly relevant to the issue before the Court, which relates to the meaning of that term in the specific context of the Pension Protection Clause, relating to public pension plans. *See Italia Foods*, 2011 IL 110350, ¶12; *see also Corbett v. Cnty. of Lake*, 2017 IL 121536, ¶ 28. The definitions specifically relating to pension benefits are particularly relevant because retirement systems under the Pension Code are "traditional defined benefit plans under which members earn specific benefits based on their years of service, income and age." *Heaton*, 2015 IL 118585, ¶ 4; *see Jones*, 2016 IL 119618, ¶ 4; *Black's Law Dictionary* 1294 (9th ed. 2009) (defining "defined-benefit pension plan" as "[a] pension plan in which the employer commits to *paying* an employee *a specific benefit* for life beginning at retirement," and "[t]he amount of the benefit is based on factors such as age, earnings, and years of service") (emphasis added).

The meaning of the word "benefits," as used in the Pension Protection Clause, also conforms to the Pension Code's consistent use of that term starting long before adoption of the Clause in 1970. When the Pension Code was enacted in 1963, it consistently used the term "benefits" to refer

exclusively to monetary benefits. *See*, *e.g.*, Ill. Rev. Stat. ch. 108½, par. 3-147 (1963) ("None of the benefits provided in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a police officer."); *id.*, par. 13-213 (providing that "[a]ll allowances, annuities and benefits granted under this Article shall be exempt from attachment or garnishment process . . . ."); *id.*, par. 3-144 (describing manner in which "[a]ll annuities, pensions and other benefits granted" by a previously existing pension fund made subject to Article 3 "shall be paid" by its board of trustees).[19] Against that background, it cannot plausibly be suggested that the Pension Protection Clause gave the term a different meaning.

Finally, the drafters' deliberations at the 1970 Constitutional Convention also demonstrate that the term "benefits" refers exclusively to pension payments and similar monetary benefits for retirement system members. Those deliberations, which the Court has examined at length in several of its decisions, show that the specific, limited purpose for adding the Pension

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[19] *See also* Ill. Rev. Stat. ch. 108½, pars. 9-184, 11-180 (1963) (directing Article 9 and Article 11 funds to "estimate the amounts required each year to pay for all annuities and benefits and administrative expenses"); *id.*, par. 14-177 (authorizing retirement system board "[t]o consider and pass on all applications for annuities, allowances and benefits"); *id.*, par. 3-108 (providing that "[a]dopted children shall be eligible for benefits only if the judicial proceedings for adoption were commenced at least one year prior to the death or disability of the police officer"); 40 ILCS 5/3-108.3 (defining "Beneficiary" as "[a] person receiving benefits from a pension fund"); 40 ILCS 5/1-119(c)(5) (referring to receipt of a "percentage of any retirement system benefit").

Protection Clause to the Illinois Constitution was to guarantee the payment of such promised benefits. *See Sklodowski*, 182 Ill. 2d at 226, 230-31; *McNamee*, 173 Ill. 2d at 437-45; *Lindberg*, 60 Ill. 2d at 271-72.

Directly addressing the Clause's relevance to issues like the one presented here, Delegate Kinney, the provision's principal sponsor, stated: "It is also not intended to get into freezing in a system of trustees or persons who would administer the various funds. That is not touched upon or contemplated in this amendment." 4 Proceedings at 2929. Explaining the Clause's effect, she stated:

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

Id. She added that the Clause was not intended to control pension system funding, "aside from the very slim area where a court might judicially determine that imminent bankruptcy would really be impairment." *Id.*

D. The Court has not silently overruled its precedent regarding the benefits protected by the Pension Protection Clause.

Plaintiffs make no effort to address the Court's precedent described above. Instead, relying on isolated statements in several of the Court's opinions taken out of context, they argue that the Court has adopted a broader definition of the benefits guaranteed by the Pension Protection Clause that is

not limited to members' monetary benefits. Pl. Br. 16-22. That strained interpretation, which assumes that the Court overruled its established precedent without saying so, is untenable. To the contrary, those statements by the Court in *Williamson County*, *Kanerva*, and *Carmichael* merely confirmed that the monetary benefits protected by the Pension Protection Clause are not limited to such benefits set forth in the Pension Code itself, but also include monetary benefits for public pension fund members that have a different legal source, as in *Kanerva*. None of them suggested that this constitutional protection extends to Pension Code provisions that do not affect payments to members, as Plaintiffs argue here.

Plaintiffs first disregard the Court's actual holdings in these cases, which give substance to its statements. *See People v. Palmer*, 104 Ill. 2d 340, 345-46 (1984) ("the precedential scope of a decision is limited to the facts before the court"); *Schweihs v. Chase Home Fin.*, LLC, 2016 IL 120041, ¶ 41 ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used") (cleaned up); *see also People v. Yost*, 2021 IL 126187, ¶ 62; *Blount v. Stroud*, 232 Ill. 2d 302, 324 (2009). As described above (at 30-31), and as the appellate court noted, A 6-7, each case addressed a challenge to a law that reduced the monetary benefits pension plan members would receive. Thus, none of these decisions should be read to support the novel and far-reaching proposition that a statutory provision with no effect on members' monetary benefits is a constitutionally protected benefit

that the General Assembly cannot change. To the contrary, the Court's statements in these cases, read in context, undermine Plaintiffs' position.

In *Williamson County*, on which Plaintiffs heavily rely, the plaintiffs became members of the Illinois Municipal Retirement Fund in accordance with the Pension Code's eligibility criteria at that time, but the General Assembly later amended those criteria in a way that would terminate their membership and right to accrue pension benefits. 2020 IL 125330, ¶¶ 1, 5-8, 13, 30, 48. The Court held that the amendment was unconstitutional, explaining that "the termination of plaintiffs' continued IMRF participation . . . predicated on the new requirements . . . decreased their service credits and *negatively impacted their annuity benefit calculation*." *Id.*, ¶ 48 (emphasis added). Thus, *Williamson County* expressly tied the constitutional flaw in the challenged legislation to its effect on the monetary benefits of existing fund members after their constitutional rights as members had vested. In other words, when the Court, citing its decisions in *Carmichael*, *Heaton*, and *Kanerva*, commented that its decisions have "uniformly construed" the Pension Protection Clause "to protect any benefit" of membership in a public pension fund, *id.*, ¶ 31, it used the term "benefit" in the same sense as those decisions — to mean a financial benefit that individuals have the right to receive based on their membership in the pension fund. And based on that meaning, the Court explained, once a person starts working and becomes a member of a public retirement system, the Pension Protection Clause prevents "any subsequent

changes to the Pension Code that would diminish" those benefits. *Id.*, ¶ 36 (cleaned up); *see also Heaton*, 2015 IL 118585, ¶ 50 ("Illinois courts have determined that benefit calculation formulas are entitled to constitutional protection") (cleaned up). The Court did not purport to silently overrule its longstanding, uniform precedent on what benefits the Clause protects.

The Court in *Williamson County* did say, as Plaintiffs note (Pl. Br. 14), that the Pension Protection Clause does not prohibit only "*immediate and direct diminishments* to public pension benefits," even though this was the situation presented in "many of our prior decisions." 2020 IL 125330, ¶ 40 (emphasis added). But Plaintiffs misinterpret the significance of that statement, made in response to the defendant's argument that the Court's prior decisions invalidated only laws under which "affected parties had lesser benefits *as soon as* the applicable statutory changes became effective." *Id.*, ¶ 38 (emphasis added). Rejecting that characterization, the Court pointed to its decisions in *Buddell* and *Carmichael*, both of which involved Pension Code changes that adversely affected existing members' right to obtain service credits used to calculate their future annuities. *Id.*, ¶¶ 42-47. Here, by contrast, Plaintiffs do not, and cannot, claim that the Act has *any* adverse effect — immediately, or at any future time — on the monetary benefits they are entitled to receive.

Similarly in *Kanerva*, there was no dispute that the challenged legislation — which lowered state contributions to retired pension fund

members' health insurance — reduced a monetary benefit to fund members. 2014 IL 115811, ¶¶ 1, 3-6, 12-14, 35, 40. The only question was whether this monetary benefit, established under legislation *outside* the Pension Code (*i.e.*, the State Employees Group Insurance Act of 1971, 5 ILCS 375/10), was within the scope of the Pension Protection Clause's protection. *Id.*, ¶ 38. The Court ruled that the Clause protects benefits that are "conditioned on" and "attendant to" membership in a public retirement system, including such benefits granted to system members by the legislature outside the Pension Code. *Id.*, ¶¶ 40, 41, 49.

Plaintiffs emphasize the Court's statement in *Kanerva* that the Pension Protection Clause was not "'intended to protect *only* core pension *annuity* benefits and to exclude the various other benefits state employees were and are entitled to receive as a result of membership in the State's pensions systems.'" Pl. Br. 20 (quoting *Kanerva*, 2014 IL 115811, ¶ 41) (emphasis added). But this statement simply clarified that the monetary benefits protected by the Clause are not limited to those specified exclusively *in* the Pension Code. And it is significant that the Court, in describing these constitutionally protected benefits, not only referred to benefits that pension fund members "are entitled to receive," 2014 IL 115811, ¶ 41, but also listed only monetary benefits traditionally associated with public employment, *i.e.*, "subsidized health care, disability and life insurance coverage," as well as "eligibility to receive a retirement annuity and survivor benefits," *id.*, ¶ 39.

Finally, *Carmichael*, like *Williamson County*, involved a law that reduced pension fund system members' monetary benefits by eliminating their right to receive pension service credits. 2018 IL 122793, ¶¶ 4, 8, 22-30. The Court also listed only monetary benefits as being protected by the Clause. *Id.*, ¶ 25.

E. Plaintiffs' proposed interpretation of the Pension Protection Clause would yield absurd consequences.

The Court should reject Plaintiffs' expansive interpretation of the benefits protected by the Pension Protection Clause for the additional reason that it would have absurd consequences, preventing the General Assembly from modifying the Pension Code to address changing circumstances while doing nothing to advance the Clause's purpose to ensure that retirement system members are paid what they are promised. *See People ex rel. Giannis v. Carpentier*, 30 Ill. 2d 24, 29 (1964) ("The constitution should whenever possible be construed to avoid such irrational, absurd, or unjust consequences."). Over the years, the General Assembly has made numerous changes to Pension Code provisions that do not affect the annuities or other amounts payable to retirement system members, but that some members could consider a "benefit" they do not want changed. Plaintiffs' theory would create constitutional doubts about all of these.

Such amendments changed the types of permitted investments, as well as the share of fund assets that may be invested in each type. *See supra* at 7-9

& n.6.[20] For example, they prohibited investments in certain companies with specified activities or dealings in South Africa, and they have required funds to adopt investment policies that take into account, among other things, "leadership diversity," "ecological impacts," and "employee health and safety." *See supra* at 8-9 & n.7. Yet other changes required local funds that are authorized to invest in common or preferred stock to retain investment advisers, paid out of fund assets, *see*, *e.g.*, 40 ILCS 5/1-113.5(a), (b)(3), and altered the number of persons that serve on local fund boards and the manner of selecting them, *see supra* at 6, n.3. Still other laws have reduced prescribed public contributions to retirement systems. *See supra* at 27-29. And other laws have reduced retirement system funding levels by increasing benefits for new or existing classes of members without requiring immediate, full actuarial funding of those benefits. *See*, *e.g.*, Pub. Act 92-257, codified at 40 ILCS 5/14-110 (granting state highway maintenance workers retroactive eligibility for

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[20] Plaintiffs appear to question whether the Act was needed at all, saying that the Task Force Report "did not indicate whether it considered the effect of removing those statutory [investment] limitations on the smaller funds." Pl. Br. 8. But the issue before the Court is not whether the Act was wise, or the best response to the problems identified. *See Board of Educ. of Roxana Cmty. Sch. Dist. No. 1 v. Pollution Control Bd.*, 2013 IL 115473, ¶ 25. And, as noted, the statutory limits on investments by smaller pension funds, which minimize their exposure to short-term volatility and asset illiquidity associated with riskier investments, protect their ability to pay member benefits as they come due.

Plaintiffs also note that the Task Force Report observed that Illinois' larger public pension funds and the Article 3 and 4 funds are both substantially underfunded, but did not include proposals to address that issue. Pl. Br. 8-9. But measures to do so were beyond the Task Force's mandate (C 127) and would have meant increasing taxes or reducing spending for other programs.

more generous annuity formula without additional contributions).

Some pension fund members might subjectively consider the law in effect before any of these changes to be a benefit, even though others might disagree. A member might take the position that investing in common stocks would risk a loss in the value of the fund's assets, or that excluding investments in companies doing business in South Africa would forego attractive investment opportunities. *Cf. Bd. of Trustees of Employees' Ret. Sys. of City of Baltimore v. Mayor & City Council of Baltimore City*, 562 A.2d 720, 738-40 (Md. 1989) (rejecting Takings Clause challenge to ordinance requiring city pension funds to divest from companies doing business in South Africa, even though it would likely reduce investment earnings). But accepting that characterization of a "benefit" as constitutionally binding would conflict with the Court's clear precedent regarding retirement system funding, *see supra* at 27-30, and with the framers' explicit understanding that it would not "get into freezing in a system of trustees or persons who would administer the various funds," 4 Proceedings at 2929; *see also Heaton*, 2015 IL 118585, ¶ 46, n.12 ("Additional benefits may always be added, . . . and the State *may* require additional employee contributions or other consideration in exchange") (citation omitted) (emphasis added). It would also undermine the normal operation of retirement systems under the Pension Code by calling into question numerous statutory amendments that adopted purely procedural and administrative changes with no effect on payments to members.

F. The Act does not diminish or impair a benefit protected by the Pension Protection Clause.

In light of the Pension Protection Clause's established meaning to protect solely pension fund members' receipt of promised monetary benefits, the lower courts properly entered judgment against Plaintiffs on their claim under the Clause because the Act does not diminish or impair such benefits.

1. The Act's change in who invests local fund assets and in Plaintiffs' ability to vote for them does not violate Plaintiffs' rights under the Pension Protection Clause.

Although Plaintiffs do not — and cannot — assert that the Act will reduce their legally guaranteed benefit payments, they nonetheless argue that the Act violates the Pension Protection Clause because it changes their relationship to the persons who invest the assets of their local funds. That argument is without merit.

a. The Pension Protection Clause does not protect local fund members' ability to choose who invests local fund assets.

Plaintiffs contend that the Pension Protection Clause protects their "right to vote on a local board . . . and to have that local board control and invest local pension funds." Pl. Br. 20. But Plaintiffs do not, and cannot, claim that the Act changes in any way their statutory right to elect members of their local funds' boards. Nor can Plaintiffs claim that the Act changes their local boards' authority to determine the amount of all benefits that Plaintiffs are entitled to receive. The only thing the Act changes is the local boards' power to invest their local funds' assets, similar to other laws that have

changed their investment authority. But that change has no effect on Plaintiffs' receipt of their promised monetary benefits, which, as described above, are the only benefits the Clause protects. Thus, the pre-Act authority of Plaintiffs' local *boards* to manage investments of their local fund assets is not a benefit of *Plaintiffs* that the Pension Protection Clause prevents the General Assembly from changing, or even one that all local fund members would consider a benefit.

As noted above (at 27-30), the Court has repeatedly held that the Pension Protection Clause is not concerned with Pension Code provisions relating to the funding of public retirement systems. It follows, as the appellate court held, A 8, that if Plaintiffs have no constitutional right in *how* their local pension funds are funded, they cannot have a constitutional right regarding *who* invests local fund assets, which likewise has no bearing on the payments they are entitled to receive. The Pension Protection Clause was intended to protect those payments, not to "freez[e] in a system of trustees or persons who would administer the various funds." 4 Proceedings at 2929 (comments of Delegate Kinney). Having the authority to invest retirement system assets exercised by a local board is no more a benefit of membership in a public retirement system than the desire to have a "more secure fund" based on repealed Pension Code provisions specifying higher government contributions. *McNamee*, 173 Ill. 2d at 439; *see also Sklodowski*, 182 Ill. 2d at 230-31. Indeed, if changing that authority by the local boards were enough to

violate Plaintiffs' constitutional rights, numerous Pension Code amendments that have no effect on the benefits paid to fund members, and that have never been questioned, would be unconstitutional. *See supra* at 7-9 & n.6. But they are not questioned for a simple reason: they do not diminish the constitutionally protected right of local fund members to receive their promised benefits.

The United States Supreme Court's recent decision in *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615 (2020), while addressing a distinct legal issue, is instructive. There, members of a private defined benefit pension plan governed by ERISA complained that the plan trustees breached their fiduciary duties by making imprudent investments, thereby reducing plan assets. *Id.* at 1618. The Supreme Court held that the plaintiffs lacked standing to bring this claim because they did not assert any risk that the plan would fail to pay their promised benefits, and the success or failure of their claim "would not affect their future benefit payments." *Id.* at 1619. The situation here is similar. Plaintiffs are participants in a defined benefit plan who do not, and cannot, complain of anything that will reduce the payments they are entitled to receive, which their municipal employers are constitutionally obligated to pay even if the funds' assets ever became insufficient. *See Jones*, 2016 IL 119618, ¶¶ 42-45. Plaintiffs accordingly lack any ground to object to the Act's changes in the Pension Code's administrative provisions governing the investment of local fund assets.

b. Plaintiffs still have the same right to elect local fund trustees, and an equal right to elect trustees of the Investment Funds.

As described above, the Court has repeatedly held that the sole right created by the Pension Protection Clause is for a pension fund member to receive promised monetary benefits. Thus, the General Assembly would not violate the Pension Protection Clause by changing Plaintiffs' ability to vote for local fund trustees. *See* 4 Proceedings at 2929 (the Pension Protection Clause "is also not intended to get into freezing in a system of trustees or persons who would administer the various funds") (comments of Delegate Kinney). And even if that ability did implicate the Clause, the Act still does not violate Plaintiffs' rights because it does not change Plaintiffs' ability to select a majority of their local boards, and it gives all local fund members an equal right to select a majority of the members of the Investment Funds. No local fund member has less of a vote, for either selection, than any other local fund member entitled to vote on it. And even before the Act, the mathematical weight of each member's vote for persons serving on a local fund board was inherently subject to going up or down due to a reduction or increase in the number of active or retired members as a result of new hiring, retirements, or deaths. Such changes therefore do not implicate the Pension Protection Clause.

Under Plaintiffs' theory, every time a local police or fire department makes a new hire, it increases the number of voters, unlawfully diminishing

and diluting the existing members' voting rights. But as a practical matter the number of persons eligible to vote is in constant flux as new employees are hired, and as members retire and pass away. To preserve the weight of each member's vote would mandate an absurdly complex system of weighted voting, contrary to the general principle of equal voting rights, and be utterly unworkable.

On the other hand, voting equality is preserved under the Act. Plaintiffs still vote for trustees on their local funds' boards, with the weight of their votes changing — but staying equal to all other members — as new members are hired or current members leave active service. And again, those boards continue to make all decisions regarding the amount of Plaintiffs' monetary benefits, including retirement and disability benefits. Plaintiffs also have an equal right to select a majority of the boards of the Investment Funds, whose decisions regarding investment of the local funds' assets have no effect on the monetary benefits Plaintiffs will receive. Every person with a right to vote is treated the same, with an equal right to control who sits on a local fund's board and who sits on the board of the Investment Fund. Thus, even if the right to vote for trustees were a "benefit" for purposes of the Pension Protection Clause, *but see* 4 Proceedings at 2929 (the Pension Protection Clause "is also not intended to get into freezing in a system of trustees or persons who would administer the various funds") (comments of Delegate Kinney), the Act left it undiminished and unimpaired. For this reason as well,

the Act's change in the Pension Code provisions that previously gave local boards authority to invest local fund assets does not implicate rights secured by the Pension Protection Clause.

2. The use of local fund assets to pay minor transition costs under the Act does not diminish or impair Plaintiffs' protected pension benefits.

Plaintiffs alternately contend that the use of local fund assets to pay the Investment Funds' start-up costs, including to repay any transition loans capped at 0.1% of the local funds' assets, impairs their constitutionally protected benefits in violation of the Pension Protection Clause. Pl. Br. 22-24. This argument fares no better because these costs likewise have no effect the payment of Plaintiffs' monetary benefits under their retirement plans.

As this Court has repeatedly held, pension fund members have a constitutionally protected interest in receiving the payments promised to them under the Pension Code provisions in effect during their employment, but they do not have a protected interest in the funding of those payments. Thus, even if the payment of transition costs had an effect on a local plan's funding in the short-term, that is not constitutionally significant.

In *McNamee* and *Sklodowski*, the Court rejected claims challenging statutes that amended the Pension Code to reduce public contributions to the plaintiffs' retirement systems, despite the plaintiffs' contention that they had a constitutionally protected "benefit" in having a "more secure fund." *McNamee*, 173 Ill. 2d at 439; *Sklodowski*, 182 Ill. 2d at 230-31; *see also Jones*,

2016 IL 119618, ¶¶ 35-38; *cf. Thole*, 140 S. Ct. at 1618-20. Those challenged laws had a much greater impact on the plaintiffs' retirement systems' assets than the Act's provisions that Plaintiffs challenge here, which initially authorized the use of an extremely small share of local fund assets (about one-thousandth of those assets) to cover the transition costs of setting up the Investment Funds, but are designed to generate much higher long-term cost savings and investment returns, thereby lowering the ultimate burden on local taxpayers. Indeed, the Investment Funds have already generated cost savings, based in part on their ability to negotiate lower fees, that far surpass their startup costs. *See supra* at 14 & n.13. And nothing supports the notion that such short-term costs borne by public pension funds are constitutionally forbidden despite the significant long-term financial advantages they produce.

* * *

In short, the circuit court and appellate court correctly held that the Pension Protection Clause does not prohibit changes in Pension Code provisions that govern the investment of retirement system assets but have no effect on members' monetary benefits, and that the Act therefore does not violate the Pension Protection Clause.[21]

[21] If the Court reverses the judgment of the lower courts, on remand they should consider in the first instance the IFA Executive Director's argument, which the appellate court did not reach, and which the parties have not briefed in this Court, that Plaintiffs lack standing to seek any relief against him. *See Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 146 (1999).

V. The Act Does Not Violate the Takings Clause.

This Court should also affirm the lower courts' judgment against Plaintiffs on their Takings Clause claim for two independent reasons. First, the Act does not take any of Plaintiffs' property because, as participants in a defined benefit plan, they have a right to receive their promised benefits but do not have a property right in the source of funding for those payments. Second, the Act's change in the management of those assets is not a "taking."

The Takings Clause of the Illinois Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. art. I, § 15. The Clause's language relating to a "taking," which is identical to its federal counterpart, has the same meaning. *Hampton v. Metro. Water Reclamation Dist.*, 2016 IL 119861 ¶¶ 12-16, 31. It prevents "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (citation and internal quotation marks omitted); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017); *N. Ill. Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill. 2d 25, 31-32 (1995). The Act does not do that, but instead simply changes the custody and management of the local funds' assets while continuing to dedicate them exclusively to paying member benefits.

A. The Act's changes in the administration of local fund assets do not affect plaintiffs' property rights.

State law determines what constitutes "property" for purposes of the

Takings Clause. *Canel v. Topinka*, 212 Ill. 2d 311, 332 (2004) (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)); *see Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2075-76 (2021). Here, although Plaintiffs have a constitutional right to receive the benefit payments promised to them, which the Act does not change, they do not have a property right to any particular level of assets used to pay those benefits, or in the manner in which those assets are invested. *See Jones*, 2016 IL 119618, ¶ 36; *Sklodowski*, 182 Ill. 2d at 229-31. Plaintiffs' Takings Clause claim thus fails at the outset, for they have no property right under Illinois law that is affected by the Act. *See*, *e.g.*, *Degan v. Bd. of Trustees of Dallas Police & Fire Pension Sys.*, 956 F.3d 813, 814-15 (5th Cir. 2020) (plaintiffs did not state Takings Clause claim against statutory change in manner of withdrawing funds in "Deferred Retirement Option Plan" where, under state law, they had no property interest in the manner for withdrawing them under prior law); *Molloy v. Monsanto*, 30 V.I. 164, 183-84 & nn. 56-57 (D.V.I. June 9, 1994) (rejecting Takings Clause claim based on public pension fund members' claimed property right in earnings on their fund contributions); *cf. Thole* 140 S. Ct. at 1619-20 ("As this Court has stated before, plan participants possess no equitable or property interest in the [defined benefits] plan."); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999) ("Given the employer's obligation to make up any shortfall, no plan member has a claim to any particular asset that composes a part of the plan's general asset pool.").

Plaintiffs repeatedly, but incorrectly, refer to the assets of their local funds as "their" assets and property, as if that were undisputed. See, *e.g.*, Pl. Br. 1, 12, 25. But they offer no legal basis for that assumption, which runs contrary to their status as participants in a defined benefit plan whose benefit payments are legally guaranteed, regardless of the level of assets in their local funds. That assumption is also inconsistent with extensive precedent. *See*, *e.g.*, *Thole* 140 S. Ct. at 1619-20; *Hughes Aircraft*, 525 U.S. at 439-41; *Degan*, 956 F.3d at 814-15; *Molloy*, 30 V.I. at 183-84 & nn. 56-57; *State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E.2d 644, 652 (Ohio 1998); *State Bd. of Ret. v. Boston Ret. Bd.*, 460 N.E.2d 194, 196 (Mass. Sup. J. Ct., Suffolk, 1984); *see also Castellano v. Bd. of Trustees of Police Officers' Variable Supplements Fund*, 937 F.2d 752, 757-58 (2d Cir. 1991) ("While there is no question that plaintiffs have an entitlement under New York law to receive their pension payments — which they are receiving — they have no entitlement to, or right to direct the retention of, the particular assets that are held for investment purposes in the pension fund.") (cleaned up).

Plaintiffs nonetheless contend that they have a property right in the local fund assets used to pay for the transition costs necessary to implement the Act's transfer of local fund assets to the Investment Funds. Pl. Br. 25, 27. That is both legally and factually wrong. As explained, Plaintiffs have no property right in the manner of funding the benefit payments they are entitled to receive, and thus have no right in how local fund assets are generally

administered or invested, or in controlling the means by which reasonable and ordinary administrative costs are incurred. *See supra* at 24-27. Thus even if the local funds were exposed to higher cumulative administrative fees and costs under the Act than before, that still would not implicate a property interest that Plaintiffs have under Illinois law.

In support of their contrary position, Plaintiffs cite cases that involved pension payments to retirement system members, not retirement system assets. Pl. Br. 25-26. Those cases therefore are not relevant to the issue presented here, which is whether Plaintiffs have a property interest in the assets of their local funds. And Plaintiffs do not dispute that the Act does not in any way change the pension payments they are legally entitled to receive. On the other hand, as noted, numerous cases have rejected takings claims, for lack of a protected property interest, where the challenged law affected pension fund assets (not benefit payments), in which the plaintiffs did not have a property right under applicable law.

Plaintiffs' claimed interest in the cost to manage local fund assets is misplaced as a practical matter, too. As the record establishes, the Act significantly *reduces* the administrative fees and costs associated with managing local fund assets, thereby increasing local fund assets and decreasing local taxes necessary to fund benefit payments. C 471-73, 569-71. And those savings already greatly exceed the temporary loans (totaling only about one-thousandth of the local funds' assets) that the Investment Funds

were authorized to take out to fund their startup costs. *See* C 131, 471-73, 569-71; *see supra* at 14 & n.13.

B. Alternatively, the Act does not effect a "taking" of Plaintiffs' property for a public use.

Plaintiffs' Takings Clause claim also fails because even if they had a property right in their local funds' assets, the Act does not constitute a "taking" of that property for the government's use. Instead, the Act merely changes the procedures by which local fund assets are managed without changing the ultimate use of those assets to pay local fund members' benefits, and its short-term impact on the value of those assets, which the Act's cost savings have already greatly surpassed, is not nearly severe enough to amount to a taking. The appellate court did not reach this issue, but this Court may rely on it as an alternate ground to sustain the judgment against Plaintiffs. *See Alvarez*, 2022 IL 126927, ¶ 24.

Plaintiffs' Takings Clause claim necessarily asserts that the Act effects a "regulatory taking" of their property, not a direct appropriation of it for the government's use, as is the case for traditional takings such as the condemnation of private property. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015) ("Our cases have stressed the longstanding distinction between government acquisitions of property and regulations.") (cleaned up); *see also Davis v. Brown*, 221 Ill. 2d 435, 443 (2006). The Act did not "appropriate" any local fund assets for the government's use. It merely transferred the custody and management of those assets while maintaining the same use — namely, paying

member benefits.

States have broad police powers to "adjust rights for the public good," *Murr*, 137 S. Ct. at 1943 (cleaned up), and regulations that affect the use of private property without compensation violate the Takings Clause only in very limited circumstances, *id.*; *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 223-25 (1986); *Kaukas v. City of Chicago*, 27 Ill. 2d 197, 203 (1963); *see also Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 325-26 (1970). Two types of regulation, neither of which is relevant here, constitute *per se* takings: (1) regulations that allow the government to "physically invade or permanently appropriate [private] assets for its own use," *Connolly*, 475 U.S. at 225; *see also Lingle*, 544 U.S. at 538-39, and (2) "regulations that completely deprive an owner of *all* economically beneficial use of her property," *Lingle*, 544 U.S. at 538-39 (cleaned up) (emphasis in original).

Outside those two situations, whether a regulation violates the Takings Clause depends on (1) "the character of the government action," including whether it "merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good," and (2) the severity of "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'' *Lingle*, 544 U.S. at 528-29 (cleaned up); *see also Connolly*, 475 U.S. at 224-25; *Davis*, 221 Ill. 2d at 443-44. These factors serve "to identify regulatory actions that are functionally

equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

When applying these factors, both this Court and the United States Supreme Court have held that "only the most severe governmental regulation amounts to a taking requiring just compensation." *Forest Pres. Dist. of Du Page Cnty. v. W. Suburban Bank*, 161 Ill. 2d 448, 457 (1994); *see Murr*, 137 S. Ct. at 1949; *Lingle*, 544 U.S. at 544; *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) ("our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking"); *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 592 (1962) ("If [an] ordinance is otherwise a valid exercise of . . . police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *see generally Connolly*, 475 U.S. at 223 ("In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others."). An additional aspect of the relevant inquiry is the extent to which the owner's property rights were already subject to state regulation. *Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 227.

Notably, courts have routinely rejected Takings Clause claims challenging laws that "adjust[] the benefits and burdens of economic life to promote the common good," *Lingle*, 544 U.S. at 528-29 (cleaned up), and that had a major impact on private property rights, *see*, *e.g.*, *Connolly*, 475 U.S. at

221-28 (upholding, against "facial" and "as applied" Takings Clause claims, statute imposing financial liability on employers that withdraw from multi-employer pension plans for their proportionate share of funds' actuarial funding deficiency). In *Concrete Pipe*, for example, the Supreme Court rejected the plaintiff's Takings Clause claim despite evidence that complying with the challenged law would require it "to pay out 46% of shareholder equity." 508 U.S. at 645. The Court observed that it had upheld, against Takings Clause claims, regulations that resulted in 75% and 92.5% diminutions in value, respectively. *Id.* at 645. And in *Goldblatt*, the Court upheld an ordinance that prohibited excavation below the water table and prevented plaintiff from continuing mining operation in an existing quarry, and it relied on and approved a decision upholding an ordinance that prohibited brick manufacturing within certain areas of a city, causing "a diminution in value from $800,000 to $60,000" of the plaintiff's property. 369 U.S. at 592-97.

Here, neither the character of the Act's changes to the Pension Code nor the severity of those changes' effects on Plaintiffs' purported property rights is sufficient to establish a taking. The Act's contested provisions bear no resemblance to a government taking of private property for public use. To the contrary, the Act preserves the use of local fund assets to pay member benefits and simply changes the custody and administration of those assets to better accomplish that use. *See Connolly*, 475 U.S. at 224 ("the United States has taken nothing for its own use"); *Bd. of Trustees of Employees' Ret. Sys. of*

City of Baltimore, 562 A.2d at 738-40 (ordinance requiring city pension funds to divest from companies doing business in South Africa was not "taking" of beneficiaries' property where the challenged action "does not involve the government appropriating the beneficiaries' money for its own use or for the use of others"). Nor has the Act severely impaired any investment-based expectations that Plaintiffs might claim in their local funds' assets. Before the Act, the Pension Code extensively regulated, and from time to time modified, the procedures governing the administration and investment of local fund assets. *See supra* at 7-9. The Act's changes in those procedures thus fall well within the scope of changes that could readily be anticipated as part of the General Assembly's efforts to improve local fund operations for the benefit of members and local taxpayers alike. *See Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 227. And any short-term financial impact that these changes had on local fund assets, including transition loans for approximately one-thousandth of their value, are miniscule compared to the economic effects that courts have held do not to amount to a taking. *See Concrete Pipe*, 508 U.S. at 645-46; *Connolly*, 475 U.S. at 221-28; *Goldblatt*, 369 U.S. at 592-97; *see generally Forest Pres. Dist. of Du Page Cnty.*, 161 Ill. 2d at 457. Moreover, the long-term cost savings the Act makes possible will greatly exceed those transition costs, consistent with the Act's express purpose to "streamline investments and eliminate unnecessary and redundant administrative costs, thereby ensuring more money is available to fund pension benefits for the

beneficiaries of the transferor pension funds." 40 ILCS 5/22B-114, 22C-114.

In sum, the Act's salutary purpose — to improve the local funds' fiscal position, thus reducing local taxes without reducing any benefits paid to members — and means to achieve that purpose do not plausibly implicate the Takings Clause.

CONCLUSION

For the foregoing reasons, the appellate court's judgment should be affirmed.

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Respectfully submitted,

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and the matters to be appended to the brief under Rule 342(a), is 14,955 words.

/s/ *Richard S. Huszagh*

Certificate of Filing and Service

On September 13, 2023 I electronically filed this Brief of Defendants-Appellees with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system.

Counsel for the other participants in this appeal named directly below are registered service contacts on the Odyssey eFileIL system and will be served via the Odyssey eFileIL system.

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Counsel for the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and on September 13, 2023, I served this Brief on them at their indicated e-mail addresses.

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

/s/ *Richard S. Huszagh*
Assistant Attorney General