NO. 127239

IN THE
SUPREME COURT OF ILLINOIS

MICHAEL NOLAND, an individual, and JAMES CLAYBORNE, JR., individually and in his official capacity as a member of the Illinois Senate, Plaintiffs-Cross Appellants/Appellees, v. SUSANA MENDOZA, in her official capacity as Comptroller of the State of Illinois, Defendant-Cross Appellee/Appellant.	)	On Direct Appeal to the Supreme Court from the Circuit Court of Cook County, County Department, Chancery Division No. 2017 CH 07762 Honorable FRANKLIN U. VALDERRAMA, And ALLEN P. WALKER Judges Presiding

CROSS-APPEAL REPLY BRIEF OF PLAINTIFFS/CROSS-APPELLANTS

E-FILED
5/2/2022 4:03 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

Michael J. Scotti III
Garry L. Wills
Roetzel & Andress LLP
30 N. LaSalle Street, Suite 2800
Chicago, IL 60602
Phone: (312) 580-1200
Fax: (312) 580-1201
mscotti@ralaw.com
gwills@ralaw.com

Attorneys for Plaintiffs/Cross-Appellants

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

[Remainder of page intentionally left blank]

ARGUMENT

I. Introduction

Defendant in her response engages in an academic overview of various understandings of what constitutes a "public right." However, Defendant fails substantively to address the core feature of this case – namely, that it involves a constitutional provision that was ratified to protect the right of the people of Illinois to a legislature free from improper influences or motivations. Instead of grappling with this issue, the Comptroller evades it by incorrectly framing this case as merely involving claims by "individuals seeking monetary relief against the government." (Def. Reply, at 10.) Defendant uses this incorrect framing to brush aside relevant precedent, and instead to cite irrelevant case law involving municipal employees who were only enforcing individual rights. Because Plaintiffs are seeking to enforce a right created for the benefit of the public collectively, Plaintiffs may seek as an element of relief that the Comptroller comply with the Illinois Constitution and pay all members of the General Assembly their unconstitutionally withheld salaries. The circuit court's ruling to the contrary should be reversed.

II. Plaintiffs are Seeking to Enforce a Public Right, Not a Private Right.

As Defendant notes, public rights are, in the most general terms, those that "protect collective interests." (Def. Reply, at 10.) American law historically has recognized three different categories of public rights that belong to the people as a whole:

> (1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority "for the government and tranquillity of the

> whole." At any given time, the law recognized many such "public rights"--interests that enjoyed legal protection, but that belonged to "the whole community, considered as a community, in its social aggregate capacity."

Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 566 (2007), quoting 4 William Blackstone, Commentaries *5 and 7. This case involves one of these "less tangible" public rights intended to ensure proper governance for the benefit of the people as a whole.

The Legislative Salary Clause was not – at least not primarily – included in the Constitution to ensure that legislators be paid their salaries. Existing contract law would be sufficient if that were the only interest needing protection. Instead, as recognized by this Court in numerous cases, the provision against mid-term changes in legislative salary was ratified to protect the people of Illinois' right to a legislature that cannot be bought or sold, but instead acts for the benefit of the state and of the public generally in the process of government. This lawsuit is thus not simply about recovering the lost salary that legislators are due, but instead requiring Defendant to perform her public duty as imposed by statute and the Illinois Constitution to pay legislators their rightful salaries as fixed by law. It is the fulfillment of this public duty imposed on Defendant, which affects the public as a whole, that is at stake in this lawsuit.

The bedrock principle behind the Salary Protection Clause is the precept that "public offices are created in the interest and for the benefit of the public." *People ex. rel. Sartison v. Schmidt*, 281 Ill. 211, 215 (1917); *see also Kreitz v. Behrensmeyer*, 149 Ill. 496, 503 (1894) (a "public office" is a "public agency created for the benefit of the state"). Because of this, a public officer's salary is not a private right, but instead is a public right that attaches to the office and may be recovered in full. *See People ex rel. Barrett v. Bd. of*

Comm'rs of Cook County, 11 Ill. App. 3d 666, 668 (1st Dist. 1973) (a "public office holder's right to compensation is not based on any personal or contract rights but attaches to the office"); *see also Kelly v. Chicago Park Dist*., 409 Ill. 91, 96 (1951) ("if one is lawfully entitled to a public office the right to salary attaches to the office and that it may be recovered in full").

This principle was aptly in *Galpin v. City of Chicago*, 269 Ill. 27 (1915), which rejected an estoppel defense and stated:

> The fees or salary of an officer, having been fixed by law, become an incident to the office, and it is contrary to public policy for candidates to attempt to attain such office by promises made to the electors to perform the duties of the office for any other or different compensation than that fixed by law. Such promises being illegal, they cannot be enforced.

269 Ill. at 41. *See also People ex rel. Dinneen v. Bradford*, 267 Ill. 486, 490 (1915) (because the "the legal right to the office carried with it the right to the salary" . . . the "salary follows the legal title" (quotation omitted).)

In *Pitsch v. Continental and Commercial National Bank*, 305 Ill. 265 (1922), this Court addressed a situation where a public officer, whose salary was set by statute, had agreed to accept less than the statutory amount, and rejected waiver and estoppel defenses, stating:

> The compensation of a public official for the performance of his official duties is not a matter for traffic or trade, for bargaining or for favoritism . . . . Official morality and public policy alike prohibit the undermining of the public service by permitting officers to make merchandise of their official services.

Id. at 271. As this case law establishes, the Legislative Salary Clause was ratified to protect the people against the undermining of the public service by permitting the General

Assembly to make merchandise of their official services.[1] This squarely fits into the definition of a public right, even as the public right doctrine formulated in Defendant's brief. [2] Defendant is therefore incorrect in framing this a run-of-the mill employment case where employees were not paid their correct salary.

Defendant misses the mark in trying to distinguish these cases by arguing that they reference the public policies behind their holdings (which Defendant claims only prevents certain rights from being defeated by waiver or estoppel) but do not expressly state they are protecting a public right (which only then according to Defendant would not be subject to laches or statute of limitations defenses). (Defendant Resp. 17.)

Defendant's attempt to draw a bright line distinction between "public policy" considerations and a "public right" is misguided. The issue is not whether Plaintiffs are seeking to enforce a "public policy" as opposed to a "public right" because public rights by their very nature embody the state's public policy. *See O'Brien v. Encotech Const.*

---

[1] Accord *Brissenden v. Howlett*, 30 Ill. 2d 247, 249 (1964) (explaining that one of the purposes of the Illinois Constitution's various salary protection clauses is to preclude public officials "from using his personal influence or official action" to change their salary mid-term); *Rock v. Burris*, 139 Ill. 2d 494, 499-500 (1990) ("What the constitution requires, both within the legislative article and elsewhere, is that the salary for the various constitutional offices within State and local government be carved in stone when the public officials take office and that the salary structure so set not be changed to take effect during that term . . . . It is not permissible, however, as in the present case, for the legislature to alter the pay structure to become effective immediately.").

[2] This is in accord with case law from other jurisdictions. *See, e.g., County of Beaver ex rel. Beaver Cty. Bd. of Comm'rs v. Sainovich*, 96 A.3d 421, 427 (Pa. Commw. Ct. 2014) (action by county to recover from the county solicitor money paid in excess of that allowed by the county code was "not a breach of contract action", but instead accrued to the county in its governmental capacity, and therefore the statute of limitations did not apply to bar the action); *see also Maricopa Cty. v. Rodgers*, 52 Ariz. 19, 78 P.2d 989 (1938) (action to recover money which was paid to defendant judge without authority of law was for the public benefit and thus the statute of limitations did not apply).

Servs., Inc., 183 F. Supp. 2d 1047, 1049 (N.D. Ill. 2002) (citing numerous Illinois cases and noting that "there is strong support in Illinois law for the proposition that the state's minimum wage and wage payment laws involve public rights and embody the state's public policy"). The issue instead is whether the state's public policy is protecting a right that belongs only to individuals or to the people generally. In *People ex. Re. Northrup v. City of Chicago*, 308 Ill. App. 284, 296 (1st Dist. 1941), for example, the court did not specifically reference the public right doctrine, but nevertheless stated that the "so–called defenses by the city officers, namely, the statute of limitations, laches and gifts, are all contrary to the Constitution and public policy of the State, and cannot be sustained."

It is reasonable to presume the drafters of the 1970 Constitution were aware of the import of this language from the *Northrup* decision at the time they drafted the Illinois Constitution's various salary protection clauses, including the clause at issue in this proceeding. *See In re Pension Reform Litig*., 2015 IL 118585, at ¶ 70 (observing that the drafters of the 1970 Constitution are presumed to be aware of the prior case law involving the constitutional provision they are drafting).

For these reasons, Plaintiffs are seeking to enforce a public right that embodies the public policy of the State as expressed in the Illinois Constitution.

III. Because Plaintiffs Assert a Mandamus Claim to Enforce a Public Right, Plaintiffs Can Seek as Relief Payment to All of the Affected Legislators.

Defendant admits that under Illinois law, "public rights are enforceable through mandamus by members of the public, proceeding as relators in the name of the People." (Def. Reply, at 12.) *See People ex rel. Chilcoat v. Harrison*, 253 Ill. 625, 629 (1912) (in a proceeding by relators as citizens and electors to enforce a public right, all the public are regarded as represented and "all the individuals constituting the public are bound by the

decree"). That is precisely the situation here, where Plaintiffs are seeking the enforcement of a public right on behalf of the people of Illinois.[3]

Defendant makes two arguments against the application of this principal here. First, Defendant re-asserts her position that no public right is implicated, but instead private claims to collect money owed by the government. (Def. Reply, at 26.) For the reasons above, Defendant's position misconstrues the underlying interest that is being protected by the Legislative Salary Provision, which is the public's right to a General Assembly that is free from improper influences and incentives. That is not a private right, but instead a public right that affects the public at large.

In making her misplaced argument, Defendant cites to two inapposite cases. Defendant first references *Murphy v. City of Park Ridge*, 298 Ill. 66, 68, 131 N.E. 256 (1921). (Def. Resp. 14-15.) *Murphy* was a mandamus proceeding by a holder of bonds to compel the city to collect unpaid installments of a special assessment to be used to pay off his bonds. *Id*. at 67. Murphy did not involve any circumstances similar to what makes this case about a public right – namely, a constitutional provision designed to protect the people of Illinois collectively. It therefore is unsurprising that the Court in *Murphy* held that the case involved only the collection of a private claim. *Murphy*, however, is not instructive here.

[3] As Plaintiffs noted in their initial brief, when a mandamus petition seeks to enforce a public right, the "usual and best approved practice" is to file the lawsuit in the name of the People of Illinois, but it is "unnecessary" to do so and the lawsuit may be filed in the name of the individual petitioners. *Voss v. Prentiss*, 154 Ill. App. 609, 615 (1st Dist. 1910). (Pl. Br. at 33 n.6.) Defendant does not challenge this principal. The fact that as postured Plaintiffs are not expressly bringing this lawsuit as relators does not alter the fact that their mandamus claims assert a pubic right.

The second case that Defendant relies on, *City of Shelbyville v. Shelbyville Restorium, Inc*., 96 Ill. 2d 457, 460 (1983), also does not support Defendant's assertion that this case involves a private right, not a public right. (Def. Resp., at 15-16.) *City of Shelbyville* examined at length the application of the doctrine of governmental immunity from statutes of limitations (known by the Latin phrase "nullum tempus occurrit regi" – *i.e.*, "no time runs against the king."). This governmental immunity doctrine only applies when the government is enforcing a public right, not when it is acting in a proprietary manner. *Id*. at 461. Relevant to this case, the Court in *City of Shelbyville* posed the private right / public right inquiry as follows: "The question of *who would be benefited* by the government's action and *who would lose by its inaction* is of paramount importance in statute-of-limitations immunity cases. *Id* at 462 (emphasis added).

The facts in *City of Shelbyville* involved a municipality that sued to enforce and recover damages under an ordinance relating to a home builder's construction of streets in a subdivision. The Court in *City of Shelbyville* held that the case involved a public right because it involved the safety of all members of the public who had occasion to use the streets. *Id*. at 464.

Defendant tries to contrast the public right found in *City of Shelbyville* with this case by again inaccurately claiming that this lawsuit only involves Plaintiffs "seeking specific payments of public funds" that are "primarily for Plaintiffs' individual benefit." (Def. Reply, at 17.) In fact, the question posed in *City of Shelbyvill*e – "who would be benefited by the government's action and who would lose by its inaction" – actually cuts in favor of finding a public right in this case, and thus that the governmental immunity to the statutes of limitations doctrine applies here.

As described above, the Legislative Salary Clause was ratified to protect the people's right to a proper functioning General Assembly. Under the guiding principles set forth in *City of Shelbyville*, therefore, the people as a whole are the parties who will be benefitted by Defendant's action, and this case therefore involves a public right. That Plaintiffs individually will also benefit if the Salary Reduction Laws are ultimately found to be unconstitutional does not alter the fact that Plaintiffs are seeking to enforce a public right for the benefit of the people as a whole. *See Donald L. Doernberg*, "'We the People'": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 Cal. L. Rev. 52, 56 (1985) ("there is a class of cases where individual and collective interests, far from being opposed, actually coincide-cases where the government is charged with violating the Constitution"). Plaintiffs therefore have standing to ensure that Defendant follows the constitutional salary mandate as to all affected legislators. *See Hill v. Butler*, 107 Ill. App. 3d 721, 725 (4th Dist. 1982) (citizens have right to bring mandamus action to enforce public rights set forth in statute); *see also People for Use of Cook Cty. v. Majewski*, 28 Ill. App. 3d 269, 271, 328 N.E.2d 195, 197 (1975) (a public officer exercises some of the sovereign functions of the government, to be exercised by him for the benefit of the public).

Illustrative of the public nature of the right being asserted here is the fact that Plaintiffs are represented in this matter by an attorney who was appointed a Special Assistant Attorney General solely for the purpose of representing Plaintiffs. (C 238; C 240.) The Office of the Illinois Senate President made the request for the appointment of a Special Assistant Attorney General to the Illinois Attorney General's Office. (C 238.) The Senate President expressly specified that the request was made because "a legislator's

salary is a legal incident of office." *Id*. The Illinois Attorney General's Office then acceded to the request and appointed Plaintiffs' counsel as a Special Assistant Attorney General, with the State of Illinois paying Plaintiffs' legal fees. (C 240.)

Notably, the statute authorizing the appointment of a Special Assistant Attorney General, 15 ILCS 205/6, provides in relevant part that whenever the attorney general "is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend," a competent attorney may be appointed "and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general would have had if present and attending to the same." If this case only involve a private claim for money owed by the government, as Defendant argues, there would have been no right or need to appoint a Special Assistant Attorney General to represent Plaintiffs.

The case *People ex rel. Barrett v. Bd. of Comm'rs of Cook Cty*., 11 Ill. App. 3d 666 (1st Dist. 1973) is instructive on this issue. In *Barrett*, the question was whether the county clerk was entitled to have a special state's attorney represent him to recover salary that was unconstitutionally decreased by the county board on a midterm basis. The court held that the county clerk was entitled to a special state's attorney because his salary was "not based on any personal or contract right but attaches to the office." *Id*. at 668. Here, similarly, the appointment of a Special Assistant Attorney General to represent Plaintiffs was proper because Plaintiffs claim are "not based on any personal or contract right", contrary to what Defendant argues.

Defendant fairs no better with her second argument against paying all legislators their withheld salaries. Defendant claims that Plaintiffs should have filed their case as a

class action, and because Plaintiffs did not do so "due process prevents other any [sic] legislator from being bound by a judgment in a case" in which he is not named as a party. (Def. Reply, at 27.)

In making this argument, Defendant again frames the issue in an incorrect way. At issue are Plaintiffs' mandamus claims, which seek to compel Defendant to comply with her non-discretionary duties under the Illinois Constitution and the Compensation Act. If this court affirms the circuit court's holding that the Salary Reduction Laws are facially unconditional and that Defendant has no valid defenses, that judgment will be binding on Defendant, who is the party before the Court as the defendant in this case. Defendant is the only person that would be bound by an order that she comply with the constitutional mandate and pay all affected members of the General Assembly their withheld salaries. Such a ruling will of course impact the non-party legislators, but impact on non-parties is always the case when a statute is deemed facially unconstitutional. Indeed, as requested in Plaintiffs opening brief, this Court may, pursuant to the express terms of Supreme Court Rule 366, permanently enjoin Defendant from continuing to enforce these facially unconstitutional statutes and order the Comptroller to make the constitutionally required payments to all affected members of the General Assembly.

No due process concerns are therefore raised. Otherwise, every lawsuit seeking a ruling that a statute is facially unconstitutional would have to be brought as a class action, which is not the case. See *Lerman v. Bd. of Elec. in City of New York*, 232 F.3d 135, 143-44 (2nd Cir. 2000) (noting that a facial challenge is "a species of third party (jus tertii) standing by which 'a party seeks to vindicate not only his own rights, but those of others

who may also be adversely impacted by the statute in question.'" (quoting *City of Chicago v. Morales,* 527 U.S. 41, 55–56 n. 22, (1999) (plurality opinion)).

Defendant's due process argument is therefore misplaced, and (if this Court affirms the finding that the Salary Reduction Statutes are facially unconstitutional) Defendant should be ordered to make the withheld salary payments to all of the legislators.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enjoin Defendant from continuing to enforce these unconstitutional Laws and order Defendant to pay Plaintiffs and all other members of the General Assembly their withheld salaries.

Date: May 2, 2022

Respectfully submitted,

Michael Noland & James Clayborne Jr.

By: /s/ *Michael J. Scotti III*

One of Their Attorneys
Michael J. Scotti III
Special Assistant Attorney General
ROETZEL & ANDRESS LPA #49399
30 North LaSalle Street, Suite 2800
Chicago, IL 60602
Phone: (312) 580-1200
Fax: (312) 580-1201
mscotti@ralaw.com

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 11 pages.

/s/ Michael J. Scotti III

CERTIFICATE OF FILING AND SERVICE

I certify that on May 2, 2022, I electronically filed the foregoing CROSS-APPEAL REPLY BRIEF OF PLAINTIFFS/CROSS-APPELLANTS with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

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

Richard S. Huszagh

Primary e-mail: CivilAppeals@ilag.gov

Secondary e-mail: richardhuszagh@ilag.gov

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/ Michael J. Scotti III