No. 125330

IN THE SUPREME COURT OF ILLINOIS

WILLIAMSON COUNTY BOARD OF COMMISSIONERS, a body politic and Corporate; ROBERT GENTRY; RONALD M. ELLIS, and JAMES D. MARLO,	On Appeal from the First Judicial Circuit Court, Williamson County
Plaintiffs-Appellees,	
vs.	Circuit Court Case No.: 18MR215
BOARD OF TRUSTEES OF THE ILLINOIS MUNICIPAL RETIREMENT FUND, et al.	Honorable Jeffrey Goffinet, Judge Presiding
Defendants-Appellants.	

OPENING BRIEF OF PLAINTIFFS-APPELLEES

Don E. Prosser, ARDC #2258722
Rhett T. Barke, ARDC #6277080
Gilbert, Huffman, Prosser, Hewson & Barke, Ltd.
102 S. Orchard Drive
P.O. Box 1060
Carbondale, IL 62903-1060
(618) 457-3547 - telephone
(618) 457-8017 – fax
dprosser@southernillinoislaw.com
rbarke@southernillinoislaw.com

Attorneys for Plaintiffs-Appellees

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

POINTS AND AUTHORITIES

ARGUMENT

This case presents the question of whether the administrative agency decision of the Defendant Board of Trustees of the Illinois Municipal Retirement Fund ("IMRF") terminating Plaintiffs Robert Gentry, Ronald Ellis and James Marlo from post-February 2017 membership and participation in the Illinois Municipal Retirement Fund is unconstitutional and violates the Plaintiffs' rights under Article XIII, Section 5 of the Illinois Constitution of 1970. The Defendant justifies its decision premised upon (1) the General Assembly's enactment of P.A. 99-900 and (2) the Defendant's position that termination of the Plaintiffs from further participation in IMRF is the legitimate consequence of the actions of Plaintiffs' public employer after the legislature's enactment of P.A. 99-900. Neither position is well-taken or legally correct.

The record will show that the Defendant IMRF's decision terminating the Plaintiffs from further membership and participation in IMRF violates the Plaintiffs' rights to their 'enforceable contractual relationship' as members in IMRF and unconstitutionally impairs and diminishes promised benefits due Plaintiffs as members of a State pension system. Accordingly, this Court should affirm the decision of the Circuit Court finding the termination of Plaintiffs' post-February 2017 membership unconstitutional and the Circuit Court's direction the Plaintiffs' membership and participation be reinstated in the Illinois Municipal Retirement System and Plaintiffs should be made whole.

1. Prior to the adoption of P.A. 99-900, Plaintiffs Gentry, Ellis and Marlo were duly qualified participating members in IMRF and entitled under the Illinois Constitution's protection to enforce their contractual relationship in IMRF and to be free from unilateral diminishment and impairment of the benefits of IMRF membership.

As shown in the record below, in February of 2017 the Defendant, acting unilaterally and over the Plaintiffs' objections, terminated the Plaintiffs' continued membership in IMRF, a State pension system established for public employees of municipalities, counties and other units of local government. (A1-8) The Defendant asserts that it was compelled to terminate each of the Plaintiffs from continued Fund participation as a consequence of the legislature's adoption of P.A. 99-900 and the failure of Williamson County, the Plaintiffs' employer, to provide the Fund, within 90 days of Plaintiff Gentry's 2016 re-election, with IMRF form 6.64 recertifying to the Fund the continued expectation of Williamson County that its county board members would be expected to provide in excess of 1000 hours of service annually.

A critical and defining issue in this appeal is the effect and application of Article XIII, Section 5 of the Illinois Constitution of 1970 which provides that "[m]embership 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." In this proceeding the Defendant incorrectly asserts that the

termination of the Plaintiffs from post-February 2017 membership in IMRF based on provisions of P.A. 99-900 adopted in August of 2016 does not (1) violate the Plaintiffs' protected 'enforceable contractual relationship' or (2) diminish or impair the Plaintiffs' constitutionally protected pension system benefits.

A. Plaintiffs qualified for IMRF membership prior to the adoption of P.A. 99-900.

An examination of the record shows that prior to enactment of P.A. 99-900 in August of 2016, Plaintiffs Gentry, Ellis and Marlo were elected members of the Williamson County Board of Commissioners and these Plaintiffs were duly qualified and recognized by the Fund as qualifying members and contributing participants in the IMRF. (See Findings and Conclusions of Law by the IMRF Board of Trustees, pars. 1-3, (A3-4))

It is undisputed by the Fund that, prior to the enactment of P.A. 99-900, the Illinois Pension Code permitted elected county board members to participate as contributing members and participants in IMRF if two conditions were met. (Defendant's Opening Brief, p. 11) First, the Code limited participation in the Fund to persons who occupied positions whose performance would normally require at least 600 hours of service annually (See Section 7-137(b)(1)) or, as was the case here, if the employer has adopted a resolution or ordinance limiting participation in the Fund to public employees or public officials whose positions

are expected to normally require 1000 hours of public service, a participating public official must occupy a position requiring 1000 hours of service annually. (See Section 7-137(e)). As a second statutory condition for membership in the IMRF pension system for elected officials, the Pension Code required individual elected office holders to file with the Fund an election by the public employee to participate in IMRF. (See Section 7-137(b)(2) of the Pension Code)

It is significant that the Defendant does not dispute that the Pension Code's two conditions for IMRF membership for Gentry, Ellis and Marlo were satisfied long before the legislature's adoption in August of 2016 of P.A. 99-900. Defendant has never contended that the Plaintiffs had failed to apply for membership in the Fund as required by Section 7-137(b)(2) of the Pension Code. Neither has the Defendant claimed that *before or after* the legislature's adoption of P.A. 99-900, the Plaintiffs have failed to provide the requisite 1000 hours of annual public service as members of the Williamson County Board of Commissioners as required for Fund membership in Section 7-137(b)(1) of the Pension Code. Similarly, the Defendant does not contend the Plaintiffs' employer, the County of Williamson, had prior to the enactment of P.A. 99-900, failed to comply with the Fund's 1968 administrative rule requiring a county to adopt and serve on the Fund a resolution on IMRF form 6.64 certifying to the Fund the employer's expectation that the position held by the Plaintiffs would normally be

expected to require at least 1000 hours of service annually. (See Amended Judgment, pars. 2-4, (A10-11) and Defendant's Opening Brief, p. 12-13)

While there is no disagreement between the parties that the Plaintiffs were duly qualified contributing members in IMRF prior to February of 2017, the parties fundamentally disagree as to the constitutionality of the legislature's imposition in P.A. 99-900 of a new condition for the Plaintiffs' continued membership in IMRF and the legality of the Defendant's termination of the Plaintiffs' IMRF membership after February of 2017.

B. The Constitution protects the 'contractual relationship' of public employees' membership in public pension funds.

The plain and unambiguous language of Article XIII, Section 5 of the Constitution makes a public employee's status and '*membership*' in a State pension system 'an enforceable contractual relationship.' The decisions of this Court indicate that constitutional provisions are to be construed to effectuate the common understanding and purpose of the citizens who adopted it and the language should be given its natural and popular meaning. *Hamer v. Board of Education of School District No. 109*, 47 Ill.2d 480, 486 (1970); *Committee for Educational Rights v. Edgar,* 174 Ill.2d 1, 13 (1996). In *Kanerva v. Weems* this Court examined the constitutional debates regarding Article XIII, Section 5, which

is commonly referred to as "the pension protection clause," and concluded the pension protection clause "was intended to eliminate the uncertainty that existed under traditional classification of retirement systems and to guarantee that retirement rights enjoyed by public employees would be afforded *contractual status* and insulated from diminishment or impairment by the General Assembly." *Kanerva v. Weems,* 2014 IL 115811, Par. 48 (2014) (Emphasis supplied.) Accord *Matthews v. Chicago Transit Authority*, 2016 IL 117638, Par. 57 (2016).

Consistent with the language, intent and purpose of Article XIII, Section 5, of the Constitution, it should be clear that a public employee's status as a member in a State pension system is a constitutionally protected 'enforceable contractual relationship' which cannot be unilaterally modified or terminated and whose promised benefits cannot be diminished or impaired by legislation adopted by the General Assembly *after* the public employee's membership in the pension fund has begun. As this Court said in *Matthews v. Chicago Transit Authority*, 2016 IL 117638, Par. 59 (2016),

> Moreover, this court has consistently held that the contractual relationship protected by section 5 of article XIII is governed by the actual terms of the contract or pension plan in effect at the time the employee becomes a member of the retirement system. *Heaton*, 2015 IL 118585, ¶ 46, 392 Ill.Dec. 1, 32 N.E.3d 1; *People ex rel. Sklodowski*, 182 Ill.2d at 229, 230 Ill.Dec. 884, 695 N.E.2d 374; *McNamee*, 173 Ill.2d at 439, 220 Ill.Dec. 147, 672 N.E.2d 1159; *Di Falco v. Board of Trustees of the Firemen's Pension Fund of the Wood Dale Fire*

> *Protection District No. One*, 122 Ill.2d 22, 26, 118 Ill.Dec. 446, 521 N.E.2d 923 (1988); *Kerner v. State Employees' Retirement System*, 72 Ill.2d 507, 514, 21 Ill.Dec. 879, 382 N.E.2d 243 (1978); see also ILCS Ann., Ill. Const.1970, art. XIII, § 5, Constitutional Commentary, at 665 (Smith–Hurd 2006).

In this case, the Defendant has terminated the Plaintiffs from continued membership in IMRF after February of 2017 based on the General Assembly's imposition of a new requirement for county board members' continued participation in IMRF (*i.e.* P.A. 99-900's requirement that Plaintiffs' employer, the County of Williamson, deliver to the Fund within 90 days of the election of a county board member a newly adopted resolution certifying the county's expectation that its county board members would be expected to provide at least 1000 hours of service in the position of county board member). This action constitutes a unilateral and unconstitutional change in the 'enforceable contractual relationship' of the parties and the terms of the pension plan in effect at the time the employees became members in the pension system.

Plaintiffs recognize that the Constitution's protection of the Plaintiffs' membership status as an 'enforceable contractual relationship' in IMRF does not in every circumstance guarantee that Plaintiffs will continue as members until separation from public employment. If the facts in evidence were to show that the Plaintiffs ceased to serve as county board members or if the Plaintiffs ceased to provide the required 1000 hours of annual service in their positions as county

board members, the Fund would be justified in terminating the Plaintiffs from continued membership because the Plaintiffs would have failed to satisfy the Pension Code's contractual terms for public pension system participation existing at the time of the Plaintiffs' initial application for membership in IMRF. Here the record contains no evidence and the Defendant has not contended that the Plaintiffs have failed to continue to qualify for IMRF membership under the terms of the Pension Code as the Code existed prior to the Code's amendment by P.A. 99-900.

In the now 3-year period following the Defendant's termination of the Plaintiffs' IMRF membership, the record shows each of Plaintiffs has continued to hold public office as an elected county board member and the individual Plaintiffs have continued to provide in excess of the 1000 hours of annual service needed for participation and membership in the Fund. At no point in these proceedings has the Defendant asserted, and the record would not support, a claim or contention that the Plaintiffs have, by their conduct, failed to continue to meet the Pension Code's qualifications for IMRF membership as they existed before the adoption of P.A. 99-900. Neither has the Defendant contended that at some point *after* the Plaintiffs have become pension system members that the Plaintiffs have committed conduct which was defined as disqualifying by the Pension Code's provisions when the Plaintiffs became pension fund members. This situation

should be compared with and contrasted with the facts presented and this Court's analysis in *Kerner v. State Employee's Retirement System*, 72 Ill.2d 507, 514 (1978).

In the *Kerner* decision, this Court held that Otto Kerner's felony convictions were disqualifying events depriving Kerner of the protections of Article XIII, Section 5 for the reason that a public employee's felony conviction had been defined in the Pension Code as a disqualifying event for pension system participation and benefits throughout the period of Kerner's membership in the pension system. *Ibid.* The key fact for this result was the *Kerner* court's conclusion that the disqualifying event – Kerner's felony convictions – had been defined as disqualifying "in effect years before Otto Kerner became a member of the retirement system, and it [the statute prohibiting pension benefits for convicted felons] became, by its terms, a condition of the contractual relationship to which he consented by applying for membership." *Ibid.*

Unlike the facts presented in *Kerner*, there is no suggestion by the Defendant that the Plaintiffs committed conduct which would disqualify the Plaintiffs for pension system membership under the terms of the Pension Code's terms as they existed when Plaintiffs applied for and began their pension fund membership. On the contrary, the Defendant Fund seeks to justify termination of the Plaintiffs' continued membership in IMRF based on (1) the Fund's application

of P.A. 99-900 and the Act's imposition of new terms and provisions for Plaintiffs' employer which did not exist when these Plaintiffs began their membership in IMRF and (2) evidence the Fund determined was sufficient to support the conclusion that the Plaintiffs' employer had failed to timely comply with the new provision of P.A. 99-900. The effect of P.A. 99-900 and the Fund's termination of the Plaintiffs' post-February 2017 membership in IMRF is to unconstitutionally alter the 'enforceable contractual relationship' of the Plaintiffs with IMRF.

C. The Constitution protects the benefits of a public employee's pension from legislation which diminishes or impairs the pension's promised benefits.

In decisions subsequent to the *Kerner* decision this Court has consistently made clear that the Constitution's pension protection clause affords public employees protection from diminishment and impairment of the promised benefits of membership in a state retirement system as set forth in the Pension Code's terms existing when the individual employee embarks upon public employment in a position covered by a public retirement system and not when the employee ultimately retires. *Di Falco v. Board of Trustees of the Firemen's Protection Fund of the Wood Dale Fire Protection District No. One*, 122 Ill.2d 22, 26 (1983); *In re Pension Reform Litigation*, 2015 IL 118585, Par. 46 (2015); *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago*,

2018 IL 122793, Par. 26 (2018) As this Court explained in *In re Pension Reform Litigation*, "once an individual begins work and becomes a member of a public retirement system, any subsequent change of the Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that individual." See *Pension Reform Litigation*, 2015 IL 118585, Par. 46 (2015) citing *Buddell v. Board of Trustees, State University Retirement System*, 118 Ill.2d 99, 105-06 (1987) favorably for the same proposition.

As noted by the Defendant's administrative decision, prior to the adoption of P.A. 99-900 and prior to February 6, 2017, the Plaintiffs were duly qualified participating members of IMRF. (See Findings and Conclusions of Law by the IMRF Board of Trustees, pars. 1-3, (A3-4); par. 10 (A7)) In this regard, the record shows that Plaintiff Gentry was first elected to Williamson County Board in the general election of 2004 and Gentry became a participant member in IMRF on December 6, 2004. (See Amended Judgment, par. 2 (A11)) Plaintiff Ellis was first elected to the county board in 2008 general election and his membership in IMRF began membership on November 12, 2008. (See Amended Judgment, par. 3 (A11)). Plaintiff Marlo was first elected in the general election of 2012 and began participation in IMRF on November 30, 2012. (See Amended Judgment, par. 4, (A11))

Under the provisions of Article XIII, Section 5 of the Constitution and the decisions of this Court interpreting the Constitution's pension protection clause, the Plaintiffs' membership in IMRF and the benefits of this membership existing when each of the Plaintiffs initially embarked on public employment are constitutionally protected. As repeatedly noted by this Court, any subsequent change in the Pension Code which diminishes or impairs the benefits of Plaintiffs' membership as defined by the Pension Code at the time the Plaintiffs began their IMRF membership may not be applied to the Plaintiffs. (See *In re Pension Reform Litigation*, 2015 IL 118585, Par. 46 (2015); *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 2016 IL 118585, Par. 29 (2016) An examination of the terms and effect of P.A. 99-900 will show that the legislature and Defendant have violated the Plaintiffs' protected rights and the Court should affirm the decision of the Circuit Court requiring the Defendant Fund to reinstate the Plaintiffs as members of IMRF and make the Plaintiffs whole.

2. The effect of P.A. 99-900 and the Defendant's termination disqualifying Plaintiffs from post-February 2017 pension fund membership violates the constitutionally protected 'enforceable contractual relationship' of Plaintiffs in IMRF and unconstitutionally diminishes and impairs the Plaintiffs' protected pension benefits.

Although the Plaintiffs became members in IMRF long before the legislature's enactment of P.A. 99-900, the legislature purported to limit these and other county board members from continued membership in IMRF upon a term

and condition which did not exist when the Plaintiffs began IMRF membership. The constitutionally problematic new term which P.A. 99-900 adds to the Pension Code is the provision which purports to condition a previously qualified county board member's continued IMRF membership in IMRF upon certain actions and communications between the member's public employer and the Fund. P.A. 99-900 provides that the participating county employer must deliver to the Fund within 90 days of an election of a county board member a resolution certifying the county's expectation that its board members would provide at least 1000 hours of service annually. This provision, which is now codified as 40 ILCS 5/7-137.2(a), did not exist when the Plaintiffs' IMRF membership and participation began. The effect of the legislature's new provision and the Defendant's termination of the Plaintiffs from post-February 2017 participation in the Fund is to impermissibly change the contractual status and relationship of the Plaintiffs with the Fund and to diminish and impair the benefits promised to the Plaintiffs when they became Fund members.

As this Court has stated, Article XIII, Section 5 of the Illinois Constitution "means precisely what it says: if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired." *Kanerva v. Weems*, 2014 IL 1155811, par. 38 (2014), quoted in *In re Pension*

Reform Litigation, 2015 IL 118585, Par. 45 (2015). The consequence of the termination of the Plaintiffs from continued membership in IMRF after February of 2017 is that the Fund does not permit Plaintiffs to earn additional service credits commencing in February of 2017 and thereafter and this circumstance clearly results in a diminishment and impairment of the benefits of Fund membership afforded these Plaintiffs when they embarked on public employment and qualified for public pension membership.

A. The Plaintiffs' protected pension annuity benefits are diminished by the termination of the Plaintiffs' continued membership in IMRF.

In this Court's decision of *In re Pension Reform Litigation*, 2015 IL 118585, Par. 47 (2015) this Court made clear that the Constitution's pension protection clause protects both the entitlement and the method of calculation of a pension annuity from diminishment or impairment. In the Court's words:

> "[r]etirement annuity benefits are unquestionably a 'benefit from membership' in the four State-funded retirement systems. Indeed, they are among the most important benefits provided by these systems."

Ibid. Under the Pension Code as it existed prior to the adoption of P.A. 99-900, Plaintiffs and other participating and covered employees in the IMRF system were eligible to receive service credits for each year of the employee's 'current service' (*i.e.* from the date of commencement of employment in a covered position up to

the date of retirement. (See Section 7-112 [40 ILCS 5/7-112])). Significantly, throughout Plaintiffs' employment and participation in IMRF prior to the enactment of P.A. 99-900, the Pension Code provided that Plaintiffs would qualify for a retirement annuity upon retirement if, on the date of employee's retirement or separation from public employment, the employee had at least 8 years of creditable service (See Section 7-141(a)(4) [40 ILCS 5/7-141(a)(4)]) and, upon qualification for a retirement annuity, the amount of the retirement annuity benefits would be computed based on a calculation and formula which considered the number of service credits of the employee and the employee's final earnings as of the date of retirement. (See Section 7-142 [40 ILCS 5/7-142]). In general, the greater the number of years of recognized service credit and the greater the member's final earnings, the greater the amount of the member's annuity benefit.

As of February of 2017 when the Defendant terminated Plaintiffs from further and continued membership in IMRF according to the Defendant's understanding of the dictates of P.A. 99-900, Plaintiffs Gentry and Ellis had been employed and had served as county board members and members in IMRF in excess of the required minimum of 8 years of public employment entitling them to the service credits necessary to qualify for an IMRF retirement annuity. [40 ILCS 5/7-141(a)(4)] Unfortunately for Plaintiff Marlo, Commissioner Marlo had not acquired the required 8 years of service credit to qualify for pension annuity when

the Defendant terminated Marlo from further membership in IMRF in February of 2017.

Plaintiff Marlo began his public employment and his membership and participation in IMRF as a newly elected member of the Williamson County Board on November 30, 2012. (See Amended Judgment, par. 4, (A.10)) As of the February 2017 termination of Marlo's membership in IMRF, Marlo had qualified for 4 years and 3 months of service credits when he was terminated by the Fund in late February of 2017. Although Marlo has continued to serve as a member of the Williamson County board in the period subsequent to the Fund's February, 2017 termination of Marlo's membership in the Fund, and although Marlo has continued to provide the county in excess of the 1000 hours of public service in each of the years following the Fund's termination of Marlo from membership in IMRF, Marlo's post-February 2017 public service has not been credited to him because the Fund has terminated him from membership and he cannot earn additional service credits without membership in the pension system.

If Marlo had not been terminated from further IMRF participation in 2017 Marlo's continued service as a county board member through this year would result in his accumulation this year with four additional years of service credit which, together with Marlo's pre-February 2017 service and Fund membership, would be sufficient for Marlo to qualify for a retirement annuity under Section 7-

141(a)(4) [40 ILCS 5/7-141(a)(4)]. The Fund's decision to terminate Marlo from IMRF membership, which rests upon the Fund's application of P.A. 99-900, works to *forfeit* or *eliminate* the opportunity for Marlo to qualify for and receive a retirement pension annuity – a benefit which is recognized by this Court as one of the most important benefits provided by the pension system for public employees. (See *In re Pension Reform Litigation*, 2015 IL 118585, Par. 47 (2015))

The elimination of Marlo's opportunity to receive a retirement annuity as a consequence of the Defendant's termination of Marlow from the Fund's membership and participation pursuant to P.A. 99-900 should be compared with the factual situations addressed by this Court in *Buddell v. Board of Trustees, State University Retirement System*, 118 Ill.2d 99 (1987) and in *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago*, 2018 IL 122793, Par. 27 (2018), where this Court found the legislature had unconstitutionally altered the 'enforceable contractual relationship' of public pension members and impermissibly diminished and impaired benefits promised members under the Pension Code as they existed at the time the public employees began pension fund membership and participation.

In *Buddell*, the law in effect prior to the enactment of the challenged legislative change in the Pension Code provided that pension system members were permitted to increase or enhance the value of their pension annuity by the

public employee's purchase of additional service credits for the years of the member's military service. This Court in *Buddell* held unconstitutional the legislature's change in the Pension Code which would have deprived Buddell, after the effective date of the General Assembly's amendment to the Pension Code and after Buddell had become a member in the retirement system, of the opportunity for Buddell to enhance his retirement annuity by Buddell's purchase of military service credits. *Buddell v. Board of Trustees, State University Retirement System*, 118 Ill.2d 99, 105-106 (1987). The *Buddell* court held unconstitutional the challenged change to the Pension Code because it diminished and impaired Buddell's protected pension rights by eliminating his previously existing option under the Pension Code as a pension fund member to enhance and increase the amount of the member's pension annuity by the member's purchase of service credits for the period of military service. *Ibid.*

Similarly, in *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago*, 2018 IL 122793, Par. 27 (2018), this Court found unconstitutional a legislative change which deprived members of a public pension fund from the opportunity to enhance and increase the amount of the member's retirement annuity by the member's optional purchase of service credits for periods when the employee was on a leave of absence from public employment while the employee was working for a local labor union. In the *Carmichael*

decision, this Court reaffirmed its *Buddell* analysis and again held the removal of the public employee's opportunity to purchase service credits and enhance the amount of the annuity the employee would receive upon retirement was prohibited under Article XIII, Section 5, even if the participant had not yet exercised the option at the time when the amendment of the pension system's terms took effect. *Ibid.*

The impairment and diminishment of Marlo's pension benefit which deprives him of the opportunity to qualify for a pension annuity is a significantly more serious and egregious violation of Marlo's protected constitutional rights than was presented in either *Buddell* or *Carmichael.* Marlo has lost not just an opportunity to increase a retirement annuity as was the case in *Buddell* and *Carmichael.* Marlo has suffered the loss of *all* opportunity to qualify for a retirement annuity. As a consequence of the Fund's termination of Marlo from continued Fund membership Marlo cannot earn the number of service credits required for Marlo to qualify for a retirement pension annuity.

While, unlike Marlo, neither Gentry nor Ellis will lose entitlement to receive a retirement annuity as a consequence of P.A. 99-900 and the Defendant's termination of these Plaintiffs' continued IMRF membership, the termination of Gentry and Ellis from post-February 2017 membership in IMRF will nevertheless adversely affect, impair and diminish the amount of retirement annuity payments

each will receive as a consequence of the Fund's termination of Gentry and Ellis from post-February 2017 membership in IMRF. This result occurs because IMRF annuities are computed based on a formula which considers the retiree's age at retirement, the years of recognized service credit and the final rate of earnings of the retiree at the time of retirement. (See Section 7-142 [40 ILCS 5/7-142]) The termination of Gentry and Ellis from continued IMRF membership in February 2017 deprives Gentry and Ellis of the increased service credits they would have earned, but for P.A. 99-900 and the Fund's termination of Plaintiffs' IMRF membership, and this termination further deprives them of consideration of these Plaintiffs' earnings after February of 2017 when the Fund calculates the amount of these Plaintiffs' pension annuity benefits.

The termination of Gentry and Ellis in February of 2017 from IMRF changes and diminishes the benefit calculation formula which will be applied to Gentry's and Ellis' detriment when they retire because IMRF will not consider these Plaintiffs' post-February 2017 public service when calculating their annuities and because the Fund will not consider the earnings these Plaintiffs will earn after February of 2017 in determining the Plaintiffs' final rate of earnings. As noted by the Circuit Court in the Amended Judgment, the termination of these Plaintiffs from post-2016 membership in the Fund results in a diminishment and impairment of the Plaintiffs' retirement annuities from the terms existing when

Gentry and Ellis embarked upon public service and the terms of the Pension Code existing when they became members and participants in IMRF. (Amended Judgment, par. 22 (A15))

This Court has consistently and repeatedly held unconstitutional changes in the Pension Code's formula and method of calculation of the retirement annuities where the changes would result in a diminishment of the annuity amounts which will be paid to existing employee upon retirement. In *Felt v. Board of Trustees of the Judges Retirement System*, 107 Illl.2d 158, 162-63 (1985), for example, this Court held unconstitutional an amendment to the Pension Code changing the formula used to compute the employee's pension annuity (*i.e.* the base salary used to compute the amount of a member's retirement annuity) adversely affecting existing retirement system members' annuity benefits. In *In re Pension Reform Litigation*, 2015 IL 118585, Par. 46-47 (2015) this Court held unconstitutional legislative changes to the Pension Code reducing the retirement benefits pension system members would receive from the benefits existing employees would have received prior to the date of the Pension Code change. In the Court's words, "once the additional benefits are in place and the employee continues to work, remains a member in a covered retirement system, and complies with any qualifications imposed when additional benefits were first offered, the additional benefits cannot be unilaterally diminished or eliminated." *Ibid.* at Par. 46. In this

case, as was the case in *Felt* and in *In re Pension Reform Litigation*, the terms and benefits of membership in a public pension fund system were changed by new legislation redefining the terms of pension program provisions to the Plaintiffs' detriment – an unconstitutional violation of the Plaintiffs' protected and 'enforceable contractual relationship' and an impermissible diminishment and impairment of the pension fund benefits to be afforded these Plaintiffs.

Similarly, in *Jones v. Municipal Employees' Annuity and Benefit Fund of Chicago*, 2016 IL 119618, Par. 31 (2016), this Court found unconstitutional and beyond the General Assembly's authority a public act which reduced the value of annual annuity increases and eliminated them for certain years, finding these modifications unquestionably diminished the value of the retirement annuities which were promised to members of the retirement system when they joined the system. Most recently in the decision of *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago*, 2018 IL 122793, Par. 27 (2018) this Court held unconstitutional legislation which deprived members of a public pension plan of the option to enhance the value and amount of a pension annuity by the member's optional purchase of service credits for the period the employee was on a leave of absence from public employment to work for a local union. The Court found this change in the law could not be constitutionally applied to Carmichael because the legislative change diminished benefits

promised to Carmichael when Carmichael became a pension system member. *Ibid.* The *Jones* and *Carmichael* decisions are additional authority supporting the decision of the Circuit Court that P.A. 99-900 is unconstitutional and cannot serve to justify termination of the Plaintiffs from IMRF membership and its benefits.

When Plaintiffs began public employment – Gentry in 2004, Ellis in 2008 and Marlo in 2012 – the Plaintiffs' participation and membership in IMRF was secured by these employees' election to participate in IMRF and their service in positions which required 1000 or more hours of service as county board commissioners. The Pension Code's provisions existing when Plaintiffs began membership in IMRF provided that each of the Plaintiffs would qualify to earn a service credit for each year of service and, after 8 or more years of credited service, each Plaintiff would qualify for a retirement annuity calculated by a formula considering the employee's total years of service and the employee's final rate of earnings upon retirement. The effect of the Fund's termination of Gentry, Ellis and Marlo from post-February 2017 membership in IMRF works an unconstitutional diminishment and impairment to the Plaintiffs' contractual relationship with the Fund and decision of the Circuit Court finding unconstitutional the Defendant's termination of the Plaintiffs from post-February 2017 IMRF membership should be affirmed.

B. The Defendant's claim that the Fund's termination of Plaintiffs from continued IMRF membership is constitutionally permitted is not supported by the Illinois pension protection clause and the decisions of this Court.

It is significant that Defendant's Brief does not attempt to explain how the language of Article XIII, Section 5, can be read or understood to permit the legislature and the Fund to unilaterally redefine the 'contractual relationship' of the Plaintiffs' IMRF membership by imposing new conditions on the Plaintiffs' continued membership in IMRF after the Plaintiffs had qualified for pension system membership. Neither does the Defendant's Opening Brief explain how the termination of the Plaintiffs from continued IMRF membership does not 'diminish or impair' pension benefits which result from the termination of the Plaintiffs from continued Fund membership and participation.

Although the Plaintiffs have continued to serve as county board members for the 3-year period following the Fund's termination of the Plaintiffs' pension system membership, the Plaintiffs have not qualified for pension service credits for this period of public service and employment. This is an unconstitutional change in the Plaintiffs 'contractual relationship' which cannot be squared with the language, intent and purpose of the Constitution's pension protection clause. The effect and consequence of the Defendant's termination of Plaintiffs from post-February 2017 membership in IMRF is the loss of these Plaintiffs' right to accrue

service credit recognition for their public employment and service after February of 2017. This loss impermissibly impairs and diminishes the benefits promised to Plaintiffs when they began membership in IMRF.

Despite the numerous decisions of this Court which have addressed the Constitution's pension protection clause, Defendant does not refer this Court to even one decision which Defendant claims to be both analogous to this case and authority supporting the constitutionality of the termination of Plaintiffs in a pension system protected by Article XIII, Section 5, of the Constitution. Plaintiffs respectfully state that the reasons for these omissions from the Defendant's argument is that neither the language of the Constitution nor the decisions construing the pension protection clause support the Defendant's argument and position.

In lieu of presenting either an argument which attempts to reconcile P.A. 99-900 and the Fund's termination of the Plaintiffs from continued IMRF membership and benefits with the Constitution's pension protection clause or citation to case law which supports the Defendant's termination of Plaintiffs from Fund membership, the Defendant posits that the entire body of case law interpreting the pension protection clause is inapposite premised on the Defendant's assertions that an intervening event has been shown which should be found to justify the Defendant's termination of Plaintiffs in IMRF. (See

Defendant's Opening Brief, p. 15) These positions are not well taken and should be rejected by this Court.

In support of the Defendant's effort to distinguish prior case law which finds unconstitutional legislative changes to the Pension Code from the terms existing when public employees commenced to become public pension system members, Defendant contends that, in this case, P.A. 99-900 did not immediately diminish the Plaintiffs' pension benefits when the Act became effective in August of 2016. Rather than immediately reduce the benefits of existing IMRF membership, the Defendant contends P.A. 99-900 instead simply established a new and future condition for the Plaintiffs' to continue as members in IMRF (*i.e.* a requirement for participating counties to deliver to the Fund within 90 days of the election of a county board member a new resolution certifying the county's expectation that county board members would provide at least 1000 hours of public service in their position.) The Defendant contends that the inaction of the Williamson County Board to timely meet the 90-day deadline for the County to again notify the Fund that the county board members of Williamson County were expected to continue to devote at least 1000 hours in their positions is an "intervening event" disqualifying Gentry, Ellis and Marlo from continued IMRF membership and participation.

Missing from the Defendant's argument is an explanation of how, consistent with the Constitution's pension protection clause, the legislature may create a new qualification for the Plaintiffs' IMRF membership which is applied to IMRF members who had qualified for IMRF membership under the terms and conditions of the Pension Code existing when the employee began public employment. As this Court said in *Mathews v. Chicago Transit Authority*, 2016 IL 117635, Par. 59 (2016) "this court has consistently held that the constitutional relationship protected by section 5 of article XIII is governed by the actual terms of the contract or pension plan in effect at the time the employee becomes a member of the retirement system."

The Defendant's claimed reliance on the 'intervening act (or failure to act)' of the Plaintiffs' employer, Williamson County, to justify the Plaintiffs' termination in IMRF is both factually unjustified and legally immaterial. The Defendant asserts in this appeal that when the Fund failed to receive a resolution informing the Fund by February 6, 2017, Williamson County was communicating to the Fund that it did not expect its county board members would provide 1000 service hours annually in 2017 or subsequent years of their public office. (See Defendant's Opening Brief, p. 17) In light of the Defendant's findings that, until mid-February of 2017, Williamson County and, in particular, the county commissioners, were *unaware* of the provisions of P.A. 99-900 requiring adoption

and delivery to the Fund of a resolution within 90 days of a county board member's election (See Findings of Fact and Conclusions of law by the IMRF Board of Trustees, pars. 6 and 11, (A4-5)) Defendant's assertion that the County's inaction and failure to deliver to the Fund by February 6, 2017 a newly readopted resolution can be viewed as informing or communicating to IMRF the employer's doubt as to future service and qualification of its county commissioners for IMRF membership is, at a minimum, an unreasonable inference or conclusion. When the County learned of P.A. 99-900's provisions, Williamson County promptly acted on February 23, 2017 to adopt and deliver to the Defendant the County's resolution recertifying its expectation that its board members would continue to meet the 1000 hours of annual service requirement of IMRF membership. (See Findings of Fact and Conclusions of law by the IMRF Board of Trustees, pars.13-1, (A5)) This action makes clear that Williamson County did not believe and did not intend to communicate to IMRF a concern or doubt that the members of the Williamson County board would not be expected to provide 1000 hours of public service.

Contrary to Defendant's argument and asserted reliance on the message it attributed to the Plaintiffs' employer, the Fund knew on February 23, 2017 – a date prior to the Defendant's termination of Plaintiffs' continued IMRF membership – that the Plaintiffs' employer, Williamson County, expected its

county board members would provide the required 1000 hours of annual public service in the positions of county board members. Defendant's suggestion that it was relying on a "communication" from Williamson County of the county's expectations of its county board members' hours of public service as a basis for termination of the Plaintiffs is factually unsupportable and disingenuous.

Leaving aside the falsity of the Defendant's claim of reliance on the expectations of Williamson County to justify terminating Plaintiffs from continued IMRF membership, it should be clear that, as a matter of law, the Defendant's contention that the County's failure to timely provide the Fund a newly adopted resolution as required by P.A. 99-900 by February 6, 2017 is immaterial and unavailing under the pension protection clause. The Constitution prohibits the legislature from unilaterally changing the 'contractual relationship' of a public employee's membership in a public pension system. Once the Plaintiffs met the requirement for IMRF membership and participation, the legislature was prohibited from establishing a new condition for these Plaintiffs' IMRF membership. The legislature's action in P.A. 99-900 which purported to create a new condition the Plaintiffs' continued IMRF membership (*i.e.* action by the Plaintiffs' employer) was a unilateral change in the Plaintiffs public pension contract.

The Constitution simply does not permit the legislature to make the Plaintiffs' pension membership and benefits uncertain or to unilaterally add new conditions or qualifications for membership in the pension system after the public employee has qualified and continues to qualify under the pension system's 'actual terms in effect at the time the employee becomes a member of the retirement system." See *Mathews v. Chicago Transit Authority*, 2016 IL 117635, Par. 59 (2016) and *In re Pension Reform Litigation*, 2015 IL 118585, Par. 46 (2015)

3. The Circuit Court's finding that the Defendant's February 2017 termination of the Plaintiffs' continued membership in IMRF violated due process of law and the Circuit Court's finding that the Defendant Fund improperly construed P.A. 99-900 to require termination of the Plaintiffs are not the basis of the Circuit Court's Amended Judgment and these findings are not the subject of the Defendant's appeal to this Court.

Although the Circuit Court made findings indicating that (1) it found that the Plaintiffs' due process rights under the United States Constitution were violated by the failure of the record to show an attempt by the IMRF Board to provide Plaintiffs with notice of P.A. 99-900's new provisions of the Pension Code (See Amended Judgment, par. 24, (A16)) and (2) although the Circuit Court found the Defendant IMRF improperly construed P.A. 99-900 [40 ILCS 5/7-137.2(a)] to require termination of the Plaintiffs' participation in IMRF (See Amended Judgment, par. 23, (A15)), the Defendant's Opening Brief correctly

notes that the Circuit Court based the Amended Judgment on the Circuit Court's finding of unconstitutionality of P.A. 99-900 under the Illinois Constitution, Article XIII, Section 5, in the Circuit Court's determination of the issues raised in Count II of the Plaintiffs' Amended Complaint which sought the court to enter a declaratory judgment finding 40 ILCS 5/7-137.2(a) unconstitutional. As urged above, Plaintiffs believe the Circuit Court was correct and its Amended Judgment should be affirmed.

In the event this Court were to conclude that the Circuit Court erred in the determination that the Constitution's pension protection clause was not violated by the adoption of P.A. 99-900 and the Defendant's termination of the Plaintiffs from post-February 2017 membership in IMRF, it would be necessary to remand this matter to the Circuit Court for further proceedings concerning the Plaintiffs' Count I Complaint for Administrative Review and the Circuit Court's determination of violations of the Plaintiffs' due process rights and Defendant Fund's erroneous conclusion that termination of Plaintiffs from further membership and participation in IMRF was proper in light of the facts and administrative record on review.

CONCLUSION

In this case, the legislature acted unconstitutionally when it enacted the portion of P.A. 99-900 which established a new condition for the Plaintiffs'

continued membership in IMRF. (See 40 ILCS 5/7-137.2(a)) Although, the legislature was permitted to exclude from IMRF membership and participation of persons who had not been IMRF members prior to the effective date of P.A. 99-900, the Act's imposition of a new condition for the continued membership in IMRF of Plaintiffs Gentry, Ellis and Marlo unconstitutionally violated the Plaintiffs' rights under the Illinois Constitution of 1970's pension protection clause which guaranteed the Plaintiffs protection of their 'enforceable contractual relationship' and the Constitution's prohibition of actions which would diminish or impair the Plaintiffs' promised pension benefits.

The Defendant Fund has enforced the legislature's new condition on Plaintiffs by the Fund's termination of the Plaintiffs post-February 2017 membership and participation in IMRF with the consequence that these Plaintiffs' pension benefits have lost recognition by the Fund of pension service credit contrary to the terms of the Pension Code when the Plaintiffs became members of the pension system. The Plaintiffs' constitutionally protected 'contractual relationship' has been violated and the Plaintiffs have suffered diminishment and impairment of their promised pension benefits.

Accordingly, Plaintiffs Robert Gentry, Ronal Ellis, James Marlo and the County of Williamson respectfully urge this Court to affirm the Amended Judgment of the Circuit Court.

Respectfully submitted,

/s/ *Don E. Prosser*
/s/ Rhett T. Barke
Gilbert, Huffman, Prosser
Hewson & Barke, Ltd.
102 S. Orchard Drive
P.O. Box 1060
Carbondale, IL 62903-1060
(618) 457-3547 – telephone
(618) 457-8017 – fax
dprosser@southernillinoislaw.com
rbarke@southernillinoislaw.com

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief conforms to requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 33 pages.

/s/ Rhett T. Barke

/s/ Don E. Prosser

CERTIFICATE OF SERVICE

On this 10th day of February, 2020, the undersigned filed this Brief of Plaintiffs-Appellees with the Clerk of the Supreme Court of Illinois using the eFiling system which will send notification of such filing to:

Vladimir Shuliga
vshuliga@imrf.org

On this date the undersigned also sent this filing by electronic mail and U.S. mail to:

Vladimir Shuliga, Jr.
Associate General Counsel
Illinois Municipal Retirement Fund
2211 York Road, Ste. 500
Oak Brook, IL 60523-2337
vshuliga@imrf.org

/s/ Rhett T. Barke

/s/ Don E. Prosser

VERIFICATION BY CERTIFICATION

Under penalties provided by law, pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

/s/ Don E. Prosser