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,	)	On Direct Appeal to the Supreme Court from the Circuit Court of Cook County, County Department, Chancery Division,
Plaintiffs/Appellees/Cross-Appellants,	)	No. 2017 CH 07762
v.	)	
SUSANA A. MENDOZA, in her capacity as Comptroller of the State of Illinois,	)	The Honorable FRANKLIN U. VALDERRAMA and ALLEN P. WALKER,
Defendant/Appellant/Cross-Appellee.	)	Judges Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT AND BRIEF OF CROSS-APPELLEE

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ISSUE PRESENTED ON CROSS-APPEAL

Whether the circuit court correctly held that Plaintiffs' claim that the Salary Reduction Laws are unconstitutional did not permit them to seek a judgment granting monetary relief to other legislators who are not plaintiffs in this case.

ARGUMENT

I. Introduction

In this action, former Illinois Senators Noland and Clayborne alleged that a series of laws they voted for, which reduced their salaries as legislators, violated the Legislative Salary Clause of the Illinois Constitution (art. IX, § 11), and they sought a judgment requiring Illinois Comptroller Susana Mendoza to pay them all of the compensation excluded by these laws, including compensation for periods of their legislative terms covered by one of these laws (the "Salary Reduction Laws") *after* it was enacted. Plaintiffs sought such relief for those periods (as well as the parts of their terms in office before the relevant Salary Reduction Law took effect) on the theory that the Salary Reduction Laws were *facially* unconstitutional, and therefore *void ab initio*. The circuit court agreed with that contention, expressly finding that the Salary Reduction Laws are facially unconstitutional, and entered a judgment in Plaintiffs' favor requiring the Comptroller to pay them all of the amounts they claimed. That was error.

The circuit court also held that none of the Comptroller's affirmative defenses of laches, the statutes of limitations, and waiver, was available to eliminate or reduce Plaintiffs' recovery. That was also error. The circuit court correctly held, however, that Plaintiffs were not entitled to a judgment granting individual monetary relief to other legislators who are not plaintiffs in this case.

In this appeal, the Comptroller challenges the circuit court's rulings that the Salary Reduction Laws are facially unconstitutional and that none of her affirmative defenses is available against Plaintiffs' claims. In their cross-appeal, Plaintiffs challenge the circuit court's holding that they cannot obtain monetary relief for legislators who are not parties in this case.

* * *

Plaintiffs' position in this litigation — that their demand for monetary recovery from the State is not subject to any affirmative defenses, including laches and the statute of limitations, and that they may obtain the equivalent of class-wide relief for all state legislators without filing a class action — proceeds from two flawed premises. First, Plaintiffs maintain that the Salary Reduction Laws are facially unconstitutional, and hence void *ab abinitio*, on the basis that these Laws could not validly apply in any circumstances. But each of the Salary Reduction Laws could validly apply to any legislator's term that began *after* that Law took effect, including several of Plaintiffs' own terms in office. Second, Plaintiffs contend that their claim to recover unpaid salaries represents the enforcement of a "public right" that is not subject to the Comptroller's laches and statute of limitations defenses, and for which Plaintiffs were entitled to a judgment awarding monetary relief to all similarly situated legislators, including legislators who are not plaintiffs in this case. Plaintiffs are mistaken. Public rights are rights of the people collectively (e.g., to unobstructed public roads). Here, Plaintiffs seek to enforce "private rights"

for their individual benefit. Thus, their claims are subject to the Comptroller's laches and statute of limitations defenses, and Plaintiffs may seek relief only for themselves. In addition, Plaintiffs, as members of the body that set their own salaries, could validly waive claims that they were legally entitled to higher salaries — which they did by voting to receive lower amounts — after those rights accrued.

II. The Salary Reduction Laws Are Not Facially Unconstitutional.

In support of their argument to sustain the circuit court's ruling that the Salary Reduction Laws are facially unconstitutional, Plaintiffs have abandoned any reliance on, and do not even mention, that court's rationale: that a statute must be facially unconstitutional, not unconstitutional as applied, if the court "has not held an evidentiary hearing." (C 891.) As explained in the Comptroller's brief (at 18–20), that reasoning is unsound. Thus, the issue here is whether, under the test this Court has repeatedly affirmed, there is "no set of circumstances" in which the Salary Reduction Laws could validly apply. *People v. Bochenek*, 2021 IL 125889, ¶ 10; *see In re M.T.*, 221 Ill. 2d 517, 532–33, 536 (2006).

Plaintiffs purport to accept and apply this standard. (Pl. Br. at 5, 7, 10.) But they actually urge the Court to apply a different standard, under which a statute that is invalid in some applications is facially unconstitutional if the General Assembly could have written it to apply only in situations where it is constitutional. (Pl. Br. at 7–11.) The Court should reject that approach, under

which virtually every statute that is unconstitutional in *some* circumstances would be facially unconstitutional because the legislature could have written it to exclude its invalid applications. Plaintiffs also simply ignore the situations in which a Salary Reduction Law would validly apply to a legislator's term of office that began after that Law took effect.

For starters, Plaintiffs' argument mistakenly focuses on the scope of the Salary Reduction Laws according to their terms, not whether the application of those terms to specific situations is valid or invalid. Thus, Plaintiffs' argument begins with the incorrect premise that if a statute, by its terms, applies to a category of defined conditions, it is facially unconstitutional unless it may constitutionally be applied in *all* situations falling within that category. Plaintiffs argue as follows:

> All of the statutes are mandatory and prohibit the Comptroller from making *any* COLA payments or *any* Furlough Day salary payments to *any* of the members of the General Assembly during any on the months of the fiscal year. . . . Because of this, there is no set of circumstances where the Comptroller could comply with the statutes without violating the Constitution.

(Pl. Br. at 4–5, emphasis in original.) This contention embodies an "all-or-nothing" fallacy under which a law that by its terms applies to many particular instances is facially constitutional only if it can constitutionally apply to *all* of those instances. That gets the doctrine exactly wrong.

As the Court has repeatedly held, a statute is facially unconstitutional only if there are *no* circumstances in which it could validly apply. *Bochenek*, 2021 IL 125889, ¶ 10; *In re M.T.*, 221 Ill. 2d at 536 (a facial challenge requires

"showing that the statute would be invalid under *any* imaginable set of circumstances") (emphasis in original). If that standard is not met, constitutional applications of the statute may be given effect, while any unconstitutional applications will not. *People v. Gray*, 2017 IL 120958, ¶ 58; *Hansen v. Raleigh*, 391 Ill. 536, 546 (1945). Plaintiffs' proposed standard for declaring a statute facially unconstitutional unless *all* of its applications are valid would largely obliterate the distinction between facial and as-applied challenges and likely nullify thousands of otherwise valid laws where the legislature could have expressly excluded any subset of applications to which the law cannot constitutionally apply.

Plaintiffs attempt to bolster their proposed redefinition of the standard for determining whether a law is facially unconstitutional by relying on the Court's decision in *People v. Burns*, 2015 IL 117387. That attempt misapprehends *Burns*' holding, which expressly acknowledged and applied the same standard that the Court has recognized for years.

Burns involved a constitutional challenge to a provision of Illinois' aggravated unlawful use of a weapon statute making it a criminal offense to carry in a public place a firearm that "was uncased, loaded and immediately accessible," which the Court described as "a flat ban on carrying ready-to-use guns outside the home." 2015 IL 117387, ¶¶ 9, 14, 25 (quoting 720 ILCS 5/24–1.6(a)(3) (2008)). The sentencing provision of the statute increased the punishment to a Class 2 felony if the offense was committed by a person

previously convicted of felony. *Id.*, ¶ 9. Reaffirming its prior holding that the Second Amendment does not allow the State to impose "an absolute ban on an individual's right to possess a gun for self-defense outside the home," *id.*, ¶ 21, the Court ruled that this provision was facially unconstitutional because it was invalid in all possible applications within the scope of its terms, *id.*, ¶¶ 26–32.[1] Responding to the People's argument that the provision was not facially unconstitutional because the Second Amendment permits reasonable restrictions on the use of firearms by felons, the Court held that the legislature made use of a firearm by a felon a sentencing enhancement, not an element of the offense, and that the Court could not add a prior felony as an element of the offense where the legislature had not done so. *Id.*, ¶¶ 29–30. Thus, contrary to Plaintiffs' characterization of *Burns*, the Court held that the statute was invalid in *all* applications under its terms as enacted, even as to defendants who had a prior felony conviction, because the statute did not make such a conviction an element of the offense that the State must establish during the guilt phase of the case.

[1] The Court's opinion in *Burns,* citing the United States Supreme Court's opinion in *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418 (2015), noted that whether a statute is facially unconstitutional is evaluated in light of situations where the challenged provision is operative, not situations where the provision has no relevance or effect. 2015 IL 117387, ¶ 27. That proposition does not affect the analysis here because the Salary Reduction Laws were operative, according to their terms, to legislators' terms of office that began after those Laws took effect. *See People v. Eubanks*, 2019 IL 123525, ¶ 60.

Accordingly, there is no basis to contend that *Burns* intended to change the Court's long-established standard for deciding whether a statute is facially unconstitutional. Indeed, the concurrence in *Burns* suggested that the Court was doing that, 2015 IL 117387, ¶¶ 44–51 (Garman, J., concurring), but the majority disagreed and held that the statute at issue was facially invalid under "the long-accepted principle that a statute is facially unconstitutional only if no set of circumstances exists under which the [statute] would be valid." *Id.*, ¶ 26 (citation and internal quotation marks omitted, brackets in original). And on numerous occasions since *Burns* the Court has reaffirmed and applied that standard. *See*, *e.g.*, *Bochenek*, 2021 IL 125889, ¶ 10; *Burns v. Mun. Officers Electoral Bd. of Vill. of Elk Grove Vill.*, 2020 IL 125714, ¶¶ 13–26; *Eubanks*, 2019 IL 123525, ¶¶ 34, 59–68; *Oswald v. Hamer*, 2018 IL 122203, ¶ 40.

In this case, the "no set of circumstances" standard is not satisfied because Plaintiffs admit that the Legislative Salary Clause does not prohibit a change in legislators' compensation during their terms in office that begin *after* a law enacting that change takes effect. And Plaintiffs themselves had terms in office that began after some of the Salary Reduction Laws became law. (C 355, 357.) A valid application would also exist if a legislator's seat were vacated and a new Senator or Representative took the seat after one of the Salary Reduction Laws took effect. Those circumstances defeat any claim of facial unconstitutionality. *See Oswald*, 2018 IL 122203, ¶ 40 ("if any situation exists where a statute could be validly applied, a facial challenge

must fail"); *People v. Rizzo*, 2016 IL 118599, ¶ 24 (same).

Thus, as the Comptroller argued in her opening brief (at 15–20), the Salary Reduction Laws are not facially unconstitutional and may validly apply to the portions of Plaintiffs' terms in office that commenced after any of the Salary Reduction Laws took effect. Indeed, that is a common result for statutes that may validly apply prospectively but not retroactively. *See People v. One 1998 GMC*, 2011 IL 110236, ¶ 69; *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 404, 407–12 (2009); *Bossert v. Granary Creek Union Drainage Dist. No. 1*, 307 Ill. 425, 430 (1923). That is also what the Attorney General concluded in an opinion addressing an earlier statute that increased certain legislators' salaries, including for periods before the statute took effect. *See* 1989 Ill. Att'y Gen. Op. 257, File No. 89–002, 1989 WL 264975. After examining the statute and the Legislative Salary Clause, the Attorney General gave the opinion that the Clause "prohibits these salary increases from taking effect *during the current term* of any member of the General Assembly." *Id.*, 1989 WL 264975, *5 (emphasis added). A law reducing legislators' salaries is no different.

In sum, Plaintiffs' argument that the Salary Reduction Laws are facially unconstitutional because the General Assembly could have expressly limited their application to legislators' terms commencing after the Laws were enacted is incorrect, and Plaintiffs do not otherwise defend the circuit court's finding of facial unconstitutionality. The circuit court's finding of facial unconstitutionality should therefore be reversed.

III. Plaintiffs' Claims under the Legislative Salary Clause for Payments of Public Funds to Them Are Not Claims to Enforce "Public Rights," Exempt from the Comptroller's Laches and Statute of Limitations Defenses.

In support of their effort to sustain the circuit court's rulings in their favor, Plaintiffs' rely primarily on an argument the circuit court rejected: that their salary claims involve the assertion of a "public right" not subject to the Comptroller's laches or statute of limitations defenses. (A 26; C 1013; Pl. Br. at 11–17, 20–24.) Thus, Plaintiffs contend, "a public officer's right to his salary is not an individual right but rather a public right that belongs to the People of Illinois as a whole." (Pl. Br. at 20.) That contention is wrong. A claim by a public official seeking payment of compensation from public funds is the assertion of a private right, not a public right on behalf of the people generally. Indeed, claims by individuals seeking monetary relief against the government, like Plaintiffs' claims here, are the antithesis of a public right.

English common law, adopted by many States, recognized a basic distinction between private rights, primarily asserted by individuals, and public rights, typically asserted by the government. *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 460 (1983); *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 344–46 (2016) (Thomas, J., concurring); *see generally* Seth Davis, *Implied Public Rights of Action*, 114 Colum. L. Rev. 1, 47 (2014) ("The distinction between private rights, which protect personal entitlements, and public rights, which protect collective interests, is a persistent feature of American law."); F. Andrew Hessick, *Standing, Injury in Fact, and Private*

Rights, 93 Cornell L. Rev. 275, 279–80 (2008). This distinction is relevant, among other things, for purposes of applying the doctrine of governmental immunity from laches and statutes of limitation. *City of Shelbyville*, 96 Ill. 2d at 459–62. When the government seeks enforcement of a public right, courts apply the maxim *nullum tempus occurrit regi*, which means "time does not run against the king," to exclude application of laches or the statute of limitations (unless the statute of limitations expressly includes the government). *Id.*; *see Du Page County v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 153 (1985); *People ex rel. City of Chicago v. Comm'l Union Fire Ins. Co.*, 322 Ill. 326, 331 (1926) ("Time does not run against the people in respect to the exercise of their governmental rights and powers."); *Brown v. Trustees of Schools*, 224 Ill. 184, 186–87 (1906); *City of Chicago v. Latronica Asphalt & Grading, Inc.*, 346 Ill. App. 3d 264, 269 (1st Dist. 2004). By contrast, government enforcement of private rights is not excluded from laches and statute of limitations defenses. *City of Shelbyville*, 96 Ill. 2d at 462; *Comm'l Union Fire Ins.*, 322 Ill. at 331.

By definition, claims to enforce public rights may be brought by the government, usually acting through the Attorney General or a State's Attorney. *People ex rel. Scott v. Illinois Racing Bd.*, 54 Ill. 2d 569, 575–76 (1973); *Hunt v. Chicago Horse & Dummy R. Co.*, 121 Ill. 638, 642 (1887) (adopting reasoning of appellate court opinion, 20 Ill. App. 282, 287 (1st Dist. 1886)); *see also City of Shelbyville*, 96 Ill. 2d at 460–62; *Folcarelli v. Spencer*,

180 A.2d 322, 325 (R.I. 1962); *Standing, Injury in Fact, and Private Rights*, 93 Cornell L. Rev. at 280; 55 C.J.S. Mandamus § 344. In Illinois, some public rights may also be enforced by members of the public upon a showing that they sustained a "special injury," distinct from any injury to the public at large. *Young v. Bryco Arms*, 213 Ill. 2d 433, 441–42 (2004) (describing principle applicable to public nuisances, including obstruction of public streets and highways); *Hoyt v. McLaughlin*, 250 Ill. 442, 446–47 (1911) (public nuisance); *Dunne v. Rock Island County*, 283 Ill. 628, 634 (1918) (obstruction of public road). By contrast, the Court has indicated that other public rights are enforceable through mandamus by members of the public, proceeding as relators in the name of the People, without such a special injury. *See*, *e.g.*, *Murphy v. City of Park Ridge*, 298 Ill. 66, 71–72 (1921); *People ex rel. First Nat. Bank v. Czaszewicz*, 295 Ill. 11, 16–17 (1920).[2]

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[2] Many jurisdictions do not recognize general citizen standing in mandamus actions. *See* 55 C.J.S. Mandamus § 53; *O'Brien v. Members of Bd. of Aldermen of City of Pawtucket*, 25 A. 914, 914 (R.I. 1892); *Tax Equity All. for Mass. v. Comm'r of Revenue*, 672 N.E.2d 504, 509 (Mass. 1996) ("The public right doctrine does not apply to a challenge to the constitutionality of a statute."). In Illinois, such standing does not apply in *quo warranto* actions, *People ex rel. J. H. Anderson Monument Co. v. Rosehill Cemetery Co.*, 3 Ill. 2d 592, 595 (1954); public nuisance cases (see above at 12); or claims for a declaratory judgment, *Cahokia Unit Sch. Dist. No. 187 v. Pritzker*, 2021 IL 126212, ¶ 36. In addition, the Court's decisions recognizing such standing in mandamus actions, none of which is recent, *see*, *e.g.*, *Retail Liquor Dealers Protective Ass'n of Ill. v. Schreiber*, 382 Ill. 454, 459 (1943) (recognizing principle but finding case moot), are in tension with its recent jurisprudence holding that plaintiffs may not assert "a generalized grievance common to all members of the public," *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 494 (1988); *see also Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). The Court need not resolve that tension in this case, however, because it does not involve public rights.

Here, Plaintiffs assert that their claims for payment of compensation to them as legislators are claims to enforce public rights, and therefore not subject to the Comptroller's defenses of laches and the statute of limitations. (Pl. Br. at 11–17, 20–24.) The circuit court properly rejected that assertion, holding that Plaintiffs' claims seek enforcement of private, not public, rights. (A 26; C 1013.) Tellingly, Plaintiffs have not identified a single decision — in Illinois or in any other jurisdiction — holding that a public official's right to receive a salary is not subject to a laches or statutes of limitations defense because it is public right. Such a claim does not fall within the historically recognized categories of public rights, none of which include claims for the payment of public funds to the plaintiffs themselves. And it does not meet the accepted definition of a public right.[3]

The defining characteristic of a public right is that it benefits the public collectively, not particular individuals. *Murphy*, 298 Ill. at 72; *see also City of Shelbyville*, 96 Ill. 2d at 462–66; *Hoyt*, 250 Ill. at 447 ("An injury to the public, in the sense here used, is such an injury as excludes or hinders all alike in the enjoyment of a common right."); *People ex rel. Faulkner v. Harris*, 203 Ill. 272, 277 (1903) (mandamus claim against encroachment on public street asserted a

[3] The legislature may, of course, create public rights enforceable only by the government, not private parties. *See Brooks v. Midas-Int'l Corp.*, 47 Ill. App. 3d 266, 277 (1977) (holding that in section 7 of the Consumer Fraud and Deceptive Business Practice Act, the General Assembly gave only the Attorney General "the power to seek injunctive relief"). But that issue is not presented here, where Plaintiffs' rights do not meet the definition of public rights.

public right where "the act to be performed by the defendants in error is a duty in which the people of the whole state are interested"); *Parker v. People*, 111 Ill. 581, 602 (1884) ("All men have, as members of the public, a right to have the public highways free from obstruction to travel, and have the right to travel thereon. This is a public right."). As one legal scholar explained:

> The law has long distinguished between "public rights" and "private rights." Blackstone defined public rights as those rights held collectively by the community. They include the right to navigate the public waters of the state and to fish therein, to use the public highways, and to be free from violations of the criminal laws[.]

Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. at 279–80 (footnotes omitted); *see also* Richard Henry Seamon, *Patagonia vs. Trump*, 86 Tenn. L. Rev. 73, 97–98 (2018) ("To use Blackstone's definition, 'public rights' belong '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) (observing that American law traditionally distinguished "legal interests that were vested in discrete individuals from legal interests that belonged to the public as a whole").

The Court's precedent follows these long-established principles. In *Murphy,* the Court applied the distinction between public and private rights to determine whether a mandamus action could be brought without a prior demand on the defendant. The Court first stated that the rule requiring a prior demand "does not apply where the duty is a public one, affecting the *public at large*," and where the act "sought to be coerced is one *affecting the*

public generally." 298 Ill. at 72 (emphasis added). It then held that the claim before it, seeking to require public officials to collect unpaid installments of a special assessment to pay outstanding bonds, involved only private rights, for which a demand was necessary. The Court explained:

> The fact that the law imposes the duty upon municipal officers to take proper steps to provide means for paying its debts is not alone sufficient to take the case out of the general rule. So far as this record shows, the failure to perform that duty affects only the petitioner. The public is not interested in the collection of his private claim.

Id.

In *City of Shelbyville*, the Court considered at length the doctrine that Plaintiffs invoke here, which it referred to as "governmental immunity from statutes of limitation." 96 Ill. 2d at 460. In a suit by a municipality to enforce an ordinance requiring a home builder to build streets in a subdivision, the Court then held that the doctrine applied to preclude the defendant's assertion of the statute of limitations defense because the claim involved enforcement of a public right. *Id.* at 463–64. The Court explained:

> [A]lthough the doctrine of immunity from statutes of limitation developed in England as a royal prerogative, it is supported in modern law by the policy judgment that *the public should not suffer* because of the negligence of its officers and agents in failing to promptly assert *causes of action which belong to the public*.

Id. at 461 (emphasis added, citations and internal quotation marks omitted). Elaborating, the Court stated:

> In accord with the rationale, the practice in Illinois has been to determine whether the right which the plaintiff governmental

> unit seeks to assert is in fact *a right belonging to the general public*, or whether it belongs only to the government or to some small and distinct subsection of the public at large.

Id. at 462 (emphasis added). The Court added: "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).

Applying these principles, the Court in *City of Shelbyville* concluded that the claim did assert a public right because "the safety of *all persons* who have occasion to use the streets at issue here will depend on the workmanlike construction and maintenance of these streets." *Id.* at 464 (emphasis added). The Court added:

> [T]he inability of the city of Shelbyville to enforce its annexation agreement or compel payment by the defendant will affect the city's finances and may impair its ability to build or oversee the construction or maintenance of streets within its jurisdiction in the future. See *Greenwood v. Town of LaSalle* (1891), 137 Ill. 225, 229 (municipality's right to collect local property taxes ruled "public" because the "taxes may be levied for *purposes in which the public, generally, are directly interested*, such as 'constructing or repairing roads, bridges or causeways' within the town").

Id. (emphasis added). The Court further held that it did not "find any logic in allowing the designation of the city's action as 'public' or 'private' to be controlled by the origin of the city's rights in a private contract or local ordinance." *Id.* at 465–66.

Under these principles, Plaintiffs' contention that they are asserting public rights, and therefore that their monetary claims against the State are

not subject to a laches or statute of limitations defense, is unpersuasive. The rights that Plaintiffs seek to enforce — to obtain specific payments of public funds to themselves based on their individual circumstances and tenures as members of the legislature — are not public rights for the benefit of the public collectively. They are the opposite: they are primarily for Plaintiffs' individual benefit. The circuit court therefore correctly rejected Plaintiffs' attempt to defeat the Comptroller's statute of limitations defense by invoking the public rights doctrine. Relying on this Court's opinion in *City of Shelbyville*, it held:

> [I]t cannot be said that Plaintiffs are pursuing their claims on a theory of protecting the public akin to that which was implicated in *City of Shelbyville*. Therefore, the doctrine underlying the statute of limitations is inapplicable because plaintiffs' claims do not implicate the assertion of public rights against the State.

(A 26; C 1013.) That reasoning, which applies equally to the Comptroller's laches defense, faithfully describes and properly applies this Court's precedent.

Plaintiffs nonetheless argue that their reliance on public rights principles has a solid basis in Illinois precedent. (Pl. Br. at 11–17.) This argument is unfounded. Plaintiffs confuse cases holding that "public policy" considerations prevent certain rights from being defeated by waiver or estoppel with the principle that "public rights" are not subject to laches and statutes of limitations defenses. But the two doctrines are different, and Plaintiffs have not identified a single case adopting their position that a right protected against waiver or estoppel by public policy concerns constitutes a

public right immune from any laches or statutes of limitations defense. All laws implement public policy and promote the public interest to some degree, but that does not make any rights under those laws "public rights" in the sense that they create rights in the people collectively. Thus, the fact that the Legislative Salary Clause reflects a valid public policy and serves a public interest, like virtually all constitutional and statutory provisions, does not make the rights it gives legislators public rights.

Plaintiffs also emphasize that a public official's right to be paid an amount set by law is not based on a personal contract. (Pl. Br. at 5, 12, 14, 15, 17, 20.) That is true. *See Crumpler v. Logan County*, 38 Ill. 2d 146, 150 (1967); *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 608–09 (1898); *Levitt v. Gorris*, 167 Ill. App. 3d 88, 92–93 (1st Dist. 1988); *Gust v. Village of Skokie*, 125 Ill. App. 3d 102, 107 (1st Dist. 1984). But it does not further establish, as Plaintiffs maintain, that such rights to compensation are "public rights," in the sense discussed in *Murphy* and *City of Shelbyville*. It just means that these rights are not governed by general legal principles applicable to private contracts. *See*, *e.g.*, *Akin*, 175 Ill. at 608–09 (terms of public officer's service are not within constitutional protection against impairment of contract obligations); *Levitt*, 167 Ill. App. 3d at 92–93 (claim for tortious interference with contractual relationship was unavailable because "no contractual relationship existed between plaintiff and the Village"). And the Court in *City of Shelbyville* expressly rejected the notion that whether a public right exists

depends on whether the claimed right is based on a contract or legislative enactment. 96 Ill. 2d at 465–66.

Plaintiffs also offer as support for their reliance on the public rights doctrine the appellate court's decision in *People ex rel. Northrup v. City Council of City of Chicago*, 308 Ill. App. 284 (1st Dist. 1941). (Pl. Br. at 12–16, 19–22.) But *Northrup* did not hold that elected public officers' constitutionally protected right against changes in their compensation during their terms in office is exempt from the defenses of laches and the statute of limitations because it constitutes a "public right." Instead, the court reasoned that allowing these defenses would frustrate the constitutional command, and consequently are *never* available. The court held:

> 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. Such defenses, as we have shown, if sustained, would create a situation equivalent to avoiding the constitutional mandate.

308 Ill. App. at 296. Plaintiffs recognize, however, that this Court has rejected that absolutist view of constitutional rights, which mistakes constitutional mandates with the availability of remedies for them. (Pl. Br. at 14–16; Def. Br. at 22–24.)[4]

[4] Plaintiffs try to distinguish the Court's cases holding that constitutional claims are subject to laches and the statute of limitations on the ground that these cases involved private rights, not public rights. (Pl. Br. at 14–16.) As explained above, however, Plaintiffs are not asserting private rights, so this purported distinction, which finds no support in the Court's precedent, fails at the outset.

Nor does *Northrup*'s reliance on this Court's opinions in *Galpin v. City of Chicago*, 269 Ill. 27 (1915), and *Pitsch v. Continental & Commercial National Bank of Chicago*, 305 Ill. 265 (1922), support Plaintiffs' reading of *Northrup*, as they argue. (Pl. Br. at 13–14.) To the contrary, *Northrup* relied on those decisions as the basis for its holding that the defenses of waiver and estoppel were unavailable, as a matter of public policy, to defeat the plaintiffs' claims to recover their compensation as elected officials. 308 Ill. App. at 291–94. That reliance was understandable because *Galpin* and *Pitsch* expressly relied on "public policy," not the "public rights" doctrine, to preclude the defense of estoppel or waiver. *Galpin*, 269 Ill. at 41; *Pitsch*, 305 Ill. at 270–72. But *Northrup* did not rely on either decision to support its separate holding that the defenses of laches and the statute of limitations were unavailable. 308 Ill. App. at 296. Again, Plaintiffs are confusing the doctrine of governmental immunity from statutes of limitations and laches, which is limited to public rights, *see City of Shelbyville*, 96 Ill. 2d at 459–62, with the different principle that public policy prohibits certain rights from being subject to estoppel or waiver, at least before a claim has accrued.

Laches and statutes of limitations are well-recognized grounds to defeat claims alleging the underpayment of public salaries, including salaries established by law. *See*, *e.g.*, *Deasey v. City of Chicago*, 412 Ill. 151, 152–56 (1952); *Lashever v. Zion-Benton Twp. High Sch.*, 2014 IL App (2d) 130947, ¶¶ 7–8; *Lee v. City of Decatur*, 256 Ill. App. 3d 192, 196–98 (4th Dist. 1994);

People ex rel. MacGowan v. Chicago Park Dist., 307 Ill. App. 383 (1st Dist. 1940) (abstract); *People ex rel. Hollie v. Chicago Park Dist.*, 296 Ill. App. 365, 381 (1st Dist. 1938). Plaintiffs have not shown any reason why they should be unavailable as defenses to their claims. Accordingly, the Court should reverse the circuit court's decision denying the Comptroller leave to file her affirmative defense of laches and remand for further proceedings regarding that defense. The Court should also reject Plaintiffs' attempt to sustain the circuit court's entry of summary judgment against the Comptroller on her statute of limitations defense based on the public rights doctrine, which the circuit court correctly held did not apply.

IV. The Statute of Limitations Began to Run on Plaintiffs' Claims When They Did Not Receive the Payments They Claim, Not When the Circuit Court Agreed with their Interpretation of the Legislative Salary Clause.

There is also no merit to Plaintiffs' effort to sustain the circuit court's ruling rejecting the Comptroller's statute of limitations defense on the ground the circuit gave: that the five-year statute of limitations on these claims did not accrue until it announced its agreement with Plaintiffs' view that the Legislative Salary Clause prohibits any reduction in legislators' salaries during their terms in office. As explained in the Comptroller's opening brief (at 34–38), a claim accrues, for statute of limitations purposes, when the facts supporting the elements of that claim (typically the violation of a legal duty and a resulting injury) have occurred. A favorable judicial ruling on some point of law on which the claim depends is not an "element" of the claim that

must be obtained before the claim accrues and the statute of limitations begins to run. (*Id.*)[5]

Plaintiffs rely heavily on the Court's opinion in *Kelly v. Chicago Park District*, 409 Ill. 91 (1951). (Pl. Br. at 19, 25–26.) But that reliance on *Kelly* — or on other cases by public officials who sought both reinstatement and back pay — is misplaced because Plaintiffs did not seek reinstatement to their positions as legislators, which was the key fact on which the Court in *Kelly* relied. Some background is helpful. In *City of Chicago v. People ex rel. Gray*, 210 Ill. 84 (1904), the Court held, under the pleading principles in effect at the time, that until a public official who contested his termination "was reinstated and his name restored to the roll he was not . . . entitled to maintain mandamus requiring the city or its officers to pay him." *Id.* at 89. Later, however, the Court held that both types of relief could be obtained in a single action. *People ex rel. McDonnell v. Thompson*, 316 Ill. 11, 16 (1925). Yet in *Kelly*, the Court ruled that the statute of limitations did not bar a salary claim joined with a claim for reinstatement because "[t]he cause of action for salaries could not accrue to plaintiffs until their rights to their respective positions were first determined." 409 Ill. at 95. In *Sundance Homes, Inc. v. County of*

[5] If such a judicial ruling were an element of a claim for purposes of determining when it accrued, the statute of limitations for every garden-variety negligence claim could be extended by seeking an judicial ruling on whether the defendant owed the plaintiff a "duty," which is a "question of law to be determined by the court." *Fancil v. Q. S. E. Foods, Inc.*, 60 Ill. 2d 552, 555 (1975).

DuPage, 195 Ill. 2d 257 (2001), the Court questioned the logic and continued "vitality" of *Kelly*'s holding, but it did not have to decide whether *Kelly* is still good law. *Id.* at 275–76. (*See* Def. Br. at 36–39.) Nor need it do so here, because Plaintiffs' complaint did not seek reinstatement to their positions as state legislators.

The only coercive relief sought in Plaintiffs' complaint was recovery of their compensation excluded by the Salary Reduction Laws. In this situation, therefore, all elements of their claims — the Comptroller's alleged violation of her legal duty to pay Plaintiffs, and their financial injury from that alleged violation — were in place before the circuit court accepted their interpretation of the Legislative Salary Clause, and in fact long before they filed these claims. (*See* Def. Br. at 35–36, 38.) Thus, Plaintiffs' claims belong to the general category of claims in which the statute of limitations accrues when the defendant's alleged violation of a legal duty and the resulting injury to the plaintiff have occurred. (*Id.* at 34–35.) The circuit court therefore erred in entering summary judgment against the Comptroller on her statute of limitations defense, and its judgment in that respect should be reversed.

V. The Comptroller Stated a Valid Defense that Plaintiffs Waived Their Claims to Additional Compensation by Voting, After Their Terms in Office Began, to Accept Less than the Legislative Salary Clause Entitled Them to Receive.

Public policy principles, not the public rights doctrine, also apply to the Comptroller's waiver defense. Here, however, public policy should not prevent the Comptroller from raising waiver as a defense to Plaintiffs' claims.

The Comptroller recognizes the general rule that public policy prohibits a person from agreeing in advance to accept less compensation than the law requires. (Def. Br. at 32–33.) But the circuit court erred by holding that Plaintiffs' claims are not subject to waiver under the particular circumstances here, where Plaintiffs waived their rights under the Legislative Salary Clause — by affirmatively voting to accept reduced salaries — after their claims for the disputed salary amounts accrued, and where Plaintiffs themselves are part of the body that sets their own salaries.

As noted in the Comptroller's opening brief (at 29–31), although most rights may be waived, *see Smith v. Freeman*, 232 Ill. 2d 218, 228 (2009) ("Individuals may waive substantive rules of law, statutory rights and even constitutional rights."), public policy prevent many rights from being waived in advance, before a claim has accrued. *See Matthews v. Chicago Transit Auth.*, 2016 IL 117638, ¶ 74 (noting cases holding "that a prospective waiver of employment discrimination claims . . . is invalid as against public policy"); *Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 71–72 (1990) (contractual forum-selection clause in student loan agreements, waiving rights under venue statute for future claims, violated public policy); *Recht v. Kelly*, 82 Ill. 147, 147–48 (1876) (law exempting certain property from execution cannot be waived "by an executory contract"). It is relevant, therefore, that the Comptroller's waiver defense applies only to Plaintiffs' salary claims under the Legislative Salary Clause that had *already* accrued when they voted to enact

the Salary Reduction Laws. (As noted above, that defense is not necessary for any terms of office that began after the Salary Reduction Laws were enacted because the Legislative Salary Clause does not prevent salary changes during a future term.)

It is also relevant, as recognized in other jurisdictions, that Plaintiffs were part of the decisionmaking body that set their own salaries, largely eliminating the public policy dangers underlying the rule against advance waiver. (See Def. Br. at 30.) *Cf. MacGowan*, 307 Ill. App. 383 (estoppel barred claim for back pay by Superintendent of Chicago Board of Park Commissioners who was head of civil service department and recommended salary reduction that Board adopted). Plaintiffs argue that such an exception should not be recognized because it would encourage legislators who run for reelection to "entrenc'" themselves in office by promising to accept less compensation than the amount to which they are legally entitled, inevitably leading to "the virtual auctioning off of official positions to the lowest bidder, and . . . the least efficient employees to fill the positions." (Pl. Br. at 18 (citation and internal quotation marks omitted). This scenario is exaggerated and has little if any relevance here, where Plaintiffs, along with other members of the legislature, could have enacted a law that prospectively lowered their salaries starting at the beginning of each member's next term. No compelling public policy justifies allowing them instead to vote for economically equivalent compensation for themselves but later conveniently claim, at the end of their

legislative careers, that these votes were a sham. For these reasons, the Court should reverse the circuit court's decision denying the Comptroller leave to file her affirmative defense of waiver.

VI. Plaintiffs' Cross-Appeal Lacks Merit Because the Circuit Court Correctly Held that They May Not Obtain a Judgment that Grants Relief in Favor of Other Legislators Who Are Not Plaintiffs in this Case.

In their cross-appeal, Plaintiffs challenge the circuit court's ruling that the judgment in their favor must be limited to any relief to them personally, and may not include relief in favor of other legislators who are not plaintiffs in this case. (Pl. Br. at 32–36.) Again, they base that challenge on the notion that they are asserting public rights and therefore have standing to obtain such relief. Plaintiffs are mistaken.

As explained above (at 10–18), Plaintiffs are not asserting a public right — *i.e.*, a right for the benefit of the people of Illinois in the aggregate, collectively, and as a whole. Just the opposite, they seek monetary relief payable to themselves personally out of state funds, the amount of which depends on their individual circumstances. Such relief is inconsistent with the very concept of a pubic right. Similar relief in favor of any other legislator therefore must be sought, if at all, by each legislator who personally wishes to seek that relief, not by Plaintiffs as self-appointed guardians of their interests without any legal authority to represent them.

Plaintiffs did not file a putative class action on behalf of similarly situated legislators in which a court would first have to determine whether

Plaintiffs are adequate representatives to press claims with common issues of law or fact. See 735 ILCS 5/2-801; *Frank v. Teachers Ins. & Annuity Ass'n of Am.*, 71 Ill. 2d 583, 592–94 (1978); *see also Ballard RN Ctr., Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶¶ 42–44. Absent compliance with those requirements, due process prevents other any legislator from being bound by a judgment in a case — either favorable or unfavorable — "in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *see also Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008); *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 798 (1996); *Sundance Homes*, 195 Ill. 2d at 274; *Feen v. Ray*, 109 Ill. 2d. 339, 344–49 (1985). Thus, Plaintiffs cannot represent the rights of nonparties, and the circuit court correctly held that it had no authority to enter a judgment on Plaintiffs' claims that included relief for other legislators who are not plaintiffs in this case.

Plaintiffs also argue that a ruling by this Court that the Salary Reduction Laws are facially unconstitutional will entitle Plaintiffs to a judgment granting monetary relief in favor of nonparty legislators, and that requiring the filing of a class action on their behalf would needlessly "wast[e] resources." (Pl. Br. at 36–37.) Of course, the Court need not address that argument if it concludes that the Salary Reduction Laws are not facially unconstitutional. But the argument is unsound in any event because it confuses the legal theory of Plaintiffs' claim with the permissible scope of a

judgment on that claim, and in particular whether that judgment can bind nonparties consistent with due process and established procedural requirements for entering a judgment that is binding in favor of, or against, a person. A ruling by the Court that the Salary Reduction Laws are facially unconstitutional would establish that principle of law as a matter of *stare decisis*, thus greatly limiting any redundant adjudication of that same issue in other cases brought by legislators who wish to seek compensation excluded by the Salary Reduction Laws. *See Taylor*, 553 U.S. at 903–04. But it could not, consistent with due process, change the permissible scope of a binding judgment in this case, in which Plaintiffs have standing to seek relief only for their own injuries, and other legislators were not made plaintiffs. *Id.*; *see also Richards*, 517 U.S. at 798–802.[6]

Nor can the Court's general authority under Supreme Court Rule 366 overcome this fundamental obstacle, as Plaintiffs suggest. (Pl. Br. at 37.) Plaintiffs have not pointed to any case in which the Court held that Rule 366 authorizes such extraordinary relief. And because interpreting Rule 366 to do so would raise serious constitutional doubts, it should not be construed to permit that relief. *See In re Loss*, 119 Ill. 2d 186, 194 (1987); *Oswald*, 2018 IL 122203, ¶ 38.

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[6] As Plaintiffs' brief acknowledges (at 35, n.8), their counsel has filed a putative class action for other legislators based on the claim that the Salary Reduction Laws violate the Legislative Salary Clause. Thus, they know how to seek class-wide relief in accordance with the constitutional requirements for doing so.

CONCLUSION

For the foregoing reasons, the circuit court's judgment in Plaintiffs' favor should be reversed and the matter remanded for further proceedings consistent with the as-applied nature of Plaintiffs' constitutional claim, and an adjudication of the merits of the Comptroller's affirmative defenses.

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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 29 pages.

/s/ *Richard S. Huszagh*

CERTIFICATE OF FILING AND SERVICE

I certify that on April 18, 2022, I electronically filed this Reply Brief of Defendant-Appellant and Brief of Cross-Appellee with the Clerk of the Supreme Court by using the Odyssey eFileIL system.

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

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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.

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