

# State Universities Annuity Association



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Lunch with Staff  
Monday, June 6  
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## SUAA Mini Briefing May 6, 2016

Travel with SUAA to  
ICELAND  
to see the  
Northern Lights



### *SURS SUAA LEGISLATIVE RECEPTION CELEBRATING SURS 75<sup>TH</sup> ANNIVERSARY*

for more pictures go to the [SUAA Website](#) and the [SUAA Facebook Page](#)

On Tuesday evening, May 3<sup>rd</sup>, SUAA hosted the annual SURS SUAA Legislative Reception at the SUAA office in Springfield. This year's reception was not only celebratory; it was an evening of comradery and relaxation among Legislators, Friends, SURS and SUAA Board Members and both Staffs along with Senate Staff. We look forward to another 75 successful years for SURS!

[HR1100](#) and [HJ0137](#) recognize SURS 75<sup>th</sup> Anniversary

A special Thank you to Rep. Carole Ammons, Rep. Chad Hays,  
Senator Scott Bennett and Senator Chapin Rose

More attendees  
pictures on Facebook  
and the SUAA  
Website



Continue reading as we provide a response from SUAA Attorney Aaron Maduff to the April 28<sup>th</sup> Tribune  
[Commentary: Congress Can Solve Illinois' Pension Crisis](#). Website provided in case you missed it.

After the Tribune Editorial of the Manhattan Institute Regarding “Empowering Illinois’ Pension Reforms” Attorney Aaron Maduff was asked to respond due to the emails that began arriving at the SUAA office.

The proposal itself is to amend the Federal Bankruptcy Code to provide a mechanism, by way of the Supremacy Clause of the U.S. Constitution, to override the Illinois Constitutional protections provided to pensions. There are several problems with this proposed legislation. Mr. Maduff is not concerned about this in the short run. First, it would require an act of the U.S. Congress. Second, its procedural implementation is complicated. Third, there are several potential challenges to it. The following is an outline of Mr. Maduff’s responses. While it is lengthy, it does provide the information needed to hopefully answer questions many of you might have. You might also want to keep this information for further reference.

### **The Proposed Legislation**

The proposal itself requires a Congressional Act amending the Federal Bankruptcy Code. The concept is that by providing a mechanism for changing pensions through the Federal Code, the Pension Protection Clause of the Illinois Constitution can be overridden. The second clause of Article VI of the U.S. Constitution — the Supremacy Clause— provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, Illinois cannot enforce a State Constitutional provision in conflict with an act of the U.S. Congress. The key language in the proposed legislation that would trigger the Supremacy Clause is as follows:

Notwithstanding any prohibition against or limitations on changes to Pension Benefits contained in, *inter alia*, any State constitution, law, regulation, judicial decision, contract, or other local legal document, decision or rule, Pension Benefits may be modified to ensure the performance of Essential State Actions. Such changes may be prospective, retrospective, or both, and may include modifying the vesting or qualification requirements for or reducing Pension Benefits provided by the State or any subdivision, agency, or municipality thereof.

The proposed legislation at issue would provide a mechanism by which the State could propose a plan to a Federal bankruptcy court for approval. Here are the steps:

- 1) The State would have to prepare a proposal that would:

- a. Explain the changes the State deems necessary to “ensure the undiminished and unimpaired performance of any Essential State Action” (which is essentially defined as the action justifying the use of the police power); and
- b. Provide the factual basis for its determination that an Essential State Action is threatened.

This would have to be followed by public hearings on that factual basis.

- 2) The proposal then has to be passed by the General Assembly and signed by the Governor like any other law.
- 3) Next, the State would have to file a Petition in the bankruptcy court. The petition would have to be sent by first class mail to everyone affected by it (i.e. all members of the pension systems affected), and publish the petition in the biggest newspaper in the State. Individuals then have 20 days to file a challenge to the petition.
- 4) The bankruptcy court then holds a hearing at which the State has the burden of proving that the petition is proposed in good faith and duly passed, and that its new proposal will effectively fund the pension at issue.
- 5) Challengers can then argue that the proposal is unnecessary because the State can meet all of its obligations without making any changes to the pensions.

Were this legislation to be introduced, I think we would have some substantive objections. First, the State’s initial burden is by a preponderance of the evidence (more likely true than not true). Given that we are talking about effectively taking property from someone, and given the questionable efficacy of past proposals, (e.g. taking people’s state paid health care) it should be a much higher burden.

Second, once the State meets its burden, the pension members have the burden of showing that the State can meet all of its obligations. At the outset, the pension members’ burden is one of clear and convincing evidence — a much higher burden than that on the State for its initial case. But the burden should not be on the pension members in the first instance. It is the State who has all the information on its budgets and obligations, not the pension members, and the proposed legislation does not even provide for discovery.

Third, even if this proposal did provide for discovery, the cost of taking the discovery and proving that the State can meet all of its obligations is prohibitive. Moreover, the proposed legislation requires the Bankruptcy Court to rule within 30 days of the first challenge which is simply unrealistic. There would be an exception to that time frame if both parties agree to an extension (although there seems to be no incentive for the State to do so). But that extension would not stay implementation of the pension reforms anyway.

## **U.S. Congressional Action**

The Manhattan Institute's proposed legislation would have to be passed by the U.S. Government like any other law (passed by a majority of both houses and signed by the President or vetoed and overridden by a 2/3 vote of both houses of Congress.) This is a considerable task on what would be a controversial bill. We can be sure that it would be heavily lobbied by many organizations, SUAA included. Although the proposal is aimed at Illinois, it would affect constituencies in many states, so that lobbying effort would probably also involve objections by sister organizations and national unions.

Such legislation is unlikely to be of interest to our elected officials in an election year at all. But until the Manhattan Institute can mobilize other organizations and States, it is unlikely to gain enough traction to find sponsors. Thus, this entire enterprise is currently theoretical and academic at best.

## **The Procedural Implementation**

Assuming this legislation were introduced and passed into law by the United States, it would then take an act of the Illinois General Assembly to first formulate a plan and then pass it. Formulation of that plan is not so simple as it may sound. It would require the State to find a consensus among the members of the General Assembly for a plan that it can defend in a bankruptcy court as ensuring that the pensions will be funded. Not only would it face the divisions among members of the General Assembly (even SB1 only passed by a two vote margin in the House and with none in the Senate), but a rather furious lobbying effort.

## **Legal Challenges**

While there would be some questions about standing, there are legal challenges that could be made in both State and Federal Court. First, the pensions at issue are property rights. The Fourth Amendment to the United States Constitution (as applied to the Federal Government) and the 14<sup>th</sup> Amendment (as applied to the States) prohibits the taking of property without due process of law. The State would inevitably argue that the legislative process itself is due process. *See Pro-Eco, Inc. v. Board of Commissioners of Jay County, Indiana*, 57 F.3d 505, 513 (7<sup>th</sup> Cir. 1995) ("Governing bodies may enact generally applicable laws, that is, they may legislate without affording affected parties so much as notice and opportunity to be heard.")

Nonetheless, how much process is due is generally considered on a case by case basis taking into account: 1) the private interest at stake; 2) the risk of an erroneous deprivation; and 3) the burdens on the government that such a process would entail. *See Mathews v. Eldridge* 424 U.S. 319, 334-35 (1976). We would argue that all three of these factors militate against use of this process. First, depending upon the proposed plan, some pension members might find themselves in dire straits, making the private interest an extraordinary stake. Second, we would argue that the inability of the State to meet its pension funding requirements in the past means that there is a dramatic risk of an erroneous deprivation, particularly given that the Plaintiffs would have only 30 days from making a challenge with no discovery to prepare their case. This

brings the third factor into play — the burden on the Government of providing the necessary discovery and time is minimal when compared to the stakes for individuals.

Another challenge might be under the Equal Protection Clause of the United States Constitution’s 14<sup>th</sup> Amendment on the basis that the proposed legislation would provide a means to deprive only pension members of their property rights, but not other creditors. The Manhattan Institute argues that “In the past, the Supreme Court has ruled that it is not necessary to have identical treatment for every class of *creditor*.” (“Empowering Illinois’ Pension Reform”, Manhattan Institute, April 2016, pg. 18 *citing Railway Labor Executives’ Association v. Gibbons*, 455 U.S. 457, 473 (1982). Emphasis added.)

First, the Manhattan Institute misreads the case. The sentence at issue actually reads “[o]ur holding today does not impair Congress’ ability under the Bankruptcy Clause to define classes of *debtors* and to structure relief accordingly.” *Gibbons* at 473 (emphasis added.) The Manhattan Institute’s substitution of “creditor” for “debtor” in that sentence is remarkable.

Second, the cited language relates to an analysis under the uniformity requirement of the bankruptcy code. It has no applicability to the Equal Protection Clause.

Obviously, considerably more research would need to be done to analyze these arguments, but on first look, a case can be made that the Manhattan Institute’s proposed legislation is unconstitutional. Such a challenge would also provide an opportunity for a Federal Court to enter preliminary injunctive relief against implementation of the law.

## Conclusion

For the moment, the Manhattan Institute’s proposal is academic and theoretical at best. The Tribune Editorial was written by the author of the Manhattan Institute Paper in the first instance. That the Tribune should choose to publish it is not a cause for concern among SUAA membership. It would take years to get through legislative acts of both the U.S. Congress and the Illinois Congress and subject to numerous challenges. This does not mean that we would not react with our own lobbying effort at both the Federal and later the State levels if necessary, but there is nothing to react to at this time. Meanwhile, the challenges that we could pose if necessary are substantial. At best, the editorial suggests that efforts to reform pensions are not yet over and we need to be vigilant. We need to be prepared to fight in the legislature and we need to have funding for continued legal battles. Pension members have the upper hand in these battles because of the Pension Clause and the Supreme Court’s opinion in *In Re Pension Litigation*. The latter is dispositive of most potential reforms.

As has been stated many many times, there will be continuing attacks on the Illinois public pensions. The Governor and legislators do read these articles, just as you do. Ideas will continue to swarm as long as the State remains in a fiscal quandary.

More . . . keep reading.

## Are You Following Legislation?

The passage of proposed Constitutional Amendments by the May 6<sup>th</sup> deadline turned out to be anticlimactic. [HJRCA36](#) was the only Amendment that passed both chambers by Thursday before both Houses left Springfield. The amendment basically says that taxes and fees related to transportation must be used for transportation purposes. Unfortunately the Road Fund is the go to fund for sweeping. According to *Capitol Fax* the Road Fund has been hit for a total of \$6.4 billion since 2003. The amendment was backed by road construction companies and unions. If it is passed by the voters in November, we can most likely look for an increase in the motor fuel tax. A full explanation will be sent to the voters from the Secretary of State's office.

[SB2048](#) was passed by the Senate on May 5<sup>th</sup> by a vote of 055-002-000. The sum of \$6,524,400 is to be appropriated from the General Revenue Fund to Governors State University; \$90,618,300 to the Illinois Community College Board for distribution as well as City Colleges of Chicago; \$4,277,500 to the Illinois Mathematics and Science Academy; \$10,005,100 to Northeastern Illinois University; \$53,773,700 to Southern Illinois University; \$159,431,200 to the University of Illinois; \$13,572,400 to the University of Illinois Hospital; \$11,652,800 to Eastern Illinois University; \$19,584,300 to Illinois State University; \$24,699,800 to Northern Illinois University; \$13,949,400 to Western Illinois University; \$46,000,000 to the Illinois Student Assistance Commission for the MAP Grants. Appropriation in SB2048 are in addition to any amount previously appropriated. This money will help the campuses get through the summer. The bill is now in the House with Chief House Sponsor Barbara Flynn Currie.

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SUAA continues its statewide awareness program sponsored by the State Universities Annuitants Association Foundation. We are getting noticed. We hope you are doing your part.



We still have signs available. If you have not picked up signage from your local chapter, please contact your chapter president or the SUAA office. Our job remains intact as our campuses continue to struggle without proper funding. Without proper funding we lose our students, our campuses and our communities.

Executive Committee Member John McGuire provides comments to *McDonough Voice*:

MACOMB – Macomb and several other communities across the state with universities are about to see an influx of signs promoting the value of higher education.

The signs, done with black and yellow lettering, read “Higher education creates jobs.” They’re part of a \$20,000 statewide educational campaign paid for by the State Universities Annuity Association (SUAA) to impress on residents, legislators and others the value of higher education, according to John Maguire, who represented the SUAA at the Government Affairs meeting Thursday afternoon.

“All of the universities (public and private) are getting the short end of the stick in terms of the funding of higher education in the state of Illinois,” Maguire said in an interview after the meeting. “...and SUAA, although it’s an organization that’s retirees from state universities and community colleges, we see the big picture, that higher education creates jobs. SUAA is part of a coalition of those in support of higher ed who are doing the statewide awareness campaign...we feel it’s important to improve awareness about the value of higher education. I think in the discussions that have been taking place in Springfield, higher education is undervalued.”

The statewide campaign includes 1,500 signs and a print and online advertising campaign taking place in areas wherever there is a university or community college. He said members of SUAA were helping to distribute them this past week.

“I think the university needs to continue to educate the community about all of the decisions they have been making, the breadth of them. I thought there was – a response to some of the questions I asked – I think people need to be aware how everybody throughout the community is affected by these changes,” he said.

Maguire worked as spokesperson for WIU several years and held a similar public relations fund development role at McDonough District Hospital for seven years. He is currently on the board of the SUAA. He brought six of the signs to the meeting for interested individuals to take and place in support of Western Illinois University and the many other higher education institutions affected by the state budget impasse. He introduced the signs – and the campaign behind them – after WIU President Jack Thomas delivered a presentation entitled, “Leading the Way to Greatness.”

Thomas spoke early in the meeting about the cuts. “People talk about this. We have 500 employees who are on furloughs at our institution. Some of us – people like myself and Matt (Bierman) and other leaders – you may have, you know, read that nonsense – that says, you know, “Administrators didn’t take furlough” – we gave up salary reductions because I can’t afford to be away from the university 15 days on furlough. We have to be there to run the institution. So what we did, we gave up our salary, parts of our salary, that’s coming out of our check every month. We were the first. This started in January,” he said.

Thomas’ presentation outlined the recent cuts, what the university is doing to stay viable, and the kind of support the university needs from the community. He appealed to committee members to “tell the WIU story,” asking them to highlight positive reviews and signature academic programs such as the Law Enforcement and Justice Administration, which he said is WIU’s top major and

the fifth largest of its kind in the country. He also appealed to them to write local officials and to support WIU financially.

Maguire said in the meeting that he thinks the SUAA campaign for higher education will help provide some of that necessary support. “I think what President Thomas says and what we all know is that, what we need to do is generate support but also generate it with those that have to make the legislative decisions in Springfield. Community awareness is what we’re doing,” he said.

Reach Michelle Langhout via email at [mlanghout@McDonoughVoice.com](mailto:mlanghout@McDonoughVoice.com), or follow her on Twitter @mlanghout1.

One editorial comment: SUAA represents currently working too!

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SUAA sadly says goodbye to SURS Executive Director Bryan Lewis as he accepts a new position as the chief investment officer for the Pennsylvania State Employees’ Retirement System (PA SERS).

Working with Director Lewis during his tenure has been enjoyable. We wish him the very best as he ventures on to a new opportunity.

Tom Cross, chairperson of the SURS Board of Trustees, states that there is already a nation-wide search in place.

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The SUAA Annual Meeting is right around the corner; Tuesday, June 21<sup>st</sup> and Wednesday, June 22<sup>nd</sup>. [President Abraham Lincoln Springfield](#) is the same hotel as in the past. Hotel reservations are due by Memorial Day for the discount. After that date there are no guaranteed rooms available. Telephone number is: 217.544.8800.

More information is forthcoming.

While you are visiting Springfield, think about joining a tour of the State Capitol after Wednesday’s meeting. Or a visit to the Abraham Lincoln Museum and other Lincoln historical spots around town.

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[Illinois Channel](#) has a new face. Illinois Channel has outstanding interviews around the State centering on politics and government, news, business, education, and culture. Terry Martin, Executive Director and Producer, records the SUAA Annual Meetings. He also provided interviews with SUAA Attorney Aaron Maduff during the hearings on Senate Bill 1 and on the State Health Insurance.

Need more information – Take a look at the [Civic Federation’s](#) Analysis and Recommendations of the State of Illinois FY 2017 Recommended Operating Budget.

The Commission on Government Forecasting and Accountability has a [Monthly Briefing](#) for April 2016.

