No. 118585

In the

Supreme Court of Illinois

IN RE: PENSION REFORM LITIGATION

DORIS HEATON, et al.,

Plaintiffs-Appellees,

v.

PAT QUINN, in his capacity as
Governor of the State of Illinois, et al.,

Defendants-Appellants.

Appeal from the Appellate Court of Illinois of the Seventh Judicial Circuit,
Sangamon County, Illinois, Nos. 14 MR 1, 14 CH 3 and 14 CH 48;
Cook County Case No. 13 CH 28406 and Champaigne County Case No. 14 MR 207
(consolidated).
The Honorable **John W. Belz**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLEES STATE UNIVERSITIES ANNUITANTS ASSOCIATION, ET AL.

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POINTS AND AUTHORITIES

INTRODUCTION

The State Universities Annuitants Association ("SUAA") represents the interests of members of the State Universities Retirement System ("SURS"). These include employees of Illinois' State Universities and Community Colleges. In 1970, one of those SURS members, Henry Green, then director of development for Parkland Community College, and a delegate to the Constitutional Convention, was the original sponsor of the Pension Clause. He introduced the Pension Clause to "guarantee [pension] rights". 4 Proceedings 2925.

Delegate Helen Kinney, another sponsor put it this way:

> All we are seeking to do is to ***guarantee*** that people will have the rights that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are $100 a month in 1971, they should not be less than $100 a month in 1990.

(Comments of delegate Helen Kinney, 4 Proceedings 2931-32, emphasis added.)

The fears expressed by Mr. Green and other 1970 convention delegates have come to pass and the need for the Pension Clause has never been so apparent. The Pension Clause's goal of guaranteeing pensions, indeed its entire existence, will become meaningless if the State is permitted to apply the police power to diminish pensions.

Illinois' public pension systems have been underfunded for nearly a century. Complete funding is not always necessary to pay pensions because money is being paid into the system by current employees that will not be paid out of the system until they retire. That fact, combined with other monies that the State should be putting into the systems to meet their obligations, should enable the systems to navigate economic ebbs

and flows. When the State fails to put money into the systems, however, there is less margin for error when the economy ebbs.

Today the State blames its problem not on its lack of fiscal discipline, but on its feigned surprise that, after an economic boom in the 1990's and early 2000's, it faced a "Great Recession" from 2008-2010. It even goes so far as to suggest in its Statement of Facts that "the Act reduces future COLA's *only* to recover a portion of the liability attributable to the Great Recession" (St. Br. at 10), as though retired State employees are somehow responsible for the State being caught unaware that the economy has cycles. But history repeats itself. An economic boom in the early 1830's was followed by the recession of 1837, another boom was followed by the recession of 1873, and of course the roaring '20's were followed by the Great Depression. But mankind has known about economic cycles at least as early as Joseph's interpretation of Pharaoh's dreams. Genesis 41.

Prior to 1970 most pensions were mandatory, and therefore considered gratuities provided by the State that could be diminished or revoked at the State's whim. The pensions were not adequately funded and pension system members were concerned that the pension funds could run out of money and that the State would be unable to pay pensions. By 1970, the State had been under-funding the pension funds for more than fifty years. Immediate complete funding was well beyond the State's capacity at that time and, had the Pension Clause actually required it, it would not have passed. Thus, the Pension Clause did not require immediate funding, but it did require that all pensions be paid, and it was intended to "direct the General Assembly to take the necessary steps to

fund the pension obligations." 4 Proceedings 2925. The State did not follow that directive, however, and continued to ignore its obligation to fund the pensions.

The State now seeks to avoid application of the Pension Clause to the very danger it was created to address. The State tries to justify its actions citing its police powers, to which it claims the Pension Clause, and indeed the entire Constitution, is subservient. But such a construction is anathema to the Pension Clause in the first instance.

Moreover, the police power – reserved sovereign power – is not applicable where the State acts in its role as a contractor as opposed to acting in its role as the sovereign. The primary object of Public Act 98-599 is to save the State money by reducing the amount it will have to pay in pensions. While some provisions of the Act are non-pecuniary, the Act as a whole is financial in nature. The State is attempting to breach contracts and unilaterally change their terms to obtain a better financial deal, something no court would permit of a private party. The State is therefore engaging in commerce, rather than acting as the sovereign, and it therefore cannot invoke the police power.

Finally, Public Act 98-599 stemmed from a bill carefully balanced to obtain approval from both party caucuses from each house. Even after years of negotiation and countless proposals, it then only passed by the thinnest of margins – one vote in the Senate and two votes in the House. It was intended as a complete package. Should this Court find any part of it unconstitutional, it is highly unlikely that whatever remains would have passed – this law is not severable. The entire act must be stricken.

STATEMENT OF FACTS

On December 5, 2013, the General Assembly passed, and the Governor signed, Senate Bill 1 which became Public Act 98-599. This Act is omnibus pension reform that, among other things, does the following:

- Sets a ceiling on the automatic annual increases (AAI's) which may be lower than certain members would have received prior to Act;
- Deprives certain retirement system members of their AAI's during certain years altogether;
- Imposes a cap on pensionable salary for certain retirement system members;
- Raises the retirement age (and concomitantly the amount of contributions required to receive a pension) for certain retirement system members; and
- Alters the method of determining the effective rate of interest used to calculate money-purchase formulas under Article 15.

The trial court specifically made these findings, and in so doing, noted that the State did not contest them. C2312-2317; C2328.

The State states its view of the primary issue presented in this appeal as follows:

> The Pension Clause of the Illinois Constitution provides that membership in a public pension system is "an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." Ill. Const. art. XIII, § 5 (A16). By establishing these enforceable contractual relationships, does the Pension Clause incorporate the long-accepted police-power limitation on contract rights, thereby allowing the State to modify pension contracts under limited circumstances?

Put simply, the question is whether the pensions are subject to a police power defense at all. However, the State's four-page Statement of Facts appears to be a presentation it believes proves its police powers defense as if this appeal is merely a hearing on that issue before this Court. In fact, as the State aptly notes in its statement of the "Proceedings Below", "[t]he opinion concluded that the language of the Pension Clause is 'absolute and without exception.'" (St. Br. 15) Therefore, that P.A. 98-599 diminishes pensions both with regard to AAI's and with regard to non-AAI provisions is the only relevant fact and the State's presentation of facts relating to its financial condition are a red herring which this Court should ignore.

ARGUMENT

I. THE PENSION CLAUSE IS NOT SUBJECT TO THE STATE'S POLICE POWERS (RESERVED SOVEREIGN POWER).

The text, structure, history, and purpose of the Pension Clause make clear that it is not subject to the reserved sovereign power. Indeed, as the Court below asked during oral argument on November 20, 2014, and the State confirmed, no Court in Illinois has ever invoked the police power to diminish public pensions.

The State notes that "[t]he primary purpose behind the inclusion of [the Pension Clause] was to eliminate the uncertainty surrounding public pension benefits created by the distinction between mandatory and optional pension plans." State Br. at 32, quoting *McNamee v. State*, 173 Ill. 2d. 433, 440 (1996). In this, the State is absolutely right, and the Pension Clause eliminates that uncertainty in a number of ways. First, it acknowledges that all pensions deserve the respect of enforceable contracts. Second, it creates absolute certainty that pension members will receive their contracted benefits by

barring the State from diminishing those benefits, whether by use of the State's police power to diminish those benefits.

A. THE TEXT OF THE PENSION CLAUSE DEMONSTRATES THAT IT IS NOT SUBJECT TO THE POLICE POWER.

This Court "has long recognized that the meaning of any given constitutional provision depends on the common understanding of the citizens who, by ratifying the Constitution, 'gave it life.'" *Cincinnati Ins. Co. v. Chapman*, 181 Ill. 2d 65, 77 (1998). The constitutional analysis of any provision starts by "giving effect to the plain language of the Constitution, for it is the language itself which provides the best evidence of what the drafters intended to convey to the citizens for ratification". *Id.* The text of the Pension Clause is clear and absolute:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

Ill. Const. art. XIII, § 5.

The State argues before this Court that "[t]he plain meaning of this clause allows the State to exercise its police powers …" (State Br. at 19.) But the Pension Clause does not say "subject to the police powers." To the contrary, it says that the benefits of that contractual relationship "shall not be diminished or impaired." In the Court below, the State agreed that the police powers were not found in the plain text of the clause. It conceded that: "It is true that the language of the Pension Clause is unqualified on its face." (C2194 – 2227, State's Resp. p. 7.) The State's view is that the language "shall be an enforceable contractual relationship" incorporates the Contract Clause and its lineage

of case law into the "plain text." But this distorted, self-serving view treats the words "diminished or impaired" as if they do not exist or are mere surplusage.

This Court has repeatedly taught that "[t]he presence of surplusage … is not to be presumed in statutory or constitutional construction and the fundamental rule that each word, clause or sentence must, if possible, be given some reasonable meaning is especially apropos to constitutional interpretation." *Hirschfield v. Barrett*, 40 Ill. 2d 224, 228 (1968) (citing *Winnebago County v. Industrial Com.*, 34 Ill. 2d 332, 335 (1996); *Pinkstaff v. Pennsylvania Railroad Co.*, 31 Ill. 2d 518, 524 (1964); *People ex rel. Barrett v. Barrett*, 31 Ill. 2d 360 (1964)*; Doubler v. Doubler*, 412 Ill. 597, 600 (1952). *See also People v. Stoecker*, 2014 IL 115756 (Ill. May 22, 2014); *Slepicka v. Illinois Dept. of Pub. Health*, 2014 IL 116927 (Ill. Sept. 18, 2014); *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 2012 IL 112566, 963 N.E. 2d 918, 923 (Ill. 2012).

As this Court noted last year in *Kanerva v. Weems*, 13 N.E. 3d 1228, 1241, 383 Ill. Dec. 107, 120 (Ill. 2014), "Delegate Green, who first proposed the provision which became article XIII, section 5, began his presentation to the convention by stating that it does two things: '[i]t first mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly not to impair or diminish these rights.'" Thus each sub-clause must be given its due meaning. The State argues that it is not possible to give both clauses meaning. In opposition to giving the second sub-clause meaning, the State argues: "under Plaintiffs' reading, the Clause's crucial mention of 'enforceable contractual relationships' itself becomes surplusage." (St. Br. 28) The State is wrong.

1. The first clause, "enforceable contractual relationship", has meaning independent of the second clause, "the benefits of which shall not be diminished or impaired."

The State argues that, "calling the benefits absolute is actually *inconsistent* with calling the pension an 'enforceable contractual relationship.'" *Id.* (Emphasis in original.) The State misconstrues Plaintiffs' use of the term "absolute". The words "enforceable contractual relationship" have a specific purpose — they identify a pension as a consideration-based agreement. The parties to any contract can choose to renegotiate their agreement. When the Plaintiffs say that the Pension Clause is absolute, Plaintiffs mean that the Pension Clause does not permit the State to avoid its obligations under the contractual bargain without the consent — bilateral renegotiation — of the pension systems' members.

The first sub-clause of the Pension Clause "shall be an enforceable contractual relationship" has its own independent purpose. It ensures that pensions receive the respect of contracts, rather than being considered mere gratuities, and thereby provides the pension members with property rights that they can choose to negotiate on equal terms with the State, and for which they can seek enforcement.

The State proved that point with Public Act 91-395, which offered SURS members the opportunity to renegotiate their pension benefits for other consideration, namely avoiding the health insurance premium increases it had established by way of Public Act 90-65. Those SURS members who accepted the offer may have lowered their annuity payments, but they got something in return — they eliminated health insurance

premiums they were to be charged pursuant to Public Act 90-65.[1] Thus, those members who accepted effectively renegotiated their pension contracts by accepting a new offer made by the State – new consideration in exchange for altering the existing agreement. Indeed, the State specifically identified this ability to renegotiate a contract in its briefing before this Court in *Kanerva.* There it noted that this act "demonstrates that the General Assembly knew how to create contractual rights…" (Brief of the State of Illinois, *Kanerva v. Weems,* Docket No. 115811, Supreme Court of Illinois, filed August 16, 2013, at p. 25) Thus, even if the benefits of this particular contractual relationship cannot be diminished or impaired unilaterally by the State, they still represent contractual interests that the individual parties can bilaterally renegotiate by agreement — something the State has shown they, and it, can do.

2. The second clause specifically prohibits any diminishment of benefits pension members have, by virtue of the first clause, "contracted" to receive.

In his opinion in *People ex rel Sklodowski v. State of Illinois*, 162 Ill. 2d 117 (1994) ("*Sklodowski I*"), Justice Freeman specifically recognized a difference between the words "diminish" and "impair" — the terms are not synonymous and have different purposes.

First, Justice Freeman notes that the "protection against impairment … is co-extensive with the protection[s]" of the Contract Clause. *Id.* at 147. The State claims that these words support the following statement "The Pension Clause's express language … reflects a decision to incorporate the *same degree* of protection afforded to all

[1] Because this Court had not found that health insurance benefits were pension benefits protected by the Pension Clause until its opinion in *Kanerva v. Weems* last year, these SURS members did not realize that Public Act 90-65 violated the Pension Clause.

contracts." (Pg. 26-7) Justice Freeman disagrees. He says that "to avoid rendering the [Contract Clause] surplusage where State pensions are concerned, the [Contract Clause's] scope cannot include protection afforded [pensions]." *Id.* In other words, pensions have additional protections above and beyond those provided by the Contract Clause.

Moreover, as he distinguishes the words "diminish" and "impair", Justice Freeman explains the meaning of the word diminish. *Sklodowski* was a suit to enjoin the State from defunding the pensions. As there was no statute at issue that attacked the actual benefits, Justice Freeman noted, "[i]mplicated [in that case] is the protection against impairment, rather than the protection against diminution, as plaintiffs have yet to actually receive any benefits." *Sklodowski I,* 162 Ill. 2d at147. Public Act 98-599, however, is a different beast. It specifically attacks the benefits themselves. Plaintiffs therefore seek to have that law struck down as unconstitutional to prevent the State from diminishing those benefits.

Justice Freeman's analysis in *Sklodowski I* also squares with Delegate Kinney's effort to define the word "impair" as a single word (as opposed to defining the phrase "diminish or impair") in her convention comments: "The word 'impair' is meant to imply and to intend that if a pension fund would be on the verge of default or imminent bankruptcy, a group action could be taken to show that these rights should be preserved." Illinois Constitutional Convention Debates of 1970, 4 Proceedings 2926. *See also McNamee v. State*, 672 Ill. 2d 433, 446-447 (1996). The issue before this Court is not one of funding i.e. impairment (as with cases like *McNamee*, *Sklodowski*, and others). Public Act 98-599 diminishes the pension members' actual benefits – an act which the Pension Clause unequivocally prohibits.

B. THE STRUCTURE OF THE PENSION CLAUSE ANDTHE CONSTITUTION, DEMONSTRATES THAT PENSIONS ARE NOT SUBJECT TO THE POLICE POWER.

Below, the State argued that "the purpose of the Pension Clause was to give all public pension obligations the *same* legal status as other public contracts." (C124, St. Res. 2, emphasis in original). That is to say that, like other public contracts, they are subject to the police power. Here, the State makes the same argument, though in a more strained and circular manner: "the benefits that may not be 'diminished or impaired' are the benefits *of* the 'contractual relationship' — a relationship that, as a matter of settled law, is inherently limited by the State's police power." (St. Br. at 28, emphasis in original).

The State contrives this claim by asserting that "the latter phrase [diminished or impaired] is a dependent clause". Presumably what the State means is that the benefits are dependent upon there being an enforceable contract and that, by exercise of the police power, the State makes the contract unenforceable. But the benefits came into existence upon the formation of the pension contract — they do not disappear because the State exercises its police power in an effort to abrogate the contract. To the contrary, the words "shall not be diminished or impaired" must reflect a constitutional protection against the State's use of the police power to "diminish or impair" pension benefits.

1. The Pension Clause is independent of the Contract Clause

The State takes the view that the Pension Clause merely elevates pensions to the level of contracts and thereby subjects them to the Contract Clause line of cases, nothing more. Were that the case, the delegates could simply have appended the words

"including pensions" to the end of the Contract Clause — there would be no need for the extra phrase "shall not be diminished or impaired." Indeed, the delegates considered doing precisely that and rejected it. (4 Proceedings 2929-30). By making the Pension Clause separate from the Contract Clause, the delegates added the concept that the benefits of pension membership would not be "diminished", something that Justice Freeman notes is above and beyond what is found in the Contract Clause. *Sklodowski I*, 162 Ill. 2d at 147.

2. The critical word "diminish" does not appear in the Contract Clause.

The Contract Clause does not contain the word "diminish". The prohibition against "diminishing" is unique to the Pension Clause. Moreover, the Convention rejected a suggestion by Delegate Wayne Whalen which would have eliminated the word "diminish." He suggested "if they want to give some kind of hortatory assurance to the pensioners, the place to do it would be in section 14, just by saying no law shall be passed which shall impair the obligation of pensions." (4 Proceedings 2930.) But hortatory assurance against impairment was inadequate. The proponents of the Pension Clause wanted a Constitutional protection against diminishment.

a. "Diminish" was the critical word.

That the critical word in this provision is "diminish" was made clear by Delegate Helen Kinney in her comments at the Convention. First, she explained the meaning of the word "diminish": "Benefits not being diminished really refers to this situation …", but she even went so far as to suggest that the less important word "impair" could be deleted from the provision. "Now if the word "impairment" bothers people, I suggest, if it is the will of the Convention, that the word be deleted." (4 Proceedings 2929.)

b. The State's argument that "diminish" and "impair" are redundant is wrong.

The State argues that "diminish" and "impair" are not two separate words, but rather redundant words in a phrase which are interchangeable. The State cites, as an example, the U.S. Supreme Court's opinion in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245, n. 16 (1978). The usage of the language in that case was in an entirely different context where the words themselves are used to produce a meaning inapposite to the Illinois Pension Clause. The same holds true for the State's citation to *Geweke v. Niles*, 368 Ill. 463, 466 (1938). There, this Court used the phrase "diminish the power of the village". *Id.* But the Pension Clause uses the term "diminish" in a different context — to "diminish the benefits".

The State argues that *Metro. Trust Co. v. Tonawanda Valley & C.R. Co.*, 8 N.E. 488, 489 (N.Y. 1886) and *Eddy v. London Assur. Corp.*, 38 N.E. 307, 311 (N.Y. 1894), use the words interchangeably. (St. Br. 30). Respectfully, that is a questionable interpretation of statements made by the New York Court of Appeals in a different context more than a century ago. These cases shed no light on what the Illinois Constitutional Convention meant in 1970.

The State also relies upon the Bankruptcy Court for the Eastern Division of Michigan's decision in *In Re City of Detroit*, 504 B.R. 97 (Bankr. E.D. Mich. 2013), which found that "linguistically, there is no functional difference in meaning" between the words diminish and impair. *In re City of Detroit, Mich.*, 504 B.R. 97, 152-53 (Bankr. E.D. Mich. 2013). The Supreme Court of Arizona in *Fields v. Elected Officials' Retirement Plan*, 320 P.3d 1160 (Ariz. 2014) came to the opposite conclusion — noting that "accepting this argument would render superfluous the latter portion of § 1(C), the

Pension Clause, which prohibits diminishing or impairing public retirement benefits. Because the legislature generally avoids redundancy, we reject this argument." *Id.* at 1164.

The State arbitrarily dismisses *Fields* as an aberration and then turns to *In Re City of Detroit,* for support from an analogy to other examples of what it believes to be redundant phrases: "cease and desist", "aid and abet", and "free and clear". The *Fields* analysis however, is more in line with Justice Freeman's opinion in *Sklodowski I* and Delegate Kinney's explanation of the distinction between "diminish" and "impair" than is that found in *In re City of Detroit.*

Moreover, with due respect to the Michigan Bankruptcy Court, the redundant phrase analogy referencing "cease and desist", "aid and abet", and "free and clear" is not a good one for two reasons. First, each of these phrases is conjunctive — the two parts of the phrase conceivably make a whole. That is to say that the phrase describes a complete thing (e.g. "the title is free and clear" is a complete description of a title.) By contrast, the phrase "the benefits shall not be diminished or impaired" is disjunctive — there are two different conditions that must not be permitted.

Second, while descriptive redundancy is often used with adjectives like "free and clear" to make sure that people clearly understand the description, that is not necessarily so with verbs. With all respect to the Michigan Bankruptcy Court, these verbs are not redundant at all. "Cease" means to stop doing something. "Desist" means to not start doing it again. Thus, without the complete phrase "cease and desist," one might stop doing something and then start doing it at some later point. The same concept holds true for "aid and abet". "Aid" means to assist. "Abet" means to encourage. One could aid

another in the commission of a crime without even knowing it. He is in that case not abetting — that would not amount to a crime of conspiracy for example. One could encourage another to commit a crime without assisting — that too might not meet the definition of a conspiracy. But to "aid and abet" would be to both encourage and assist, and that may indeed create a conspiracy. Finally, "free and clear" are by no means two words that can be used interchangeably. In fact, the phrase, "free and clear" has a totally different meaning than either "free" or "clear". "Free and clear" is used to describe title to property, there is no impediment to the holder's all-encompassing title. But "free" means a subject has liberty, and "clear" means an object is completely transparent, not translucent or opaque.

"Diminish" and "impair" are not redundant words in a phrase. They are, as Justice Freeman in *Sklodowski I*, and Delegate Kinney in the Convention debates, note, two separate words with two different meanings, each of which creates its own prohibition on the State.

3. In a prohibitory clause like the Pension Clause, any exception, including the police power, must be expressly reserved.

The text of the Pension Clause provides for no reservation of police power. If a reservation were intended, the drafters could have included such reservation within the language of the Clause. To conclude otherwise is inconsistent with the concept of a constitution. This is not to say that such powers cannot be reserved, but where they are, the Constitution does so expressly.

a. The Supreme Court has repeatedly instructed that the Constitution is a limit on State power.

The issue of police power in constitutional analysis is not a new one. While police power is broad, it is not without limitations, and it certainly cannot be used as an excuse to violate constitutional rights. In 1839, the Supreme Court recognized that principle in *Field v. People,* 3 Ill. 79, 95 (1839) ("No proposition is better settled, than that a state constitution is a limitation on the powers of the legislature.") The Supreme Court repeated this proposition in 1908 in *Belleville v. St. Clair County Turnpike Co*., 234 Ill. 428, 438 (1908). (Police power "must not conflict with the constitution.") Even after the enactment of the 1970 Constitution, in *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208 (1979), the Supreme Court observed that the sovereign power resides in the legislature and, as a result, it is not necessary to grant power to the legislature, but rather to place limitations upon it. The Court also noted that it is incumbent upon the courts to enforce any constitutional limitations on the legislature. *Client Follow-Up*, 75 Ill. 2d 208.

As already discussed, the Pension Clause is a limitation upon the legislature. Its text is without reservation and it goes beyond the Contract Clause. Where the drafters intended a Constitutional provision to be subject to a reservation, they were explicit. For example:

- Article I, Section 3. Religious Freedom: "…but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State."

- Article I, Section 22. Right to Arms: "Subject only to the police power, the right … to keep and bear arms shall not be infringed."

- Article XI, Section 2. Rights of Individuals [to a healthy environment]: "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through

appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."

Meanwhile, prohibitory clauses, like the Pension Clause, which are devoid of a reference to reserved police power are clearly not intended to be subject to it.[2] For example:

- Article I, Section 10: Self-Incrimination and Double Jeopardy: "No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy."

- Article I, Section 11: Limitation of Penalties After Conviction: "… No person shall be transported out of State for an offense committed within the State."

- Article I, Section 17. No Discrimination in Employment and the Sale or Rental of Property: "All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry in the hiring and promoting practices of any employer or sex in the sale or rental of property."

- Article I, Section 18. No Discrimination on the Basis of Sex: "Equal protection of the laws shall not be denied or abridged on account of sex …"

- Article I, Section 19. No Discrimination Against the Handicapped: "All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promoting practices of any employer."

The Pension Clause, like these clauses, is a prohibitory clause devoid of any reservation and therefore is not subject to the State's police power.

[2] The Contract Clause is exceptional in that it is written in very broad terms. It therefore needs a context to be considered. That context relates to whether the act at issue is a breach of contract or an exercise of sovereignty which only incidentally infringes on a contract — a contract to which the State might not even be a party. See Section II *infra.*

b. Delegate Foster's comment that the police power applies to every section of the Constitution does not represent the view of the drafters.

The State argues that the delegates understood the police power to apply to every part of the Constitution. For that argument, it relies upon a comment by Delegate Foster as follows: "Now you can go through this whole constitution and say, 'What if we applied it to that section?' *It applies to every section whether it is stated or not*." 3 Proceedings at 1689. (St. Br. at 33, emphasis in original.) At issue was whether it was necessary to include an explicit statement that the police power applies to Article I, Section 22 — the right to bear arms. That section explicitly states that it is "subject to the police power."

First, Delegate Foster's comment was made on June 10, 1970, more than a month before the debates on the Pension Clause — July 21, 1970 — began. At the time he made the comment (with an eye toward the Bill of Rights — Article I), neither he nor anyone else could know the future views of the sponsors of the Pension Clause, let alone the entire Convention. Indeed, as discussed in Section II.C. *infra*, the opposite appears to be true.

Second, it is not entirely clear what Delegate Foster means. Although he prefaced his comment with the statement that the convention could go through the "whole constitution", in his explanation he says "it applies to the whole bill of rights." *Id.* (Incidentally, this would be true as well for the right to assemble referenced by the State at pg.33-34, because it too is in the Bill of Rights — Article I.) Delegate Foster feels that the language is redundant, but he believes it a "useful redundancy." The only real

usefulness of that redundancy is that others may not agree that the police power applies to every section of the Bill of Rights (or the whole Constitution).

Third "'[i]t is possible to lift from the constitutional debates on almost any provision statements by a delegate or a few delegates which will support a particular proposition; however, such a discussion by a few does not establish the intent or understanding of the convention.'" *Client Follow Up.*, 75 Ill. 2d at 221. Clearly, given the contrary comments by the Pension Clause's sponsors, that recognition applies here.

C. THE PURPOSE OF THE PENSION CLAUSE IS TO AVOID DIMINISHMENT OR IMPAIRMENT OF PENSION BENEFITS IRRESPECTIVE OF THE POLICE POWER.

The State has taken the view that the purpose of the pension clause was to overturn the line of cases pre-1970 which held that most pensions were gratuities. Below, the State argued that "It is well established that the purpose of the Pension Clause was to give all public pension obligations the *same* legal status as other contracts." (C2194, Res. Br. 13, emphasis in original.) The State has now abandoned that position, instead quoting this Court's statement in *McNamee* that "'[t]he ***primary*** purpose behind the inclusion of [the Pension Clause] was to eliminate the uncertainty surrounding public pension benefits created by the distinction between mandatory and optional pension plans.'" (St. Br. 32, quoting *McNamee* 173 Ill. 2d at 440) (Emphasis added).

There is no doubt or dispute that the Pension Clause was intended to eliminate uncertainty. But this Court's statement in *McNamee* is a far cry from limiting the Pension Clause to merging pension analysis with Contracts Clause analysis.

The delegates could not have been clearer in stating the purpose of the Clause. In the words of Delegate Kinney:

> All we are seeking to do is to guarantee that people will have the rights that were in force at the time they entered into the agreement to become an employee, and as Mr. Green has said, if the benefits are $100 a month in 1971, they should not be less than $100 a month in 1990. (4 Proceedings 2931-32.)

By creating a guarantee, the Clause was clearly intended to ensure that the State could not find a way around paying the pensions.

1. The reason the Pension Clause was adopted was that the pension systems were underfunded causing a fear that the State would "modify or abolish" pension rights.

The State claims it can exercise the police power because the pension systems are underfunded and the State cannot meet its obligations. And yet, that is precisely the concern that caused SURS and others to seek constitutional protection in the first instance. In 1970, SURS was 47% funded. With the exception of the General Assembly Retirement System, the others were in even worse condition. In the words of Delegate Henry Green, a SURS member himself and the chief sponsor of the Pension Clause, and quoting in part from a letter from SURS:

> [I]n Illinois today we have "public employees [who] are beginning to lose faith in the ability of the state and its political subdivisions to meet these benefit payments." This insecurity on the part of the public employees is really defeating the purpose for which the retirement system was established.[3]

Some forty years later, the State has now proven Delegate Green's fears to have been well founded.

[3] Internal quotations are of the SURS memorandum which Delegate Green was reading into the record.

2. This Court recognized in *Kanerva* that the Pension Clause's purpose is to protect pensions without regard to the State's financial condition.

This Court in *Kanerva* quoted the constitutional convention debates extensively, specifically the following:

> Delegate Kemp, who spoke in support of the measure, viewed its purpose as "mak[ing] certain that ***irrespective of the financial condition*** of a municipality or even the state government, that those persons who have worked for often substandard wages over a long period of time could at least expect to live in some kind of dignity during their golden years * * *." *Id*. at 2926.

Kanerva at 13. From Kemp's comments, this Court concluded that—without qualification—the purpose of the Pension Clause was that pensions be "insulated from diminishment or impairment by the General Assembly." *Kanerva* at 13.

D. THE HISTORY OF THE PENSION CLAUSE DEMONSTRATES THAT IT IS NOT SUBJECT TO THE POLICE POWER.

Aside from the General Assembly Retirement System, the pension systems were all underfunded by more than 50% at the time of the Constitutional Convention. But underfunding was not new at that time. Records indicate that the pension systems were underfunded as far back as 1917.[4]

By 1970, these concerns were serious enough to cause the Pension Clause to be added to the Constitution. The Convention delegates appear to have anticipated the four decades of litigation that would follow. As this Court noted in *Kanerva*:

> Delegates were also mindful that in the past, appropriations to cover state pension obligations had "been made a political football" and "the party in power would just use the amount of the state contribution to help balance budgets," jeopardizing the resources available to meet the State's obligations to participants in its pension systems in the future.

[4] REPORT OF THE ILLINOIS PENSION LAWS COMMISSION OF 1916, at 272 (1917).

Kanerva at 12.

Unfortunately, the Pension Clause did little to change the practice. The challenge in *Sklodowski* in 1994, was the taking of $21 million that was already in the pension systems and returning it to the general fund in order to balance the budget.

E. THE STATE'S RELIANCE ON *FELT V. JUDGES RETIREMENT SYSTEM* IS MISPLACED. *FELT* DOES NOT STAND FOR THE PROPOSITION THAT THE PENSION CLAUSE IS SUBJECT TO THE POLICE POWER—TO THE CONTRARY, IT STANDS FOR THE PROPOSITION THAT THE POLICE POWER DOES NOT APPLY

The State argues that "[t]his Court's *only* decision addressing the application of the State's police powers to rights under the Pension Clause is *Felt*, 107 Ill. 2d 158." (St. Br. at 35, emphasis in original.) *Felt* first addresses the Pension Clause, stating unequivocally that, "[t]he change in the basis of computation clearly effects a reduction or impairment in the retirement benefits of the plaintiff members of the State retirement systems in violation of the constitutional assurance of section 5 of article XIII." *Felt v. Board of Trustees*, 107 Ill. 2d 158, 162-163 (1985). Nothing in that statement references the State's police power or any kind of balancing test. As far as the court was concerned, a statute changing the formula for determining judicial pension annuities constituted a reduction or impairment in retirement benefits. As such, the statute was absolutely unconstitutional based on Art. XIII, § 5 of the Constitution.

The State argues that "*Felt* did not hold that the statutory change was *per se* invalid under the Pension Clause, much less declare that the plain meaning of the Pension Clause categorically exempted contractual rights it established from any application of the State's police power." (St. Br. at 36) And yet, there is no other way to describe the

Court's emphatic and unqualified statement. The statute at issue "clearly effects a reduction … in violation of the Pension Clause".

The *Felt* court then proceeded to discuss an analogous provision of the New York Constitution, citing the opinion from New York's highest court in *Kleinfeldt v. New York City Employees' Retirement System,* 324 N.E. 2d 865 (1975), which held that "a statute which placed a limitation [on the calculation of] … retirement benefits was unconstitutional." 107 Ill. 2d at 163, citing to *Kleinfeldt,* 365 N.Y.S. 2d 500. It then turned to yet another New York case, *Birnbaum v. New York State Teachers Retirement System,* 152 N.E. 2d 241 (1958), which found that updating the mortality tables used in computing pension benefits "constituted an unconstitutional diminution and impairment of benefits." *Felt,* 107 Ill. 2d at 163-164, citing to *Birnbaum.* Both *Kleinfeldt* and *Birnbaum* held that "diminution" and "impairment" were absolute terms. There was no discussion of the police power in *Kleinfeldt,* and the New York Court in *Birnbaum* specifically refused to permit its legislature to use the police power in contravention of the constitutional mandate of its pension clause.[5]

Having determined that the Pension Clause had been violated, the *Felt* court turned to the Contract Clause. Citing to *Bardens v. Board of Trustees*, 22 Ill. 2d 56 (1961), *Felt* reaffirmed precedent that "before the provision of section 5 became part of the Constitution of Illinois this court had held that an amendment changing the salary basis of compensation for a retirement annuity was unconstitutional as impairing

[5] Illinois courts have frequently looked to New York law when interpreting the Pension Clause of the Illinois Constitution because the New York Constitution similarly protects public pensions in absolute terms. *See e.g. Felt* 107 Ill. 2d at 163.

contracts." 107 Ill. 2d at 165.[6] The *Felt* court then proceeded to examine the State's police power argument, starting with the first step in a contract clause analysis which is that the impairment must be substantial. It restated the State's argument on this point that the impairments were insubstantial:

> Using [certain Department of Insurance reports], the [State] argue[s] that we should hold that the reduction in the retirement benefits was not an unconstitutional impairment of contract as the impairment was insubstantial, and that the contract modifications were within the State's police power.

The Court responded to this argument with a discussion of the State's police powers, not for the purpose of doing a balancing test, but for the purpose of determining that the Contract Clause was implicated. Finally, it noted that: "Presumably the defendants would offer a similar contention regarding section 5 of article XIII on the question of diminution and impairment of benefits. The argument is not convincing. The impairment of benefits was obviously substantial." 107 Ill. 2d at 166. This is the language upon which the State rests its claim that *Felt* applies a police power analysis to the Pension Clause. But this is not an application of police power analysis to the Pension Clause at all. It is simply a rejection of the State's view that the impairment was insubstantial, and thus no reason to trigger the Pension Clause in the first instance.

II. PUBLIC ACT 98-599 IS NOT A PROPER EXERCISE OF POLICE POWER.

The State argues in Section III of its brief that "The United States Constitution Does Not Permit a State to Abdicate Its Police Powers." (St. Br. 40) This argument confuses the prohibitions of the Federal Contract Clause on relinquishing regulatory

[6] In doing so, the *Felt* court tacitly acknowledged that any analysis of Pensions ***changed*** as a result of Section 5 being added to the Constitution and was no longer confined to the Contract Clause.

power and the Illinois Pension Clause's prohibition against violating a debt contract, specifically pensions.

A. FEDERAL ANALYSIS OF THE CONTRACT CLAUSE IS NOT APPLICABLE TO THE ILLINOIS PENSION CLAUSE

The State begins this argument with the following statement and quotation from *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 at 23 (1977). "[T]he Constitution forbids a State from 'surrender[ing] an essential attribute of its sovereignty.'" By adding its own language "forbids a State" the State changes the meaning of the sentence it quotes. The sentence at issue actually reads "In Short, the Contract Clause does not require a State to adhere to a contract that surrenders and essential attribute of its sovereignty." *Id.* But this case is not about the Contract Clause of the U.S. Constitution. It is about the Pension Clause of the Illinois Constitution.

The Pension Clause to the Illinois Constitution is something entirely different. It was not passed pursuant to the Contract Clause of the U.S. Constitution and, as discussed at some length below, holds the State to its obligations under a particular kind of debt contract — pensions. As the Court in *U.S. Trust* notes: "the instant case involves a financial obligation and thus as a threshold matter may not be said to automatically fall within the reserved powers that cannot be contracted away." 431 U.S. at 25. The Court goes on to note that the promise involved in that case was "purely financial and thus not necessarily a compromise of the State's reserved powers." *Id.*

The Court's opinion is worded in a permissive manner: "cannot be said to automatically fall within reserved powers" and "not *necessarily*" implicating reserved

powers. This is because the term "financial" is not itself sufficient to define a debt contract. As the Court notes:

> Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. ***Notwithstanding these effects, the Court has regularly held that States are bound by their debt contracts***.

Id. at 24. (Emphasis added.) Pension contracts are debt contracts that must be paid.

B. THE SOVEREIGN ACTS DOCTRINE BALANCES THE STATE'S REGULATORY AND BUSINESS FUNCTIONS

The U.S. Supreme Court carefully explained the sovereign acts doctrine in *U.S. v. Winstar Corp.,* 518 U.S. 839, 895 (1986). "The sovereign acts doctrine thus balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." To be clear, the sovereign powers are those necessary "to protect the public health, or public morals." *New Orleans Gas-Light Co. v. Louisiana Light Producing and Manufacturing Co*., 115 U.S. 650, 669 (1885). For that reason, the Supreme Court in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 439 (1933) noted that "This principle precludes a construction [of the police powers doctrine] that would permit a state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of a means to enforce them." *Id*. And yet, that is precisely what Public Act 98-599 does.

C. THE GOVERNMENT ACTING AS SOVEREIGN CAN EXERCISE THE POLICE POWER; THE GOVERNMENT ACTING AS CONTRACTOR CANNOT.

The Pension Clause elevates pensions to contractual status. But pension contracts are debt contracts. In other words, in making a pension contract, the State itself is

engaging in commerce as opposed to regulating the activities of others. Put another way, it is acting as a party contractor rather than as a sovereign lawmaker. In diminishing those contracts through the passage of Public Act 98-599, the State is acting to limit its own commercial liability. This is very different from an act of sovereign regulation.

Examples of the government acting as sovereign include such things as a law prohibiting the manufacture and sale of alcoholic beverages — *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1877), and a constitutional provision prohibiting lotteries — *Stone v. Mississippi*, 101 U.S. 814 (1880). Other cases upon which the State relies to argue that it cannot wave its police power are similarly acts of sovereign regulation. These include *Atlantic Coast Line R.R. v. Goldsboro*, 232 U.S. 548 (1914) (limiting the speed and hours of trains moving through a populated area), *Pierce Oil Corp. v. Hope*, 248 U.S. 498 (1919) (regulating where petroleum could be stored), and *Butchers' Union v. Crescent City*, 111 U.S. 746 (1884) (regulating location of slaughter houses).

The Illinois cases cited by the State are similar. In *Hite v. Cincinnati, Indpls. & W.R.R. Co.*, 284 Ill. 297 (1918), this Court upheld a law prohibiting public utilities from charging different rates to different customers, finding "that the health, welfare and prosperity of the citizens require[d] … utility services at prices which … are equitable to all citizens."[7] In that case, the Plaintiffs complained that this law violated their contract with the railway for free passage. But the act at issue was clearly aimed at protecting the society's morals — equality. *Hite* in turn quoted from *Manigault v. Springs*, 199 U.S. 473 (1880) noting: "Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a

[7] 220 ILCS 5/1-102 (Public Utilities Act)

lottery all of which are subject to impairment by a change of policy on the part of the state" *Hite,* 284 Ill. at 905, citing *Manigault,* 199 U.S. at 480. And clearly any case in which the State is affecting a contract to which it is not a party is by its very nature a regulatory act. See *e.g. City of Chicago v. Chicago and Northwestern Railway Co,* 4 Ill. 2d 307 (1954). (commerce commission requires railroad to maintain viaducts despite an agreement had between the railroad and the City that the City was responsible.)

On the other hand, if a government "comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same rules that govern individuals there." *Cooke v. United States*, 91 U.S. 389, 398 (1875). There is therefore a dichotomy between the government as a contractor and the government as a sovereign. The latter may exercise a sovereign power, the former cannot. *Yankee Atomic Electric Co. v. U.S.*, 112 F.3d 1569, 1575 (Fed. Cir. 1997) ("The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.")

For this reason, the Federal Court of Claims in *Cuyahoga Metropolitan Housing Authority v. U.S.*, 57 Fed. Cl. 751 (2003) concluded that the sovereign power does not apply "when the Congress … targets the government's contractual obligations in an effort to obtain a better deal." *Id.* at 774. But that is precisely what P.A. 98-599 does. Section 1 of P.A. 98-599 specifically notes first that "Illinois has both atypically large debts and structural budgetary imbalances that will, unless addressed by the General Assembly, lead to even greater and rapidly growing debts and deficits." It claims that the State has

already taken action to address its fiscal troubles "including, but not limited to, increasing the income tax and reducing pension benefits for future employees." It then complains that the retirement systems have unfunded liability of approximately $100 billion. P.A. 98-599, Section 1. And the State does not dispute this point. Its entire Statement of Facts is a complaint about its finances, — it barely takes the time to mention that the Act reduces "COLA's". The first two sentences of that Statement of Facts complain about the "Great Recession" and financial crisis and lost revenues. (pg. 5) It goes on to complain that it cut spending from other important programs — as if to say that it must cut pensions to avoid further cuts to those programs. These include Medicaid, Divisions of Alcohol and Substance Abuse, Mental Health, and the Dept. of Public Health. (pg. 9) These are all important programs, but the necessity of those programs does not mean that the State can violate the Pension Clause.

Clearly the State is specifically targeting pension contracts to address its own fiscal concerns. That is Government-as-contractor, not Government-as-sovereign. The State cannot apply sovereign powers (police power) to pension contracts made as a contractor.

III. PUBLIC ACT 98-599 IS NOT SEVERABLE

Public Act 98-599 contains a severability clause which ties the automatic annual increases (AAI's) to each other and purports to make them severable from the rest of the Act. The State argues that this is really an "inseverability clause" in that, what it really does is to require all sections relating to the AAI's to fail if any one of them does. Respectfully, the State is splitting hairs. The effect of the State's "inseverability clause" is merely to create a legislatively proclaimed division between the AAI provisions and

the remainder of the statute. But both sides contain diminishments in violation of the Pension Clause: on one side are the capping and skipping of AAI's, and on the other side are such things as changes to the formula for calculating pensions and increases to the retirement age. That aside, the fact remains that the authority to sever unconstitutional portions of the Act is "inherent in the judiciary," *Cincinnati Ins. Co. v. Chapman*, 181 Ill. 2d 65, 80 (1998), not the legislature.

The State argues that a court should sever the unconstitutional portions of the statute and leave the remainder intact unless "(2) 'the valid and invalid portions of the statute are essentially and inseparably connected in substance' and (2) 'the legislature would [not] have enacted the valid portions without the invalid portions'" (St. Br. 47 emphasis added, citing *People v. Alexander*, 204 Ill. 2d 472, 484 (2003). The State then notes that the Plaintiffs have not "argued that the valid and purportedly invalid parts of the Act are 'inseparably connected in substance.'" *Id*. The State therefore concludes that this Court must sever the invalid portions of the Act.

The State's entire premise however, is based upon a twisting of the language of *Alexander*. By inter-mixing its own language with that of the *Alexander* opinion, the State has made these inquiries conjunctive — that is to say that Plaintiffs must prove both parts for the Court to strike the entire statute rather than sever it. *Alexander*, however, stands for the opposite proposition — the tests are disjunctive. What the Court actually said in *Alexander* was:

> Severability involves a two-part inquiry. First, we must determine "whether the valid and invalid portions of the statute are essentially and inseparably connected in substance." Second, we must determine whether the legislature would have enacted the valid portions without the invalid portions. This inquiry is a question of legislative intent.

> [The invalid section] is not inseparably connected to the child pornography statute because the statute existed for 16 years without the definition of "child." Further, the General Assembly would have enacted the child pornography statute without [the invalid section] as it did just that in 1984. We conclude that the General Assembly would prefer to leave the remaining portions of the statute in effect. Accordingly, we strike only [the invalid section].

Alexander, 204 Ill. 2d at 484.

If the Court were to determine that the valid and invalid portions of the statute are "inseparably connected in substance", it makes no sense to say that the inseparable portions could be severed. They are by definition inseparable. On the other hand, if they are separable and that alone means that a court must sever them, it would make no sense to inquire whether the legislature would have "enacted the valid portions without the invalid" ones. Moreover, it is apparent from the second paragraph quoted that the court only chose to sever them because it found both that the different sections were severable and that "Further the General Assembly would have enacted" the valid sections anyway. Indeed, the Court seeks proof of that fact by noting that the General Assembly had done so in the past. Thus, whether the different sections of the Act are inseparable in substance is irrelevant if the legislature would not have passed the law without all of them anyway.

Alexander, though coming to a different conclusion in applying the rule to its facts, is actually consistent with the Court's opinion in *Cincinnati Ins. Co. v. Chapman*, 181 Ill.2d 65 (1998). In that case, despite a severability clause, the Court determined that the entire Act needed to be stricken.

> Indeed, this court has long held that the test of severability is whether the valid and invalid provisions of the Act are " 'so mutually "connected with and dependent on each other, as

> conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently * * * ".' " *Fiorito v. Jones*, 39 Ill.2d 531, 540–41, 236 N.E.2d 698 (1968), quoting *Winter v. Barrett*, 352 Ill. 441, 475, 186 N.E. 113 (1933). See also *Bowes v. Howlett*, 24 Ill.2d 545, 550, 182 N.E.2d 191 (1962); *Grennan v. Sheldon*, 401 Ill. 351, 360–61, 82 N.E.2d 162 (1948).

Chapman, 181 Ill. 2d at 81-82.

When one considers the statements in the record of the Bill's Chief Sponsor, Senator Kwame Raoul, it is powerfully clear that the various provisions of the bill were "considerations and compensations for each other":

> Ladies and Gentlemen of the Senate, with this Conference Committee Report to the Senate Bill 1, the General Assembly can finally break the political stalemate that has held up changes to the pension systems, not only between the House and the Senate, but also between competing views within each one of the four caucuses.
>
> ***
>
> Each provision of this bill has been heavily negotiated by the conference committee members and the four Legislative Leaders. Some provisions were sought by House Democrats, some were sought by House Republicans, and some sought by the Senate Democrats. All told, the provisions in this bill are all part of **an integral bipartisan package**.

Illinois General Assembly Transcript, Illinois Senate 2d Legislative Day, December 3, 2013, 1st Special Session, 3-4 (emphasis added.)

Senator Raoul's comments that the "legislative stalemate" was finally broken by including all of these "heavily negotiated … integral bipartisan" provisions is powerfully demonstrated by the fact that the bill was passed by the thinnest of margins, garnering only the thirty votes required for passage in the Senate and passing the House by a mere two vote margin. It would seem highly unlikely that the bill would have passed had any provision been excluded, but here, the core pieces of the statute — pieces even the State

concedes are "important elements" — are unconstitutional. Put another way, "if all [parts of the bill] could not be carried into effect the legislature would not pass the residue independently" — it would have lacked the necessary votes. (See Illinois General Assembly — Bill Status for SB0001, attached as Ex. A hereto.)

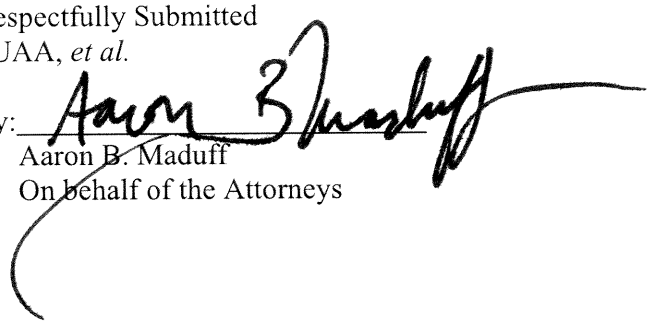
Faced with this clear statement that the Act is "an integral bipartisan package" and the narrow vote margins that prove the statement, the State complains that these indicia of what the legislature would have done is mere "political handicapping" (St. Br. at 48), and that the test for severability "is 'essentially one of statutory construction.'" *Id*.; citing *Springfield Rare Coin Galleries, Inc., v. Johnson*, 115 Ill. 2d 221, 237 (1986). But even *Springfield Rare Coin* follows its statement with the comment that it is analyzing statutory construction for the purpose of "ascertaining and giving effect to the intent of the legislature." *Springfield Rare Coin*, 115 Ill. 2d at 237. In that case, the legislature's intent was indicated by a very clear severability clause noting that the invalidity of any provision "shall not affect the other provisions." *Id*.

In this case, Senator Raoul's comments and the vote margins are the best indicia of the legislature's intent and they speak volumes. This statute is inseverable and should be stricken in its entirety.

IV. CONCLUSION

For the foregoing reasons, P.A. 98-599 is unconstitutional. The circuit court's judgment should be affirmed and the Act stricken in its entirety.

Respectfully Submitted
SUAA, *et al.*

By: 
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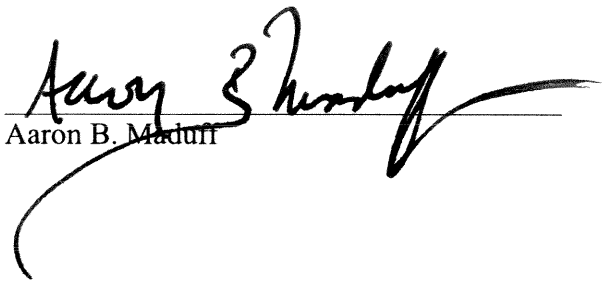
Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 34 pages.



Aaron B. Maduff

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

IN RE: PENSION REFORM LITIGATION,	)	
	)	
DORIS, HEATON, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	No. 118585
v.	)	
	)	
PAT QUINN, etc., et al.,	)	
	)	
Defendants-Appellants.	)	

The undersigned, being first duly sworn, deposes and states that he filed the original and 19 copies of the Brief of Plaintiffs-Appellees with the above court and that he also served 3 copies in the above entitled cause by depositing the same in the United States Mail at Chicago, Illinois on the 17th day of February, 2015 properly stamped and addressed to:

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Subscribed and sworn to before me
this 17th day of February, 2015.

Rose E. Olejniczak — Dennis Polk

Notary Public

OFFICIAL SEAL
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NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:10/09/18