No. 118585

IN THE
SUPREME COURT OF ILLINOIS

IN RE: PENSION REFORM LITIGATION (Doris Heaton, et al., *Plaintiffs-Appellees*, PAT QUINN, Governor of Illinois, et al., *Defendants-Appellants.*)	On Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois No. 2014 MR 1 The Honorable JOHN W. BELZ Judge Presiding

MOTION OF CONSTITUTIONAL LAW PROFESSORS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Tom Ginsburg, Deputy Dean of the University of Chicago Law School, Tonja Jacobi, Professor of Law at Northwestern University School of Law, Zoë Robinson, Associate Professor of Law at the DePaul College of Law, Mark D. Rosen, Professor of Law at the Chicago-Kent College of Law, and Christopher W. Schmidt, Associate Professor of Law at the Chicago-Kent College of Law, by and through their attorney, Latham & Watkins LLP, respectfully request that this Court grant them leave to appear and file a brief as *Amici Curiae* in support of Defendants in the above-captioned case, pursuant to Illinois Supreme Court Rule 345. A copy of the brief accompanies this motion. As grounds for this motion, *Amici* state as follows:

1. *Tom Ginsburg* is Deputy Dean, Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, and Professor of Political Science at the University of Chicago Law School. Dean Ginsburg's scholarship focuses on comparative and international law.
2. *Tonja Jacobi* is the William G. and Virginia K. Karnes Research Professor of Law at Northwestern University School of Law. Professor Jacobi's scholarship focuses on constitutional law, judicial politics, legislation, and game theory.
3. *Zoë Robinson* is an associate constitutional law professor at the DePaul College of Law. Her scholarship includes constitutional topics, such as the effect of legislation on fundamental constitutional rights.
4. *Mark D. Rosen* is Professor of Law at the Chicago-Kent College of Law. Professor Rosen has written and spoken extensively about the constitutional doctrinal issues this Court will consider in Defendants' appeal. On January 7, 2013, Professor Rosen testified before the Personnel and Pensions Committee of the Illinois House of Representatives on "The Constitutionality of Proposed Pension Reform." On March 13, 2013, he testified before the Illinois Senate Executive Committee on "Pension Reform: Constitutional Considerations."
5. *Christopher W. Schmidt* is Associate Professor of Law and Director of the Institute on the Supreme Court of the United States at the

Chicago-Kent College of Law. Professor Schmidt's scholarship focuses on constitutional law, legal history, sports law, and comparative constitutional law.

6. *Amici* appreciate that it is a privilege and not a right to appear and address the Court as *Amici Curiae*. The appeal before the Court involves a key issue of whether a constitutional provision should be interpreted as absolute (*i.e.* subject to no exceptions). This issue may potentially impact the interpretation of other constitutional provisions, including other Illinois constitutional rights.

7. As constitutional law professors, *Amici* respectfully submit that their expertise and views on constitutional absolutism will assist the Court in considering the issues in this case. As demonstrated from the attached *Amici Curiae* brief, *Amici* provide the Court with an important analysis of federal and state constitutional jurisprudence, as well as the treatment of constitutional "positive rights" in Illinois, the United States, and foreign jurisdictions. *Amici*'s perspectives and analyses provide the Court with a framework for considering whether the benefits of the Illinois Pension Clause are absolutely guaranteed.

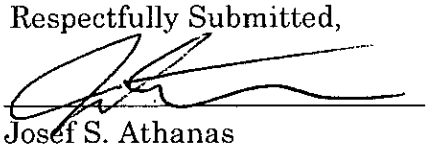
8. *Amici* request leave only to address the issue of whether constitutional rights should be given absolute effect. *Amici* will not address any other issues raised by the parties.

9. *Amici* seek to file the attached *Amici Curiae* brief in support of the Defendants within the time provided, pursuant to Illinois Supreme Court Rule 345.

For the foregoing reasons, the motion for leave to file the accompanying brief as *Amici Curiae* should be granted.

Dated: January 12, 2015

Respectfully Submitted,



Josef S. Athanas
Counsel of Record
Matthew L. Warren
Ha-Thanh Nguyen
Emily Goebel
LATHAM & WATKINS LLP
330 North Wabash Ave.
Suite 2800
Chicago, IL 60611
(312) 876-7700
(312) 993- 9767 (fax)
josef.athanas@lw.com

Counsel for *Amici Curiae*

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

IN RE: PENSION REFORM LITIGATION, Doris Heaton, et al., *Plaintiffs-Appellees,*	)	
vs.	)	No. 118585
PAT QUINN, Governor of Illinois, et al., *Defendants-Appellants.*	)	

The undersigned, being first duly sworn, deposes and states that he filed the original and three copies of the Motion of Constitutional Law Professors for Leave to File Brief as Amici Curiae in Support of Defendants-Appellant with the above court and that he also served one copy of the motion in the above entitled cause by depositing same in the United States Mail at Chicago, Illinois on the 12th day of January, 2015 properly stamped and addressed to:

SEE ATTACHED SERVICE LIST

Subscribed and sworn to before me
this 12th day of January, 2015.

Notary Public

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

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CLERK

SERVICE LIST

Michael T. Reagan
LAW OFFICES OF MICHAEL T. REAGAN
633 La Salle Street, Suite 409
Ottawa, IL 61350-2924

John D. Carr
4561 Central Avenue
Western Springs, IL 60558

Donald M. Craven
Esther J. Seitz
DONALD M. CRAVEN, P.C.
1005 North Seventh Street
Springfield, IL 62702

Michael D. Freeborn
John T. Shapiro
Jill C. Anderson
Terrence J. Sheahan
Gary L. Wills
FREEBORN & PETERS LLP
311 S. Wacker Drive, Suite 3000
Chicago, IL 60606

John E. Stevens
FREEBORN & PETERS LLP
217 East Monroe Street, Suite 202
Springfield, IL 62701

Gino L. DiVito
John M. Fitzgerald
Brian C. Haussmann
John J. Barber
Uri B. Abt
TABET DiVITO & ROTHSTEIN LLC
209 South LaSalle Street, 7th Floor
Chicago, IL 60604

Aaron B. Maduff
Michael L. Maduff
Walker R. Lawrence
MADUFF & MADUFF, LLC
205 N. Michigan Ave., Suite 2050
Chicago, IL 60601

Carolyn E. Shapiro
Brent D. Stratton
Richard S. Huszagh
R. Douglas Rees
Gary S. Caplan
Joshua D. Ratz
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

John M. Myers
Barbara K. Myers
RABIN & MYERS, P.C.
1300 South 8th Street
Springfield, IL 62703

No. 118585

IN THE
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ORDER

This cause coming to be heard on the Motion of Constitutional Law Professors For Leave to File Brief As *Amici Curiae* In Support of Defendants-Appellants,

IT IS ORDERED that the motion is ALLOWED / DENIED.

Order entered by the Court.

Date: _____

_____

No. 118585

In the

Supreme Court of Illinois

IN RE: PENSION REFORM LITIGATION (Doris Heaton, et al.),

Plaintiffs-Appellees,

v.

PAT QUINN, Governor of Illinois, et al.,

Defendants-Appellants.

Appeal from the Circuit Court of Seventh Judicial Circuit,
Sangamon County, Illinois, No. 2014 MR 1.
The Honorable **John W. Belz**, Judge Presiding.

AMICI CURIAE BRIEF OF CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS

JOSEF S. ATHANAS
Counsel of Record
MATTHEW L. WARREN
HA-THANH NGUYEN
EMILY GOEBEL
LATHAM & WATKINS LLP
330 North Wabash Avenue
Suite 2800
Chicago, Illinois 60611
Telephone: (312) 876-7700
Facsimile: (312) 993-9767

Attorneys for Amici Curiae

COUNSEL PRESS · (866) 703-9373 PRINTED ON RECYCLED PAPER

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AMICI CURIAE BRIEF OF CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS

POINTS AND AUTHORITIES

Pages

INTEREST OF *AMICI CURIAE*

Amici Curiae are Illinois law professors and nationally recognized experts in the area of constitutional law. *Amici* have focused their scholarship on examining constitutional doctrines, including the issue of whether or not constitutional rights are absolute — an important question raised by Defendants' appeal with respect to the Illinois Pension Clause.

Amici respectfully submit this Brief to assist the Court by addressing the issue of whether constitutional provisions, such as the Illinois Pension Clause, should be construed as absolute. *Amici* assert in this Brief that any view of constitutional rights as absolute is wholly inconsistent with the overwhelming body of federal and Illinois constitutional jurisprudence, which recognizes exceptions to such rights.

Individual *Amici* are as follows:

- *Tom Ginsburg* is Deputy Dean, Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, and Professor of Political Science at the University of Chicago Law School. Dean Ginsburg serves on the Tunisian Presidential Committee for International Constitutional Court. He has a BA, JD, and PhD from University of California at Berkeley. Dean Ginsburg's scholarship focuses on comparative and international law. His books include *Judicial Review in New Democracies* (2003) and *The Endurance of National Constitutions* (2009), which both won awards from the American Political Science Association.

- *Tonja Jacobi* is the William G. and Virginia K. Karnes Research Professor of Law at Northwestern University School of Law. Professor Jacobi is a graduate of Stanford University, the University of California, Berkeley, and the Australian National University. Her scholarship focuses on constitutional law, judicial politics, legislation, and game theory. *See, e.g.*, Tonja Jacobi, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NW. U. L. REV. 259 (2006); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2011).
- *Zoë Robinson* is Associate Professor of Law at the DePaul College of Law and a graduate of the University of Chicago Law School, the Australian National University, and Griffith University. Professor Robinson served as an adjunct lecturer at the Australian National University. Her scholarship includes constitutional topics, such as the effect of legislation on fundamental constitutional rights. *See, e.g.*, Zoë Robinson, *The Contraception Mandate and the Forgotten Constitutional Question*, 2014 WIS. L. REV. 749 (2014); Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133 (2011).
- *Mark D. Rosen* is Professor of Law at the Chicago-Kent College of Law and a graduate of Harvard Law School and Yale College. Professor Rosen has served as a Bigelow Fellow and Lecturer-in-Law at the

University of Chicago Law School and as a Visiting Professor at the University of Minnesota Law School. He has written and spoken extensively about the constitutional doctrinal issues this Court will consider in Defendants' appeal. *See, e.g.*, Mark D. Rosen, McCutcheon, *Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. xx (forthcoming 2015); Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691 (2005); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005). On January 7, 2013, Professor Rosen testified before the Personnel and Pensions Committee of the Illinois House of Representatives on "The Constitutionality of Proposed Pension Reform." On March 13, 2013, he testified before the Illinois Senate Executive Committee on "Pension Reform: Constitutional Considerations."

- *Christopher W. Schmidt* is Associate Professor of Law and Director of the Institute on the Supreme Court of the United States at the Chicago-Kent College of Law. Professor Schmidt is also a faculty fellow at the American Bar Foundation. He is a graduate of Harvard Law School and Dartmouth College. Professor Schmidt's scholarship focuses on constitutional law, legal history, sports law, and comparative constitutional law. *See, e.g.*, Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons From the Tea Party*, 88 DENV. U. L. REV. 523 (2011).

SUMMARY OF ARGUMENT

The holding of the lower court, that the Illinois Constitution absolutely guarantees the pension benefits of every Illinois public pensioner — with "no exception, restriction or limitation," *In re Pension Litig.*, No. 2014 MR 1, slip op. ¶ 3 (Ill. 7th Jud. Cir. Ct., Sangamon Cty., Nov. 21, 2014) — is contrary to fundamental constitutional legal principles. In particular, the holding is contrary to the long established constitutional legal principle that virtually no constitutional right is absolute. Constitutional rights often conflict with competing constitutional commitments and vital sub-constitutional interests. In such instances, constitutional rights do not simply trump these competing interests in every circumstance, but instead may be regulated if the relevant level of scrutiny is met.[1]

Examples of limitations on constitutional rights abound. As Justice Oliver Wendell Holmes noted in *Schenck v. United States*, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. 47, 52 (1919). Limitations to constitutional rights provided by the First, Second, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution demonstrate that even the most fundamental of constitutional rights are subject to exception.

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[1] *Amici* should not be understood to be specifying the particular standard of scrutiny that ought to be applied to legislation that implicates the Illinois Pension Clause.

The conclusion that the Illinois Pension Clause should not be interpreted as absolute is bolstered by the fact that it can plausibly be conceptualized not only as a negative constitutional right, but also as a positive right. "Positive" rights require the state to provide benefits, as opposed to restrict the state from taking action. Although rare in the United States Constitution, positive rights (such as rights to housing or education) are not uncommon in the state constitutions and the constitutions of other countries. And both foreign and state courts have refused to interpret positive rights as absolute, due to problems with enforcement, resource allocation, and oversight.

The lower court's view of the Illinois Pension Clause as absolute is inconsistent with federal and state constitutional jurisprudence. Like other constitutional rights, both positive and negative, the Illinois Pension Clause should not be considered absolute. For these reasons, *Amici Curiae* respectfully submit that the judgment of the court below should be reversed and remanded.

ARGUMENT

I. CONSTITUTIONAL RIGHTS ARE NOT ABSOLUTE

Nearly all constitutional rights are non-absolute. As detailed below, even the most fundamental of constitutional rights are subject to exception. Such exceptions exist because constitutional rights may conflict with competing constitutional rights or important sub-constitutional public interests. Thus, federal and state courts construe constitutional rights to

allow restrictions, if such restrictions survive the relevant level of scrutiny. *See generally Maryland v. Craig*, 497 U.S. 836 (1990) (holding Maryland's interest in protecting child witnesses from trauma of testifying in child abuse case deemed sufficiently important to outweigh defendant's constitutional right to confrontation); *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983) (impairment of private contracts is constitutional if there is "a significant and legitimate public purpose"); *In re R.C.*, 195 Ill. 2d 291, 303 (2001) ("[I]n cases where the right infringed upon is among those considered a 'fundamental' constitutional right, courts subject the statute to 'strict' scrutiny.").

Importantly, construing constitutional rights as non-absolute does not render such rights meaningless. Rather, the legislature is significantly constrained in limiting constitutional rights. For example, the U.S. Supreme Court has held that a state's authority to pass legislation impairing contracts is limited by the Federal Contract Clause, but that such an "impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977) (expressing that, while less deference may be granted to a state that modifies a public contract, a state may modify contracts under certain circumstances).

As set forth below, examples from the United States Constitution, the Illinois Constitution and foreign constitutions demonstrate that constitutional rights are typically considered non-absolute.

A. Not Even First Amendment Rights Are Absolute

The First Amendment plainly states that "Congress ***shall make no law*** respecting an establishment of religion, or prohibiting the free exercise thereof; or ***abridging*** the freedom of speech, or of the press . . . ." U.S. CONST. amend. I (emphasis added). However, as the U.S. Supreme Court has recognized, "[n]o fundamental right — not even the First Amendment — is absolute." *McDonald v. City of Chi.*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring). Indeed, the U.S. Supreme Court has long recognized that governments may enact reasonable restrictions on free speech to protect compelling state interests. *See United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("[I]t is well established that the Government may restrict speech without affronting the First Amendment.").

For example, in *McCutcheon v. FEC*, the U.S. Supreme Court recognized that "[t]he right to participate in democracy through political contributions is protected by the First Amendment, but that right is ***not absolute***." 134 S.Ct. 1434, 1441 (2014) (emphasis added) (holding statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violated the First Amendment); *see also Burson v. Freeman*, 504 U.S. 191 (1992) (upholding state law prohibiting political advocacy near polling stations on election day). The Court has also upheld state bans on cross burning as permissible under the First Amendment, stating that "[t]he protections afforded by the First Amendment, however, are ***not absolute***, and we have long recognized that

the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (emphasis added).

Other rights guaranteed by the First Amendment, such as freedom of religion and expression, are similarly not absolute, but are subject to various exceptions. *See, e.g., McDaniel v. Paty*, 435 U.S. 618, 631 n.2 (1978) ("This ***does not mean*** that the right to participate in religious exercises ***is absolute***, or that the State may never prohibit or regulate religious practices." (emphasis added)); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("[T]he freedom of expressive association, like many freedoms, is [also] ***not absolute*** . . . . [It can] be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." (emphasis added) (citations and internal quotation marks omitted)); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests . . . .").

B. The Second Amendment Right to Bear Arms is Not Absolute

Similar to the First Amendment's absolute language, the Second Amendment guarantees "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms ***shall***

not be infringed." U.S. CONST. amend. II (emphasis added). Yet, the U.S. Supreme Court has concluded that the right to bear arms may be regulated, explaining that "[l]ike most rights, the right secured by the Second Amendment is ***not unlimited.***" *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (emphasis added); *see also id.* at 683 (Breyer, J., dissenting) ("The right protected by the Second Amendment is ***not absolute***, but instead is subject to government regulation." (emphasis added)).

C. The Privileges and Immunities Clause Is Not Absolute

The Privileges and Immunities Clause of the Fourteenth Amendment also appears to be absolute: "***No State shall*** make or enforce any law which shall ***abridge*** the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1, cl. 2 (emphasis added). Yet, the U.S. Supreme Court has also recognized limitations to the Privileges and Immunities Clause because, "like many other constitutional provisions, the privileges and immunities clause is ***not an absolute***." *Lunding v. N.Y. Tax App. Trib.*, 522 U.S. 287, 297 (1998) (emphasis added) (citations and internal quotation marks omitted); *see also Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 284 (1985) (stating that the privileges and immunities clause "does not preclude discrimination against nonresidents where . . . there is a substantial reason for the difference in treatment").

D. The U.S. Constitution's Contract Clause is Not Absolute

The Contract Clause of the U.S. Constitution also appears on its face to be absolute. It provides that "No State shall . . . pass ***any*** . . . ***Law***

impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1 (emphasis added). However, "[a]lthough the language of the Contract Clause is facially absolute," *Energy Reserve Grp.*, 459 U.S. at 410, the U.S. Supreme Court has repeatedly rejected "literalism in the construction of the contract clause." *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934). Indeed, the U.S. Supreme Court has upheld laws impairing contractual obligations where there is a state interest that can justify such impairment under the relevant standard of scrutiny.[2]

For example, during the Great Depression, Minnesota granted homeowners relief by enacting a law that extended the period of redemption and thereby postponed foreclosures. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934). Insofar as it altered the terms of the mortgagees' contracts, the law was challenged as a violation of the Federal Contract Clause. *Id.* at 415-16. Despite the Federal Contract Clause's absolute language, the U.S. Supreme Court upheld the law because it found that protecting homeowners was a sufficiently important public interest. As the Court explained, "the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society." *Id.* at 445. Similarly, because a state's affirmative constitutional duty to "safeguard the vital interests of its people" can conflict with contractual

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[2] To be clear, nothing in this Brief addresses, or should be interpreted as addressing, whether or not the Illinois Pension Clause benefits have actually been diminished or impaired under the facts of this case.

obligations, the U.S. Supreme Court has held that contract rights "must be accommodated to" these other state constitutional obligations. *Energy Reserve Grp.*, 459 U.S. at 410 (citations and internal quotation marks omitted).

Much like the Federal Contract Clause, the Illinois Contract Clause also appears absolute on its face. *Compare* ILL. CONST. art. I, § 16 ("No . . . law ***impairing*** the obligation of contracts . . . shall be passed." (emphasis added)), *with* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law ***impairing*** the Obligation of Contracts . . . ." (emphasis added)). However, like the U.S. Supreme Court's Federal Contract Clause jurisprudence, this Court has rejected the view that the Illinois Contract Clause is absolute. *See, e.g., George D. Hardin, Inc. v. Vill. of Mount Prospect*, 99 Ill. 2d 96, 103 (1983) ("Both United States Supreme Court decisions and decisions of this court have held that the contract clause does not immunize contractual obligations from every conceivable kind of impairment or from the effect of a reasonable exercise by the States of their police power.").

E. The Illinois Pension Clause Should Not Be Considered Absolute

As a general matter, this Court has consistently construed constitutional rights under the federal and Illinois constitutions as non-absolute. *See, e.g., Illinois ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 296 (2003) ("It is well settled that every citizen has the right to pursue a trade, occupation, business or profession . . . . However, this ***constitutional right***

is not absolute; it is limited by the right of the State to regulate such freedom of action, through the proper exercise of the police power, where the public health, safety or welfare so requires." (emphasis added) (citations and internal quotation marks omitted)); *In re R.C.*, 195 Ill. 2d at 303 (holding that a state may infringe on a fundamental constitutional right if the statute is "necessary to a compelling state interest, and . . . narrowly tailored." (citations and internal quotation marks omitted)).

Other Illinois courts have similarly construed constitutional rights as non-absolute. *See, e.g., Druck v. Ill. State Bd. of Elections*, 387 Ill. App. 3d 144, 151 (2008) ("We are mindful of the fact that the right of qualified voters to vote and the right of citizens to associate for political purposes are considered among our more fundamental constitutionally protected rights; however, ***those rights are not absolute***." (emphasis added)).

Like the other constitutional provisions discussed above, the Illinois Pension Clause is best interpreted as non-absolute. Indeed, this Court already has done so: in *Felt v. Board of Trustees of the Judges Retirement System*, this Court struck down an amendment to the Illinois Pension Code not simply because it impaired judges' retirement benefits — which would have been sufficient if the Illinois Contract and Pension Clauses' protections were literally absolute — but because the amendment was "not defensible as a reasonable exercise of the State's police powers." 107 Ill. 2d 158, 167 (1985). This Court's approach in *Felt* was wise: there is no reason to treat the

Illinois Pension Clause differently than other constitutional rights. This is particularly true because the Illinois Pension Clause is conceptually and linguistically similar to the Federal and Illinois Contract Clauses, which have been repeatedly held to be non-absolute. *See* discussion *supra* Part I.D. *Compare* ILL. CONST. art. XIII, § 5 ("Membership in any pension ... shall be an enforceable contractual relationship, the benefits of which shall not be ***diminished or impaired.***" (emphasis added)), *with* ILL. CONST. art. I, § 16 ("No . . . law ***impairing*** the obligation of contracts . . . shall be passed." (emphasis added)), *and* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law ***impairing*** the Obligation of Contracts . . . ." (emphasis added)).

In short, similar to other constitutional provisions, the Illinois Pension Clause should not be treated as absolute, but instead should be balanced against competing constitutional and vital sub-constitutional interests. For example, the Illinois Constitution provides that "[t]he State shall provide for an efficient system of high quality public educational institutions and services" which "shall be free" and the "State has the primary responsibility for financing the system of public education." ILL. CONST. art. X, § 1. If Illinois' obligation under the Illinois Pension Clause interferes with its ability to finance a free public education, and the Illinois Pension Clause is considered to be absolute, Illinois may someday be upholding its pension obligations under one constitutional provision at the cost of limiting other constitutional rights. The lower court's ruling — that the Illinois Pension

Clause is absolute — effectively makes the clause immune to proper constitutional interpretation and ordinary constitutional standards of scrutiny.

II. POSITIVE RIGHTS ARE NON-ABSOLUTE, PROVIDING AN ADDITIONAL REASON TO INTERPRET THE PENSION CLAUSE AS NON-ABSOLUTE

The constitutional jurisprudence discussed above firmly establishes that the Illinois Pension Clause should be interpreted as non-absolute. Such an interpretation is bolstered even further by the fact that the Illinois Pension Clause can plausibly be categorized not only as a negative right, but also as a positive right. Constitutional provisions that impose obligations on the government to provide a benefit, rather than refrain from certain actions, are often referred to as "positive rights." *See* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 194 (2012).

The Illinois Pension Clause may properly be categorized as a positive right, insofar as it requires Illinois to pay each pensioner a specific payment each month for life, with annual percentage increases, after the pensioner reaches a certain age. The lower court's holding effectively grants current Illinois pensioners a right to receive ever-increasing pension payments from the state, without exception and for all eternity. Yet, to the extent the Illinois Pension Clause functions as a positive right, it is even more important that it not be construed as absolute, given the problems of enforcement, resource allocation, and oversight.

This Court has previously considered challenges to legislation affecting

certain positive rights under the Illinois Constitution, and held that such rights are "almost exclusively within the province of the legislative branch." *Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 24 (1996) (discussing the court's "exceedingly limited role" in matters relating to Illinois's constitutional obligation to provide a free public education). Other state courts interpreting positive rights, such as a right to a public school education, have similarly refused to interpret such rights as absolute. *See, e.g., Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 804 (Alaska, 1975) ("The nonjudicial nature of this problem is emphasized by appellants' concession that the right to local education is ***not absolute*** . . . ." (emphasis added)).

While positive constitutional rights are unusual in the United States Constitution, many other countries guarantee extensive positive rights in their constitutions. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 n.7 (1986) (listing various international constitutions that explicitly recognize positive rights, specifically focusing on Germany); S. AFR. CONST., 1996 ("Everyone has the right to have access to adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."); CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] arts. 48 (social security), 49 (health), 51 (housing), 67 (education). Positive constitutional rights create substantial challenges in

terms of enforcement, resource allocation, and oversight that are difficult for the judiciary to address and hence are generally the purview of the legislature.[3] These challenges also have led commentators to conclude that positive rights should not be interpreted as absolute. *See, e.g.*, Olivier, *supra* note 3, at 130 ("Fundamental rights, including the constitutional rights relating to social security, are not absolute, but may be subject to limitations of a reasonable nature.").

One manner in which positive rights have been limited abroad is through an "available resource" qualifier.[4] For example, in *Soobramoney v.*

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[3] As many courts and commentators have long recognized, "positive rights are notoriously difficult for courts to enforce because courts lack the power to spend money." Richard E. Myers, *Adversarial Counsel in an Inquisitorial System*, 37 N.C. J. INT'L L. & COM. REG. 411, 431 (2011); *see also* Landau, *supra* at 194 ("Enforcement of these rights might require . . . that the judge order the state to provide people with goods or services, which would raise the specter of the courts running everything — raising taxes and deciding how the money should be spent. Judges lack the democratic legitimacy to carry out this kind of policymaking, and they lack the capacity to do so.") (citations and internal quotation marks omitted); Marius Olivier, *Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences*, 33 VICTORIA U. OF WELLINGTON L. REV. 117, 132-33 (2002) ("Due to the peculiar nature of . . . socio-economic rights it is said that they cannot be enforced by the courts without intruding upon the terrain of the legislature and/or the executive branch of government. . . . How far will the Court go? It may require the state to review programmes and policies, but it is doubtful whether it will be prepared to order a specific distribution of financial and other sources."). Given the United States' system of separated powers, the enforcement problems that arise if positive rights are interpreted as absolute are deeply troubling.

[4] In South Africa, even when positive constitutional rights are not expressly subject to an "available resources" qualifier, courts have refused to interpret them as absolute. *See, e.g.*, Olivier, *supra* note 3, at 145.

Minister of Health (Kwazulu-Natal), the South African Constitutional Court held that the positive constitutional right to health care services did not guarantee a chronically ill man the right to dialysis. 1997 (12) BCLR 1696 (S. Afr.). In so holding, the court focused on the limited resources of the state and the legislature's right to determine the distribution of limited resources in order to fulfill its constitutional obligations. *Id.* at para. 11 ("[T]he obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that ***the corresponding rights themselves are limited by reason of lack of resources.***" (emphasis added)).[5] The court held that "there is no unqualified obligation to meet existing needs. Limited resources may, therefore, justify giving priority to the larger needs of society, rather than the specific needs of particular individuals." Olivier, *supra* note 3, at 142-43; *see also Soobramoney*, (12) BCLR at paras. 11, 31.

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5 *Soobramoney*'s "available resource" qualification to positive rights was cited with approval in *Government of the Republic of South Africa v. Grootboom*: "[T]he obligation to take the requisite measures . . . does not require the state to do more than its available resources permit." 2000 (11) BCLR 1169 (CC) at para. 46 (S. Afr.) (holding that the positive constitutional right to housing had been violated by the government's failure to develop a housing plan for the country's most indigent population and ordering specific reforms and monitoring of the state's compliance efforts).

In short, the reality of limited resources means that positive constitutional rights cannot be absolute. To the extent the Illinois Pension Clause can properly be characterized as a positive right, there is yet an additional powerful reason for interpreting it as non-absolute.

CONCLUSION

The overwhelming body of constitutional law counsels in favor of a construction of the Illinois Pension Clause as non-absolute. Like other constitutional rights, both positive and negative, the Illinois Pension Clause should be considered non-absolute and subject to regulation by the Illinois legislature, so long as the interests of the State are sufficient to meet the relevant standard of scrutiny. For the reasons set forth above, *Amici Curiae* respectfully request that this Court reverse and remand the lower court's decision.

Respectfully submitted,

Josef S. Athanas
Counsel of Record
Matthew L. Warren
Ha-Thanh Nguyen
Emily Goebel
LATHAM & WATKINS LLP
330 North Wabash Ave.
Suite 2800
Chicago, IL 60611
(312) 876-7700
(312) 993- 9767 (fax)
josef.athanas@lw.com

Counsel for *Amici Curiae*

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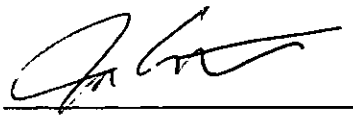
CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rules 345, 341(a) and 341(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, and the certificate of service, is 18 pages.



Josef S. Athanas
LATHAM & WATKINS LLP
330 North Wabash Ave.
Suite 2800
Chicago, IL 60611
(312) 876-7700
(312) 993- 9767 (fax)
josef.athanas@lw.com