

Case No. 118585

In The Supreme Court of Illinois

IN RE:)	
)	
PENSION REFORM LITIGATION)	Direct Appeal From:
(Doris Heaton, et al.,)	
)	Case No. 2014 MR 1 (Sangamon Cty.)
Appellees,)	Case No. 2013 CH 28406 (Cook Cty.)
)	Case No. 2014 CH 3 (Sangamon Cty.)
v.)	Case No. 2013 CH 28406 (Cook Cty.)
)	Case No. 2014 CH 48 (Sangamon Cty.)
PAT QUINN, Governor of Illinois,)	Case No. 2014 MR 207 (Champaign Cty.)
et al.)	
)	
Appellants.))	

**MOTION FOR LEAVE TO FILE
 BRIEF OF *AMICUS CURIAE*
 THE ILLINOIS POLICY INSTITUTE
 IN SUPPORT OF APPELLANTS**

Brian J. Murray, Bar # 6272767
 Meghan E. Sweeney, Bar # 6307136
 JONES DAY
 77 West Wacker Drive, Suite 3500
 Chicago, Illinois 60601
 (312) 782-3939
 bjmmurray@jonesday.com

Gregory G. Katsas
 Anthony J. Dick
 JONES DAY
 51 Louisiana Ave, NW
 Washington, DC 20001
 (202) 879-3939

January 12, 2015

Counsel for Proposed Amicus Curiae
Illinois Policy Institute ***** Electronically Filed *****

No.118585

01/12/2015

Supreme Court Clerk

Dated: January 12, 2015

Respectfully submitted,

By: /s/ Brian J. Murray

Brian J. Murray, Bar # 6272767

JONES DAY

77 West Wacker Drive, Suite 3500

Chicago, Illinois 60601

(312) 782-3939

bjmurray@jonesday.com

Counsel for Proposed Amicus

Illinois Policy Institute

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PROPOSED ORDER

This matter coming to be heard on the motion of the Illinois Policy Institute for leave to file a brief *Amicus Curiae*, notice having been given and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that the motion of the Illinois Policy Institute for leave to file a brief *Amicus Curiae* is ALLOWED / DENIED.

Justice of the Illinois Supreme Court

Date

Brian J. Murray, Bar # 6272767
JONES DAY
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Chicago, Illinois 60601

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AFFIDAVIT OF BRIAN J. MURRAY

Brian J. Murray, being first duly sworn an oath deposes and states:

1. If called to testify in this matter, I could testify to the matters set forth in this affidavit based upon my personal knowledge.
2. I am over the age of 21, a member in good standing of the Bar of this Court and one of the attorneys representing the Illinois Policy Institute with respect to its request to file an *amicus* brief in this matter.
3. I have reviewed the factual matters set forth in the accompanying Motion For Leave to File an *Amicus Curiae* Brief of the Illinois Policy Institute and the factual matters set forth in that motion are true and correct.

***** Electronically Filed *****

No.118585

01/12/2015

Supreme Court Clerk

Subscribed and SWORN to before me
this 12th day of January 2015

Maria Corasis
Notary Public



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Appellants.))	

NOTICE OF FILING MOTION TO FILE BRIEF OF *AMICUS CURIAE* AND PROPOSED ORDER

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 12, 2015, the undersigned electronically filed the Motion for Leave to File Brief of *Amicus Curiae* the Illinois Policy Institute In Support of Appellants, and the Proposed Order with the Clerk of the Supreme Court of Illinois, copies of which are herewith served upon you.

/s/ Brian J. Murray
Brian J. Murray, Bar # 6272767
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

*Counsel for Proposed Amicus
Illinois Policy Institute*

***** Electronically Filed *****

No.118585

01/12/2015

Supreme Court Clerk

SERVICE LIST

John E. Stevens
Freeborn & Peters LLP
217 East Monroe Street
Suite 202
Springfield, Illinois 62701
JStevens@freeborn.com

John M. Myers
Barbara K. Myers
Rabin & Myers, PC
1300 South 8th Street
Springfield, Illinois 62703
JMyers1951@gmail.com

Michael T. Reagan
633 LaSalle St., Suite 409
Ottawa, IL 61350
mreagan@reagan-law.com

Michael D. Freeborn
John T. Shapiro
Jill. C. Anderson
Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, Illinois 60606
Jshapiro@freeborn.com

Gino L. DiVito
John M. Fitzgerald
Brian C. Haussmann
Tabet DiVito & Rothstein LLC
209 S. LaSalle Street
7th Floor
Chicago, Illinois 60604
JFitzgerald@tdrlawfirm.com

Aaron B. Maduff
Michael L. Maduff
Walker R. Lawrence
Maduff & Maduff, LLC
205 North Michigan Avenue, Suite 2050
Chicago, Illinois 60601
abmaduff@madufflaw.com

Donald M. Craven
Esther J. Seitz
Donald M. Craven, P.C.
1005 North Seventh Street
Springfield, Illinois 62702
don@cravenlawoffice.com

Carolyn Shapiro
Solicitor General of Illinois
100 West Randolph Street
Chicago, Illinois 60601
CShapiro@atg.state.il.us

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that on this 12th day of January 2015, one copy of the foregoing Motion for Leave to File Brief of *Amicus Curiae* the Illinois Policy Institute in Support of Appellants was served on each of the below-named counsel, and one original plus one copy were served on the Illinois Supreme Court, by depositing such copies with an overnight carrier at 77 West Wacker Dr., Suite 3500, Chicago IL 60601 before 7:00 pm, in envelopes bearing sufficient postage:

/s/ Brian J. Murray
Brian J. Murray

Subscribed and SWORN to before me
this 12th day of January 2015

Maria Corasis
Notary Public



******* Electronically Filed *******

No.118585

01/12/2015

Supreme Court Clerk

SERVICE LIST

John E. Stevens
Freeborn & Peters LLP
217 East Monroe Street
Suite 202
Springfield, Illinois 62701
JStevens@freeborn.com

John M. Myers
Barbara K. Myers
Rabin & Myers, PC
1300 South 8th Street
Springfield, Illinois 62703
JMyers1951@gmail.com

Michael T. Reagan
633 LaSalle St., Suite 409
Ottawa, IL 61350
mreagan@reagan-law.com

Michael D. Freeborn
John T. Shapiro
Jill. C. Anderson
Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, Illinois 60606
Jshapiro@freeborn.com

Gino L. DiVito
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Maduff & Maduff, LLC
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abmaduff@madufflaw.com

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1005 North Seventh Street
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Brian J. Murray, Bar # 6272767
Meghan E. Sweeney, Bar # 6307136
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

Gregory G. Katsas
Anthony J. Dick
JONES DAY
51 Louisiana Ave, NW
Washington, DC 20001
(202) 879-3939

*Counsel for Proposed Amicus Curiae
Illinois Policy Institute*

January 12, 2015

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INTEREST OF AMICUS CURIAE

The Illinois Policy Institute is an independent research and education organization that generates public-policy solutions aimed at promoting personal freedom and prosperity in Illinois. The Institute advocates pension reform as an essential component of creating a prosperous future for the state. This case concerns the Institute because it will affect whether state and local governments will be able to enact reforms that are necessary to maintain their pension systems' solvency. The Institute seeks to ensure that government workers will receive a secure retirement without a funding crisis requiring cuts to education, healthcare, and public safety.

INTRODUCTION

The clear purpose of the Pension Clause of the Illinois Constitution was to overturn the common-law rule that public pensions were mere gratuities, and to provide instead that they be treated as binding contractual obligations. As a result, the state's public pension benefits are now entitled to the same protection that applies to all other contractual obligations under the state and federal Contract Clauses. *See infra* Part I.

Although that protection is strong, it is not absolute: Since the Great Depression, it has been settled that individual contractual rights may in certain circumstances yield to economic legislation that is necessary to protect the public welfare. The text and history of the Pension Clause leave no doubt that it was designed to incorporate that same principle: The Pension Clause not only refers to pensions as "contractual" benefits, but also states that they are protected against being "diminished or impaired"—a term-of-art that has long been associated with the Contract Clause. And in keeping with the settled understanding of contractual rights at the time the Pension Clause was adopted, the

debates among the delegates to the constitutional convention of 1970 reflect the qualified nature of the intended protection. *See infra* Part II.

By elevating public pensions to the level of contractual rights, the Illinois Pension Clause fits into a broader pattern that played out across the country in the course of the 20th century. Whether by judicial action or constitutional amendment, a string of states abandoned the old “gratuity” rule and extended contractual protection to cover public pensions. And with a single exception that does not govern here, all of those other states have interpreted the protection of pensions to be the same as that afforded under the Contract Clause. In light of the text, history, and national context of the Pension Clause, this Court should follow suit. *See infra* Part III.

The trial court in this case never considered whether Public Act 98-0599 can be justified under the standards of a traditional Contract Clause analysis. Instead, it foreclosed any consideration of that question by holding that the Pension Clause, unlike the state and federal Contract Clauses, *categorically* prohibits *any* impairment. This Court should correct that legal error, confirm that the Pension Clause extends to state pensions the *same* level of protection that is afforded to public contracts generally, and remand for application of the governing Contract Clause principles and the development of an appropriate factual record.

ARGUMENT

I. THE CLEAR PURPOSE OF THE PENSION CLAUSE WAS TO ELEVATE PENSIONS TO CONTRACTUAL RIGHTS, OVERTURNING THE COMMON-LAW RULE THAT THEY WERE MERE GRATUITIES

As this Court has explained when interpreting the Pension Clause, “it is proper to consider [the] constitutional language ‘in light of the history and condition of the times, and the particular problem which the convention sought to address.’” *Kanerva v. Weems*,

13 N.E.3d 1228, 1239 (Ill. 2014) (quoting *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 216 (1979)). That interpretive principle is critical here, because the Pension Clause had a clear historical purpose: It was intended to overturn the traditional rule that the benefits of mandatory pension systems were not contractual rights, but were mere gratuities that could be revoked at will by the legislature. In overturning that rule and conferring “contractual” status on pensions, the Pension Clause was designed to grant them the same protection that applies to all contractual rights under the Contract Clause—nothing more and nothing less.

“Historically, Illinois adhered to the traditional classification of pension plans as either mandatory or optional.” *People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 228 (Ill. 1998). “Where an employee’s participation in a pension plan was mandatory, the rights created in the relationship were considered in the nature of a gratuity that could be revoked at will.” *Id.* (citing *Bergin v. Bd. of Trs. of the Teachers’ Ret. Sys.*, 31 Ill. 2d 566, 574 (1964); *Jordan v. Metro. Sanitary Dist. of Greater Chicago*, 15 Ill. 2d 369, 382 (1958); *Blough v. Ekstrom*, 14 Ill. App. 2d 153, 160 (1957)). “Where, however, the employee’s participation in a pension plan was optional, the pension was considered enforceable under contract principles.” *Id.* (citing *Bardens v. Bd. of Trs. of the Judges Ret. Sys.*, 22 Ill. 2d 56, 60 (1961); *People ex rel. Judges Retirement System v. Wright*, 379 Ill. 328, 333 (1942)). Those “contract principles” meant that the benefits of optional pension plans were protected under the Contract Clause, which imposed significant limits on the State’s ability to reduce benefits. *See Bardens*, 22 Ill. 2d at 60; *Wright*, 379 Ill. at 333.

The Pension Clause was added to the Illinois Constitution in 1970 to extend

contractual protection to *all* public pensions in the state. The Clause provides that “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 (emphasis added). “The primary purpose behind the [Pension Clause] was to eliminate the uncertainty surrounding public pension benefits created by the distinction between mandatory and optional pension plans.” *McNamee v. State*, 173 Ill. 2d 433, 440 (1996). The Clause thus gave mandatory pension systems the *same* contractual protection that the Contract Clause had already provided to voluntary ones. *See Kraus v. Bd. of Trs. of Police Pension Fund*, 72 Ill. App. 3d 833, 848 (1979).

The purpose of extending contractual protection to all pensions was clearly reflected in the record of proceedings at the constitutional convention. “During the debates, Delegate Whalen noted that under then existing Illinois law, there were two lines of cases, one which characterized pension benefits as contractual, while the other did not. He then stated that with [the Pension Clause’s] characterization of pension rights as contractual, the result would be to ‘lock in the contractual line of cases into the constitution.’” *Id.* (quoting 4 Record of Proceedings, Sixth Illinois Constitutional Convention (“Proceedings”) at 2929 (Remarks of Delegate Whalen)).

The remarks of other delegates during the convention debates confirm that the Pension Clause was meant to confer the same protection that had always applied under the Contract Clause—which had previously been recognized for voluntary pension plans, but not for mandatory ones. One delegate expressly noted that “one of the overwhelming reasons to mandate this contractual status [to all pension] is based on a Supreme Court

decision in New Jersey in 1964 that . . . reject[ed] . . . an appeal to *attach a contractual status* to a plan of mandatory participation.” Proceedings at 2931 (Remarks of Delegate Green) (emphasis added). Another delegate voiced support for the Pension Clause based on his understanding that it would accomplish nothing more than “vesting contractual rights in beneficiaries of pension funds.” *Id.* at 2929 (Remarks of Del. Lyons). “I am not shocked at the notion of vesting . . . enforceable contractual rights in these pension beneficiaries, if that is *all this thing is designed to do*,” and “[w]e now have heard from the proponents that *that is the limit* of the scope of this amendment.” *Id.* (emphases added). That comports with Delegate Whalen’s recorded view that what “the proponents of this amendment s[ought] to achieve” was to give pensioners “the protection against the diminishing or impairing of their contractual rights” that “the contract clause gives” to other types of contracts. *Id.* at 2930.

At the same time, the convention debates also reveal that the delegates understood the qualified nature of the contractual protection that the Pension Clause would bestow: Delegate Whalen noted that the Contract Clause allows for the modification of contractual rights under some “contingenc[ies],” and for that reason he expressed misgivings about “characterizing all pensions as contractual rights rather than proprietary rights.” *Id.* Because he wanted to provide even greater protection for pensions, he stated that “in the long run it may be more advisable for the pensioner to have a proprietary right here” instead of a mere contractual right. *Id.* At least two other delegates also supported the proposal to provide stronger protection for pension rights, and, when that proposal was rejected, they too voted against the Pension Clause as insufficiently protective. *Id.* at 2930-32 (remarks and votes of Delegates Whalen, Bottino, and Davis).

Thus, when the majority voted in favor of the Pension Clause, they did so with full knowledge that the “contractual” language they were adopting did not provide absolute protection for pension rights, and indeed they rejected a specific proposal to afford greater protection to pensions than is afforded to other public contracts.

In sum, the Pension Clause established that the benefits of mandatory pension systems in Illinois are no longer mere “gratuities” that may be modified at the whim of the legislature. Instead they are “contractual” rights protected under “the contractual line of cases” that has developed over time under the Contract Clause. *Kraus*, 72 Ill. App. 3d at 848 (citation omitted).

II. THE PROTECTION OF PENSION BENEFITS AS CONTRACTUAL RIGHTS IS NOT ABSOLUTE

By the time the Pension Clause was adopted in 1970, it had been settled for over 35 years that while the Contract Clause provides significant protection against the diminishment and impairment of contractual rights, the protection is not absolute. By deeming pension benefits to be contractual rights and invoking the familiar language of the Contract Clause, the Pension Clause incorporated that same qualified level of protection.

“Just as the legislature is presumed to act with full knowledge of all prior legislation, the drafters of a constitutional provision are presumed to know about existing laws and constitutional provisions and to have drafted their provision accordingly.” *Kanerva*, 13 N.E.3d at 1240 (citations omitted). Read in context, the Pension Clause leaves no doubt that its drafters intended to invoke the familiar protection of the Contract Clause. The text not only indicates that pension benefits are “contractual” rights, but also states that they may not be “diminished or impaired”—precisely the same language that

courts have long used to describe the qualified protection that applies under the Contract Clause.

A. The Pension Clause Provides The Same Protection As The Contract Clause, Which Is Strong But Not Absolute

Like the Pension Clause, the Contract Clause states without qualification that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10; *see also* Ill. Const. 1970, art. I, § 16 (“No . . . law impairing the obligation of contracts . . . shall be passed.”). During the Great Depression, however, the Supreme Court famously held that states must have at least some limited ability to override contracts for sufficiently compelling reasons. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 443-44 (1934); *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934). Moreover, shortly before the Pension Clause was ratified, in the *very same year*, this Court confirmed “that the contract clause of the Federal constitution is not to be considered an absolute restriction or prohibition against the affecting of contracts.” *Community Renewal Found., Inc. v. Chicago Title & Trust Co.*, 44 Ill. 2d 284, 290 (1970) (citing *Blaisdell*, 290 U.S. at 447). Moreover, the Contract Clause of the Illinois Constitution is worded similarly to its federal counterpart, and this Court has construed the two Clauses to afford the same degree of “protection.” *Polich v. Chicago Sch. Fin. Auth.*, 79 Ill. 2d 188, 201 (1980) (citing U.S. Const. art. I, § 10; Ill. Const. 1970 art. I, §16). Against this legal and historical backdrop, it would have made no sense for the drafters of the Pension Clause to think that deeming pensions to be “contractual” rights protected against diminishment or impairment”—thereby invoking core Contract Clause concepts—would somehow create an “absolute” protection.

In keeping with their strong textual similarity, this Court has indicated that the Pension Clause confers the same protection as the Contract Clause. In *Buddell v. Board of Trustees State University Retirement System of Illinois*, 514 N.E.2d 184, 187 (Ill. 1987), the Court stated that the rights granted under the Pension Clause are “contractual in nature and cannot be altered, modified or released *except in accordance with usual contract principles.*” (emphasis added)). And in *Felt v. Board of Trustees of the Judges Retirement System*, 107 Ill. 2d 158, 164-66 (1985), the Court applied the Pension Clause by drawing heavily on a Contract Clause analysis. The Court noted the background principle 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.” *Id.* at 165 (quoting *George D. Hardin, Inc. v. Village of Mount Prospect*, 99 Ill. 2d 96, 103 (1983)). The Court then struck down the law at issue because it “severely impair[ed] the retirement benefits of the plaintiffs and those similarly situated and on the record [was] not defensible as a reasonable exercise of the State’s police powers.” *Id.* at 167. And it cited and quoted extensively from a pre-1970 case that had applied a pure Contract Clause analysis to strike down a similar reduction of contractual pension benefits. *Id.* at 164 (citing *Bardens*, 22 Ill. 2d at 60-61). The Court then expressly equated the substantive protection of the Contract Clause and the Pension Clause, stating that the challenged law was “unconstitutional as violative of the constitutional assurance against the diminution of retirement benefits and, as well, unconstitutional as an impairment of contract.” *Id.* at 165.

These cases confirm that the contractual protection afforded by the Pension Clause is significant, but not absolute. In particular, it ensures that “state and municipal

governments . . . may not abandon their pension obligations on the belief that such payments [are] *gratuities*.” *McNamee*, 173 Ill. 2d at 444 (emphasis added). At the same time, however, while state adjustments of their own contracts admittedly receive heightened scrutiny, this Contract Clause standard does not foreclose any inquiry into whether the adjustment is “reasonable and necessary to serve” an important state purpose. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977); see *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

B. The Pension Clause Mirrors The Contract Clause In Protecting Against Diminishment and Impairment

A superficial difference between the Contract Clause and the Pension Clause is that the former refers only to “impair[ment],” U.S. Const. art. I, § 10; Ill. Const. 1970, art. I, § 16, while the latter refers to “*diminish[ment]* and impair[ment].” Ill. Const., art. XIII, § 5 (emphasis added). However, the terms “diminish” and “impair” have long been used interchangeably to describe the protection that applies under the Contract Clause. In an early Contract Clause case, the Supreme Court explained that “[t]he obligation of a contract consists in its binding force on the party who makes it. . . . If any subsequent law affect to *diminish* the duty, or to *impair* the right, it . . . is directly obnoxious to the prohibition of the Constitution.” *McCracken v. Hayward*, 43 U.S. (2 How.) 608, 612 (1844) (emphases added). In keeping with that observation, it has always been understood that the Contract Clause applies equally to both diminishment and impairment, because the “diminishment” of an obligation is simply one specific type of “impairment.” Indeed, “[o]ne of the tests that a contract has been impaired is, that its value has by legislation been diminished,” *Bank of Minden v. Clement*, 256 U.S. 126, 128 (1921) (quoting *Planters’ Bank v. Sharp*, 47 U.S. 301, 327 (1848)), and “[t]he dictionary

definition of ‘impair’ is ‘to weaken, to make worse, to lessen in power, *diminish*, or relax, or otherwise affect in an injurious manner.’” *Humana Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999) (quoting Black’s Law Dictionary 752 (6th ed. 1990)) (emphasis added).

This Court too has long recognized that “diminishment” is merely one kind of the “impairment” referred to in the Contract Clause. *See, e.g., Peoria, Decatur & Evansville Ry. v. People ex rel. Scott*, 116 Ill. 401, 408 (1886) (explaining that, under the Contract Clause, the legislature may not “pass an act that will impair or substantially diminish the means of enforcing a contract”). Indeed, this Court acknowledged the equivalent meaning of “diminish” and “impair” in the same year that the Pension Clause was ratified. *See Community Renewal Found., Inc.*, 44 Ill. 2d at 289 (considering an argument that a law “impairs the obligation of contracts” under the Contract Clause because it “would diminish or destroy the rights of existing lienholders”). Other decisions, in highly analogous contexts, further confirm that every diminishment of a contractual obligation is also an impairment. *See In re City of Detroit*, 504 B.R. 97, 153 (Bankr. E.D. Mich. 2013) (“‘Diminish’ adds nothing material to ‘impair.’ All ‘diminishment’ is ‘impairment.’ And, ‘impair’ includes ‘diminish.’”). Indeed, the contrary view perversely implies that the Contract Clause itself affords *no* protection against a “diminishment” that is not also an “impair[ment].” That cannot be right.

Despite the definitional overlap between “diminish” and “impair,” the drafters of the Pension Clause had good reason to use both terms together: By using the more formal term “impair,” they ensured that pensions would be covered by the full, traditional legal protection of the Contract Clause. And by adding the more colloquial term “diminish,” they clarified the purpose of the provision in a way that the lay ratifiers

would have found most easily understandable. *See Kanerva*, 13 N.E.3d at 1231 n.1 (“The provisions of the new constitution were submitted *to the voters* for ratification at a special election held Dec. 15, 1970.” (emphasis added)).

The use of redundancy for the sake of style, emphasis, and clarity is commonplace in legal drafting. “Amplification by synonym has long been a part of the English language, and especially a part of the language of the law. . . . The purpose of doubling [is] dual: to give rhetorical weight and balance to the phrase, and to maximize the understanding of readers or listeners.” Bryan A. Garner, *GARNER’S DICTIONARY OF LEGAL USAGE*, at 294 (“Doublets, Triplets, and Synonym-Strings”). That is why the “preference for avoiding surplusage constructions is not absolute,” and does not require abandoning the plain meaning of the text. *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Indeed, where there is a conflict between plain meaning and the canon against surplusage, courts “should prefer the plain meaning since that approach respects the words of [the legislature].” *Id.* *See also In re City of Detroit*, 504 B.R. at 153 (“[I]f this Court gives these terms—‘diminish’ and ‘impair’—their plain and ordinary meanings . . . those meanings would not be substantively different from each other. The terms are not synonyms, but they cannot honestly be given meanings so different as to compel” extraordinary protection greater than that of the Contract Clause.). The point is readily apparent to anyone who has ever contemplated a “cease and desist” letter or the “aiding and abetting” of a crime: “lawyers frequently say two (or more) things when one will do or say two things as a way of emphasizing one point.” *TMW Enters., Inc. v. Federal Ins. Co.*, 619 F.3d 574, 578 (6th Cir. 2010) (citation omitted). That fully explains why the

Pension Clause invokes the familiar doublet of “diminish” and “impair”—an established term-of-art that has long been associated with the protection of the Contract Clause.

III. SIMILAR PENSION PROVISIONS IN OTHER STATE CONSTITUTIONS CONFIRM THAT THE PENSION CLAUSE IS NOT ABSOLUTE

The adoption of the Pension Clause in Illinois was part of a broader trend in which many states conferred contractual protection on pension benefits over the course of the 20th century. In some states this was accomplished by judicial decisions holding that public pensions are contractual rights entitled to protection under a state or federal Contract Clause. *See, e.g., Betts v. Bd. of Admin.*, 582 P.2d 614, 617 (Cal. 1978) (providing robust protection for pensions in California under the Contract Clause). In other states, courts adhered to the traditional “gratuity” rule that did not recognize pensions as contractual rights, and citizens responded by conferring that protection via constitutional amendment. In both situations, the result was the same: Pension benefits were no longer mere gratuities, but instead became binding contractual rights entitled to the familiar protection of the Contract Clause.

Aside from Illinois, six other states have constitutional provisions that specifically confer contractual protection on pensions: New York (adopted in 1938), Alaska (1956), Michigan (1963), Louisiana (1974), Hawaii (1978), and Arizona (1998).¹ With a single exception, courts in all of these other states have indicated that their own pension clauses

¹ Two other state constitutions protect pensions but do not expressly confer contractual status. The New Mexico constitution provides that pensions are property rights. *See* N.M. Const. art. XX, § 22(D) (“Upon meeting the minimum service requirements . . . a member of a [retirement] plan shall acquire a vested property right with due process protections.”). The Texas constitution provides that, upon certain vesting conditions, “[b]enefits granted to a retiree . . . may not be reduced or otherwise impaired.” Tex. Const. art. XVI, § 66. The courts in New Mexico and Texas have not addressed whether these pension clauses provide absolute or only qualified protection.

should be applied using a Contract Clause analysis instead of an absolute protection.

A. Of all these other states, New York is the most salient because, as this Court has recognized, the Illinois Pension Clause “was based on a nearly identical provision of the New York Constitution.” *Kanerva*, 13 N.E.3d at 1239 (citation omitted). During the 1970 constitutional convention, one of the sponsors of the Illinois Pension Clause explained that it contains “substantially the same language as the New York Constitution.” 4 Proceedings 2931 (Remarks of Delegate Kinney). Since then, this Court’s Pension Clause cases repeatedly have noted that “a similar provision is contained in the Constitution of New York,” and accordingly have looked to how that provision “has been construed by the courts of that State.” *Peters v. City of Springfield*, 57 Ill. 2d 142, 151 (1974); *see also, e.g., Felt*, 107 Ill. 2d at 163 (same).

It is particularly notable, then, that the Pension Clause of the New York Constitution had been authoritatively construed—more than a decade before it became the model for the Illinois Pension Clause—as merely granting contractual protection and thus overturning the common-law rule treating pensions as mere gratuities. The Court of Appeals of New York, the highest court in that state, explained the effect of the New York Pension Clause as follows:

By the constitutional amendment the people determined to confer contractual protection upon the benefits of pension and retirement systems of the State and of the civil divisions thereof, and to prohibit their diminution or impairment prior to retirement. . . . [S]uch systems were no longer gratuitous, but by virtue of the new amendment *became contracts* and the members of pension systems thereby acquired vested interests which could not thereafter be diminished or impaired.

Birnbaum v. New York State Teachers Ret. Sys., 152 N.E.2d 241, 245 (N.Y. 1958) (emphasis shifted).

The Pension Clause of the New York Constitution provides that “membership in

any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.” N.Y. Const. art. V, § 7. The purpose of this Clause is to “confer contractual protection upon the benefits of pension and retirement systems” for workers who have qualified for retirement benefits. *Birnbaum*, 152 N.E.2d at 245. Nonetheless, New York courts have stressed that pensions benefits are not “carved in stone.” *Village of Fairport v. Newman*, 457 N.Y.S.2d 145, 148 (N.Y. App. Div. 1982). On the contrary, “the purpose of the constitutional amendment . . . was merely to insure that pension and retirement benefits would not be subject to the whim of the Legislature or the caprice of the employer.” *Id.* And as explained above, that purpose is fully served by granting pension benefits the same level of protection afforded to all other contracts under the Contract Clause.

The Pension Clause of the Michigan Constitution is also instructive. It provides: “The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.” Mich. Const. art. IX, § 24. In the recent Detroit bankruptcy, pensions were reduced to help the city climb out of insolvency. The bankruptcy court specifically considered whether the Michigan pension clause provided special protection above and beyond the Michigan or federal Contract Clauses. Surveying the decisions of the Michigan Supreme Court, the court found it clear that “pensions were [not] given any extraordinary protection.” *In re City of Detroit*, 504 B.R. at 151-54. The court then gave a detailed history of the legal protection for pensions in Michigan, which is quite similar to the history in Illinois: “At common law, before the adoption of the Michigan Constitution in 1963, public pensions in Michigan were viewed

as gratuitous allowances that could be revoked at will, because a retiree lacked any vested right in their continuation.” *Id.* at 151 (citing *Brown v. Highland Park*, 320 Mich. 108, 114 (1948)). But then, “[t]o gain protection of their pension rights, Michigan teachers effectively lobbied for a constitutional amendment granting *contractual status* to retirement benefits.” *Id.* at 152. In light of that history, the court explained, “[t]he obvious intent” of the Michigan pension clause “was to ensure that public pensions be treated as *contractual obligations*” entitled to the same protection that applies under the Contract Clause. *Id.* (quoting *In re Constitutionality of 2011 PA 38*, 490 Mich. 295 (2011)). In reasoning directly applicable here, the court further explained:

[I]f the Michigan Constitution were meant to give the kind of absolute protection for which the [pensioners] argue, the language in the [pension clause] simply would not have referred to pension benefits as a “contractual obligation.” It also would not have been constructed by simply copying the verb from the contracts clause— “impair” —and then adding a lesser verb—“diminish” in the disjunctive.

Id.

Another example involves the Pension Clause of the Louisiana Constitution, which provides: “Membership in any retirement system of the state or of a political subdivision thereof shall be a contractual relationship between employee and employer, and the state shall guarantee benefits payable to a member of a state retirement system or retiree or to his lawful beneficiary upon his death. . . . The accrued benefits of members of any state or statewide public retirement system shall not be diminished or impaired.” La. Const. art. X, § 29. The purpose of this provision was to “invoke the constitutional protection against impairment of the obligations of contracts.” *Smith v. Bd. of Trs. of La. State Emps.’ Ret. Sys.*, 851 So. 2d 1100, 1108 (La. 2003) (citation omitted). Thus, in applying its pension clause, the Louisiana Supreme Court has not adopted an absolute

rule, but has instead indicated that it would “utilize[] a Contract Clause analysis to invalidate changes to the state’s retirement system” in cases where the state had “take[n] away vested rights.” *Id.* at 1109.

Likewise, the Pension Clause of the Hawaii Constitution states: “Membership in any employees’ retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.” Haw. Const. art. XVI, § 2. The Hawaii Supreme Court has rejected an absolute reading of this provision, and instead indicated that it confers the same protection as the Contract Clause. For example, in *Kaho’Ohanohano v. State*, 162 P.3d 696, 743-44 (Haw. 2007), the Court applied its pension clause by drawing on California case law and explaining that “although the California Constitution does not contain a non-impairment pension provision,” *id.* at 744, “California courts have nevertheless provided protection relying on the ‘contracts clauses’ of the California state and U.S. constitutions.” *Id.* at 743 n.34.

Finally, the Supreme Court of Alaska has also relied on general Contract Clause case law in construing its pension clause. Article XII, section 7 of the Alaska Constitution provides that “[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.” Instead of reading this language as an absolute bar against diminishment or impairment, the Alaska Supreme Court has held that it “leaves open for judicial decision . . . the point at which those contractual rights vest *and the degree to which ‘vested’ rights, in this context, are subject to legislative modification.*” *Hammond v. Hoffbeck*, 627 P.2d 1052, 1055 n.5 (Alaska 1981) (emphasis

statement that pension benefits “shall not be diminished or impaired” is the operative extension of the state Contract Clause to pension benefits. Second, the reasoning in *Fields* is highly dubious even on its own terms. As explained above, legal drafters commonly employ redundancy for the sake of emphasis and clarity. Moreover, the Arizona drafters had good reason to employ such slight redundancy: Merely stating that membership in a pension system is a “contractual relationship” subject to “article II, section 25” of the state constitution, without any further explanation, would hardly have resonated even with lawyers, much less with the lay public, as would have the confirmatory statement that pensions cannot be “diminished or impaired.” And given this sensible explanation for the redundancy, there is no need to invent a special new meaning for the phrase “diminished or impaired”—the exact phrase that courts have long used to describe Contract Clause protection. If anything, use of that settled term-of-art considerably strengthens the conclusion that the protection bestowed is simply to extend Contract Clause standards to public pensions.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the trial court, confirm that the Pension Clause extends to public pensions the same level of protection that the state and federal Contract Clauses afford to other contracts, and remand the case for a determination whether the pension-reform law at issue here can be sustained under the governing Contract Clause standards.

Dated: January 12, 2015

Respectfully submitted,

By: /s/ Brian J. Murray

Brian J. Murray, Bar # 6272767
Meghan E. Sweeney, Bar # 6307136
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

Gregory G. Katsas
Anthony J. Dick
JONES DAY
51 Louisiana Ave, NW
Washington, DC 20001
(202) 879-3939

*Counsel for Proposed Amicus Curiae
Illinois Policy Institute*

SUPREME COURT RULE 341(C) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court 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 19 pages.

/s/ Brian J. Murray_____

Brian J. Murray

JONES DAY

77 West Wacker Drive, Suite 3500

Chicago, Illinois 60601

In The Supreme Court of Illinois

IN RE:)
)
PENSION REFORM LITIGATION) Direct Appeal From:
(Doris Heaton, et al.,)
) Case No. 2014 MR 1 (Sangamon Cty.)
Appellees,) Case No. 2013 CH 28406 (Cook Cty.)
) Case No. 2014 CH 3 (Sangamon Cty.)
v.) Case No. 2013 CH 28406 (Cook Cty.)
) Case No. 2014 CH 48 (Sangamon Cty.)
PAT QUINN, Governor of Illinois,) Case No. 2014 MR 207 (Champaign Cty.)
et al.)
)
Appellants.))

NOTICE OF FILING OF PROPOSED *AMICUS CURIAE* BRIEF

TO: See Attached Service List

PLEASE TAKE NOTICE that on January 12, 2015, the undersigned electronically filed the Proposed Brief of *Amicus Curiae* the Illinois Policy Institute In Support of Appellants with the Clerk of the Supreme Court of Illinois, copies of which are herewith served upon you.

/s/ Brian J. Murray
Brian J. Murray, Bar # 6272767
JONES DAY
77 West Wacker Drive, Suite 3500
Chicago, Illinois 60601
(312) 782-3939
bjmurray@jonesday.com

*Counsel for Proposed Amicus
Illinois Policy Institute*

SERVICE LIST

John E. Stevens
Freeborn & Peters LLP
217 East Monroe Street
Suite 202
Springfield, Illinois 62701
JStevens@freeborn.com

John M. Myers
Barbara K. Myers
Rabin & Myers, PC
1300 South 8th Street
Springfield, Illinois 62703
JMyers1951@gmail.com

Michael T. Reagan
633 LaSalle St., Suite 409
Ottawa, IL 61350
mreagan@reagan-law.com

Michael D. Freeborn
John T. Shapiro
Jill. C. Anderson
Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, Illinois 60606
Jshapiro@freeborn.com

Gino L. DiVito
John M. Fitzgerald
Brian C. Haussmann
Tabet DiVito & Rothstein LLC
209 S. LaSalle Street
7th Floor
Chicago, Illinois 60604
JFitzgerald@tdrlawfirm.com

Aaron B. Maduff
Michael L. Maduff
Walker R. Lawrence
Maduff & Maduff, LLC
205 North Michigan Avenue, Suite 2050
Chicago, Illinois 60601
abmaduff@madufflaw.com

Donald M. Craven
Esther J. Seitz
Donald M. Craven, P.C.
1005 North Seventh Street
Springfield, Illinois 62702
don@cravenlawoffice.com

Carolyn Shapiro
Solicitor General of Illinois
100 West Randolph Street
Chicago, Illinois 60601
CShapiro@atg.state.il.us

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that on this 12th day of January 2015, three copies of the foregoing Proposed Brief of *Amicus Curiae* the Illinois Policy Institute in Support of Appellants was served on each of the below-named counsel, and one original plus 20 copies were served on the Illinois Supreme Court, by depositing such copies with an overnight carrier at 77 West Wacker Dr., Suite 3500, Chicago IL 60601 before 7:00 pm, in envelopes bearing sufficient postage:

/s/ Brian J. Murray
Brian J. Murray

Subscribed and SWORN to before me
this 12th day of January 2015

Maria Corasis
Notary Public



SERVICE LIST

John E. Stevens
Freeborn & Peters LLP
217 East Monroe Street
Suite 202
Springfield, Illinois 62701
JStevens@freeborn.com

John M. Myers
Barbara K. Myers
Rabin & Myers, PC
1300 South 8th Street
Springfield, Illinois 62703
JMyers1951@gmail.com

Michael T. Reagan
633 LaSalle St., Suite 409
Ottawa, IL 61350
mreagan@reagan-law.com

Michael D. Freeborn
John T. Shapiro
Jill. C. Anderson
Freeborn & Peters LLP
311 South Wacker Drive
Suite 3000
Chicago, Illinois 60606
Jshapiro@freeborn.com

Gino L. DiVito
John M. Fitzgerald
Brian C. Haussmann
Tabet DiVito & Rothstein LLC
209 S. LaSalle Street
7th Floor
Chicago, Illinois 60604
JFitzgerald@tdrlawfirm.com

Aaron B. Maduff
Michael L. Maduff
Walker R. Lawrence
Maduff & Maduff, LLC
205 North Michigan Avenue, Suite 2050
Chicago, Illinois 60601
abmaduff@madufflaw.com

Donald M. Craven
Esther J. Seitz
Donald M. Craven, P.C.
1005 North Seventh Street
Springfield, Illinois 62702
don@cravenlawoffice.com

Carolyn Shapiro
Solicitor General of Illinois
100 West Randolph Street
Chicago, Illinois 60601
CShapiro@atg.state.il.us