No. 118585

IN THE
SUPREME COURT OF ILLINOIS

IN RE: PENSION REFORM LITIGATION	)	Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois,
	)	Sangamon County Case Nos. 2014 MR 1, 2014 CH 3, and 2014 CH 48; Cook County Case No. 2013 CH 28406; and Champaign County Case No. 2014 MR 207 (consolidated pursuant to Supreme Court Rule 384)
	)	The Honorable JOHN W. BELZ, Judge Presiding

REPLY BRIEF OF DEFENDANTS-APPELLANTS

LISA MADIGAN
Attorney General of Illinois

CAROLYN E. SHAPIRO
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Counsel for Defendants-Appellants

RICHARD S. HUSZAGH
GARY S. CAPLAN
CLIFFORD W. BERLOW
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2587

ARGUMENT

The State's police power authority to modify contracts in extraordinary circumstances is a core attribute of sovereignty that was not swept away *sub silentio* by the Pension Clause of the 1970 Illinois Constitution. In their attack on Public Act 98–599 ("the Act"), however, Plaintiffs seek to escape the Pension Clause's plain language by transforming the protection of pension benefits from the contractual status established by the Clause into an unprecedented and unalterable super-contract. But the Pension Clause does not elevate one type of contractual commitment above all other government functions, at the expense of protecting the public welfare in extraordinary circumstances.

In response, Plaintiffs present only a false choice. They claim that without their absolutist interpretation, the Pension Clause is "meaningless," SUAA Br. 1, because it permits the State "to address problems by diminishing pension benefits" whenever it "would prefer," ISEA Br. 37, and would allow the State to deliberately underfund its pensions and then use that underfunding to justify altering benefits under the police powers, *id.* at 2-3. But the Act's benefit changes cover only a portion of the unfunded pension liabilities due to the unforeseen Great Recession (and none due to historic underfunding). *See* Def. Br. 10-11. Furthermore, Defendants agree that the government may not renounce its contracts whenever it would prefer to change its spending priorities. Defendants acknowledge the strong contractual protections provided by the Clause. And Defendants recognize that one of the factors courts look to when determining whether the invocation of police powers may overcome that protection is whether the underlying circumstances were "unforeseen and unintended," rather than anticipated and deliberate. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 31 (1977); *see also* Def. Br. 23 n.3 (describing factors). But the circuit court must decide in the first instance, based on a fully developed factual record, whether the extraordinary circumstances and other factors necessary to modify pensions are present here.

Nor can Plaintiffs use their false dichotomy to justify the extreme implications of their novel construction. Their super-contract approach would deny the State the ability to protect the public health, safety, and welfare if doing so required even a penny's reduction in pension benefits. As a result, their suggestion that worst-case scenarios — such as epidemics, collapsed bond ratings, and prolonged deflation — are hyperbolic or too far removed from this case to be relevant ignores that they are demanding an absolute protection that would apply in every circumstance, no matter how dire.

The impact of this unbounded view of the Pension Clause extends far beyond this case, as the State is not the only entity that might face pension liabilities extreme enough to threaten the public health, safety, and welfare. Even today, municipalities of all sizes and in all parts of the State are in desperate financial straits, squeezed between their pension obligations and limits on their ability to raise revenues.[1] As a result, some municipalities may conclude that they must, for example, lay off police or firefighters or privatize their public safety functions.[2] And Chicago's "massive and growing" pension liabilities "threaten the city's fiscal solvency" and its ability to deliver essential services.[3] Whether any of these

---

1 *E.g.*,Comm'n on Gov't Forecasting & Accountability, Report on the Fin. Condition of the Downstate Police & Fire Pension Funds in Ill. 64 (2013), *available at* http://cgfa.ilga.gov/Upload/2013FinancialConditionofDownstate PoliceFirePA96-1495.pdf (Cairo Firefighters Pension Fund only 24% funded); *id.* at 96 (Danville Firefighters Pension Fund 25% funded); *id.* at 171 (Kankakee Firefighters Pension Fund 18% funded); *id.* at 197 (Madison Police Pension Fund 24% funded); *id.* at 256 (Park City Police Pension Fund 18% funded); *id.* at 280 (Rock Island Police Pension Fund 38% funded).

2 *E.g., Danville Council Oks Budget that Cuts Firefighters*, The News-Gazette, Dec. 16, 2014, www.news-gazette.com/news/local/2014-12-16/danville-council-oks-budget-cuts-firefighters.html; Vill. of N. Riverside, *With Mounting State Pressure To Fund Millions in Public Pensions, North Riverside Explores Fire Department Privatization*, June 19, 2014, http://northriverside-il.org/node/432.

3 March 4, 2014 Moody's Report, available at www.moodys.com/research/Moodys-downgrades-Chicago-IL-to-Baa1-from-A3-affecting-83--PR_294237; *see also* Fitch Downgrades Chicago, IL's ULTGOs to 'A-'; Outlook Negative, Reuters, Nov. 8, 2013, available

situations would warrant invocation of the police powers to alter pension obligations are questions that courts should address on their particular facts, but Plaintiffs would deny these local governments even that possibility, no matter the consequences.

At bottom, Plaintiffs argue for a reading of the Pension Clause that would deny government the ability to respond to extraordinary circumstances if doing so had any negative impact on pensions. That interpretation lacks any support in the plain meaning of the Pension Clause and was not contemplated by its drafters. It should be rejected.

I. The Pension Clause Allows the State To Modify Pension Benefits If Doing So Constitutes A Valid Exercise of Its Police Powers.

Plaintiffs' argument that the Act violates the Pension Clause rests on the erroneous premise that the drafters of the Illinois Constitution specifically intended to grant pension benefits *greater* constitutional protection than is afforded to all other contracts. That reinvention of the Clause's history is not faithful to constitutional text, the intent of the Constitution's drafters, or this Court's precedent.

A. The Pension Clause's Plain Meaning Permits the State To Exercise Its Police Powers.

1. The Plain Meaning of a "Contractual Relationship" Is Not Altered by Adding that the Benefits of that Relationship "Shall Not Be Diminished or Impaired."

Plaintiffs do not dispute that the plain meaning of "contractual relationship" is a relationship that is "subject to the State's authority to modify contracts under certain conditions, often referred to as the State's 'police powers.'" Def. Br. 4. And they do not question that this plain meaning is settled by more than 150 years of both the U.S. Supreme

---

at www.reuters.com/article/2013/11/09/ny-fitch-ratings-chicago-idUSnBw085976a+100+BSW20131109 (describing threat that Chicago's unfunded pension liabilities will "crowd out" spending on city services); Rating Action, Moody's Downgrades Chicago, IL to Baa2; Maintains Negative Outlook, available at https://m.moodys.com/mt/www.moodys.com/research/Moodys-downgrades-Chicago-IL-to-Baa2-maintains-negative-outlook--PR_319535 (downgrading, on the day this brief was filed, Chicago's bond rating).

Court's and this Court's precedent. Despite these concessions, Plaintiffs argue that the Pension Clause departs from the settled meaning of "contractual relationship" because the Clause does not *explicitly* say that its protection is "'subject to the police powers.'"[4] SUAA Br. 6; *see* ISEA Br. 18-19. But this is backwards. Because "the drafters of a constitutional provision are presumed to know about existing laws and constitutional provisions and to have drafted their provision accordingly," *Kanerva v. Weems*, 2014 IL 115811, 41, the Clause incorporates the settled meaning of "contractual relationship."

To overcome the plain meaning of "contractual relationship," Plaintiffs argue that the Pension Clause "does two distinct things": it makes membership in a retirement system a "contractual relationship" and separately "mandat[es] that such benefits 'shall not be diminished or impaired.'" ISEA Br. 18; *see* SUAA Br. 7. But this negates the plain meaning of "contractual relationship" and results in an internally inconsistent Pension Clause. Specifically, it pits the two parts of the Pension Clause against each other. The first part, which establishes a "contractual relationship," would create rights that are, by definition, *subject to* the police power, while the second part, which provides that those rights shall not be "diminished or impaired," would create rights that are *exempt from* the police power. That conflict violates the paramount interpretive rule that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) ("The imperative of harmony among provisions is more categorical than most other canons of construction because it is

---

[4] The SUAA Plaintiffs also claim that "prohibitory clauses" restricting government power are always absolute in the absence of an express reservation of power. SUAA Br. 15-17. But as they are compelled to admit, *id.* at 17 n.2, the Contract Clause itself, the constitutional provision most analogous to the Pension Clause, contradicts their claim. And constitutional provisions are frequently written in absolute terms but are not so interpreted. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment . . . are not absolute."); *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited.").

invariably true that intelligent drafters do not contradict themselves."); *see also People v. Villa*, 2011 IL 110777, ¶ 35.

Worse, if that contradiction is resolved as Plaintiffs propose, the "contractual relationship" language would be read out of the Clause altogether. Plaintiffs' reading creates a Pension Clause that effectively provides: "the benefits of membership in any pension or retirement system of the State shall not be diminished or impaired." And that result defeats the central focus of the debates at the 1970 Constitutional Convention, which was the importance of giving all pension rights *contractual* protections. *See* discussion *infra* Part I.B.

The ISEA Plaintiffs all but concede that they attach no significance to the "contractual relationship" language, claiming that the "contractual relationship" provision "eliminated the gratuitous nature of mandatory pension plans[,] . . . [b]ut the *ultimate goal* was achieved by the additional provision prohibiting the legislature from diminishing or impairing pension benefits." ISEA Br. 24 (emphasis added). Under that reading, however, both goals would have been achieved by the second clause alone, and the "contractual relationship" language is superfluous.

The SUAA Plaintiffs, meanwhile, purport to give some effect to the "contractual relationship" clause by asserting that it means only that "a pension [is] a consideration-based agreement" the parties "can choose to renegotiate," while the dependent "diminished or impaired" clause eliminates all other contractual doctrines and defenses the State could otherwise assert. SUAA Br. 8.[5] Yet this tortured attempt to give the phrase "contractual relationship" some meaning so that it is not rendered entirely superfluous fails because it

---

[5] The SUAA Plaintiffs' suggestion that renegotiating pensions in exchange for consideration would be upheld as constitutional is inconsistent with Plaintiffs' own reading of the Clause. *See* Def. Br. 28. Moreover, even if not legally precluded, achieving meaningful pension reform through renegotiation is highly unrealistic, both logistically and practically.

empties the term of virtually all contract-law content. *See* Restatement (Second) of Contracts §§ 261, 263, 265, 280 (1981) (describing legal doctrines that can modify or excuse contracting parties' obligations).[6] Under Plaintiffs' reading of the Pension Clause, none of these doctrines, or any other contract-law principle besides mutually negotiated changes for consideration, would apply. In other words, under the SUAA Plaintiffs' interpretation, the drafters used the term "contractual relationship" to describe a legal status that cannot accurately be described as a contract. The serious internal conflict created by that reading must be rejected in favor of Defendants' alternative, which avoids any inconsistency and reaffirms in the dependent clause what the principal clause provides.

2. Applying the State's Police Powers to Benefits Protected by the Pension Clause Is the Best Reading of the Constitutional Text.

Plaintiffs' disregard of the "contractual relationship" language also ignores the long-accepted fact that the Pension Clause parallels the Contract Clause. *See* R. Helman & W. Whalen, *Constitutional Commentary*, Smith-Hurd Illinois Compiled Statutes Annotated 665 (2006) ("This provision states explicitly what is found in the more general language of [the Contract Clause]."); *Buddell v. Bd. of Trs., State Univ. Ret. Sys. of Ill.*, 118 Ill. 2d 99, 102 (1987) (stating that Pension Clause "guarantees that all pension benefits will be determined under a contractual theory"); *People ex rel. Sklodowski v. State of Ill.*, 162 Ill. 2d 117, 147 (1994) (Freeman, J., concurring in part and dissenting in part) ("The protection against impairment of state pension benefits is co-extensive with the protection afforded all contracts."). And the Pension Clause supplements the Contract Clause, *contra* SUAA Br. 9-10, because before 1970, most public pensions were not considered contracts at all. *See* discussion *infra* Part I.B; Def. Br. 33.

---

[6] Defendants' opening brief (at 19) mistakenly cited the Second Restatement on Contracts for language that appeared instead in the First Restatement, § 608 cmt. b (1932).

Moreover, the Pension Clause's specific language can be traced to its origin. The Pension Clause is modeled on the virtually identical provision in the New York Constitution, adopted in 1938. 4 Record of Proceedings, Sixth Illinois Constitutional Convention ("Proceedings") at 2925 (remarks of Delegate Green) ("Our language is that language that is in the New York Constitution . . . ."). Crucially, when New York adopted its Pension Clause, its Constitution contained no counterpart to the federal Contract Clause. N.Y. Const., 1938. Thus, while the first part of the clause gave public pensions, like all contracts, contractual status protected by the *federal* Constitution, the second part was necessary to create an equivalent *state constitutional* protection for pensions. Additionally, the New York pension clause was a response to two decisions giving pensions less-than-contractual status, one discussing the legislature's ability to "diminish[ ]" pensions, *Roddy v. Valentine*, 197 N.E. 260, 262 (N.Y. 1935), and another holding that because mandatory public pensions were not contracts, they had no federal protection against "impairment," *Dodge v. Bd. of Educ. of City of Chi.*, 302 U.S. 74, 75-78 (1937); *see* N.Y. 1938 Const'l Convention Rev. Record Vol. II, 1405-06, 1413, Vol. III 2554-44; N.Y. 1967 Temp. Comm'n on Cont'l Convention Vol. XIV 219-20; *see also Day v. Mruk*, 121 N.E.2d 362, 363-64 (N.Y. 1954). Thus, the New York provision not only states that pension rights are a "contractual relationship," but it also uses the operative terms from both cases — "diminish" and "impair" — to affirm the legal effect of that status.

In spite of this background, Plaintiffs insist that the protection provided by the Pension Clause must be greater than the protection provided by the Contract Clause because the Contract Clause states that the rights it protects cannot be "impaired," while the Pension Clause states that the rights it protects cannot be "diminished or impaired." ISEA Br. 19-20; *see* SUAA Br. 7. But the plain meanings of both "diminished" and "impaired" are so closely intertwined — in legal doctrine and case law, as well as in common parlance — that they

cannot credibly be interpreted to have such dissimilar legal impacts. *See, e.g.*, Black's Law Dictionary 819 (9th ed. 2009) (defining "impair" as "[t]o diminish the value of (property or a property right")); American Heritage College Dictionary 694 (4th ed. 2004) (defining "impair" as "[t]o cause to diminish, as in strength or quality"); *Geweke v. Vill. of Niles*, 368 Ill. 463, 466 (1938); *Peoria, Decatur & Evansville Ry. v. People ex rel Scott,* 116 Ill. 401, 408 (1886). As the court overseeing the City of Detroit bankruptcy recently explained in construing a similar provision in the Michigan Constitution,"[a]ll 'diminishment' is 'impairment.'" *In re City of Detroit*, 504 B.R. 97, 153 (Bankr. E.D. Mich. 2013). It is implausible that the drafters' use of these largely synonymous words, rather than only one of them, created an unprecedented class of super-contracts.[7]

And even if Defendants' construction did result in textual surplusage, it would not justify Plaintiffs' interpretation. The canon against constitutional surplusage provides only that "[t]he presence of surplusage . . . is not to be *presumed* in . . . constitutional construction" and "each word, clause or sentence must, *if possible*, be given some reasonable meaning." *Hirschfield*, 40 Ill. 2d at 230 (internal citation omitted) (emphasis added). Indeed, the canon "assists only where a competing interpretation gives effect to every clause and word." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011). Because Plaintiffs' "competing interpretation" attaches no substantive meaning to the term "contractual relationship," *see* discussion *supra* Part I.A.1, the surplusage canon offers them no support.

Finally, a correct understanding of the Pension Clause answers the ISEA Plaintiffs' related claim that "[w]hen the word 'diminished' is used elsewhere in the Constitution, it is

---

7 Plaintiffs are incorrect that because "diminished or impaired" is disjunctive, using the word "or" instead of "and," it cannot carry a singular legal meaning. *See* ISEA Br. 20-21; SUAA Br. 14-15. *See* B. Garner, *Dictionary of Modern Legal Usage* 292-93 (2d ed. 2011) (noting "amount or quantum," "annoy or molest," "betting or wagering," and "way, shape, or form" as examples of common legal phrases with a single meaning).

given absolute effect." ISEA Br. 20. "Diminished" is a commonplace word and it is not converted into a constitutional term of art, with only one specialized meaning, through its use in certain constitutional provisions. In fact, this Court has found that "diminished" has an absolute meaning only when construing constitutional provisions serving important separation-of-powers principles, including the fundamental purpose of preserving judicial independence. *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 304-05 (2004) (construing Ill. Const. art. VI, § 14); *People ex rel. Lyle v. City of Chi.*, 360 Ill. 25, 28-29 (1935) (construing Ill. Const. (1870), art. VI, § 16). Unlike the constitutional provisions at issue in *Jorgensen* and *Lyle*, the Pension Clause has nothing to do with either judicial independence in particular or separation of powers more generally. That is why in *Lyle*, even as this Court recognized the absolute constitutional protection for the *non-contractual* right to judicial salaries, it distinguished the more limited protection provided to *contractual* rights, emphasizing that such rights are inherently subject to the exercise of the State's police powers. 360 Ill. at 29 (citing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)).

B. The Debates Regarding the Pension Clause at the 1970 Constitutional Convention Are In Full Accord With the Clause's Plain Meaning.

The Constitutional Convention debates likewise refute Plaintiffs' interpretation of the Pension Clause. "The meaning of a . . . constitutional provision depends upon the intent of the drafters at the time of its adoption." *Sayles v. Thompson*, 99 Ill. 2d 122, 125 (1983). That is why this Court has emphasized that the Pension Clause should be "consider[ed] . . . 'in light of the history and condition of the times, and the particular problem which the convention sought to address.'" *Kanerva*, 2014 IL 115811, ¶ 36 (quoting *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 216 (1979)). But Plaintiffs fail to do just that, ignoring the specific problem the delegates were addressing and instead relying on statements from the 1970 Constitutional Convention debates divorced from their context.

Before the 1970 Constitution, "pension benefits under mandatory participation plans were in the nature of bounties which could be changed or even recalled as a matter of complete legislative discretion." Proceedings at 2925 (introductory remarks of Delegate Green). After the delegates approved new local home rule powers, municipal employees began to fear that for the first time, local governments could rely on the non-contractual nature of pensions to eliminate them. *E.g.*, Proceedings at 2926 (remarks of Delegate Kinney); 2928 (Delegate Lyons); 2928 (Delegate Parkhurst); 2930 (Delegate S. Johnson). To address this unanticipated, mid-Convention concern, several delegates turned to the New York Constitution for a possible solution. *See* discussion *supra* Part I.A.2. They proposed that, in contrast to then-existing Illinois law but consistent with New York's, all public pensions should be a part of a "contractual relationship" with a "contractual status." Proceedings at 2925, 2931 (Delegate Green); *see also id.* at 2931 (Delegate Kinney). That change, Delegate Kinney explained, would stop "a municipality who preferred to use retirement money to repair the streets or some other thing, [from] abandon[ing] a pension system." *Id.* at 2926. In light of that explanation, Delegate Lyons spoke "in favor of the amendment" because he was "not shocked at the notion of vesting contractual — 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 who have represented that that is the limit of the scope of this amendment." *Id.* at 2929.

This historical context undermines Plaintiffs' reliance on various delegates' statements to support their extreme reading of the Pension Clause. *Cf. Morel v. Coronet Ins. Co.*, 117 Ill. 2d 18, 24-25 (1987) ("Statements made by members of the General Assembly in legislative debate assist in revealing the legislative intent behind a statute only when examined in the context of the debate in its entirety."). For example, given the delegates' focus on the established distinction between contractual rights and statutory gratuities, the

statements of Delegates Green and Kinney, the Clause's sponsors, about the effect of the Pension Clause cannot fairly be read to mean that the Pension Clause was intended to confer more than a contractual protection to pensions. *Id.* at 2925, 2926, 2931-32 (Delegate Kinney); 2931 (Delegate Green). Indeed, it would not even have occurred to the delegates that these comments could be construed as referring to super-contracts because, at that time, more than a century of consistent precedent established that all contractual rights are subject to the State's police power. *See* Def. Br. 21-26. If either sponsor had intended the dramatic legal shift Plaintiffs now claim, ISEA Br. 25; SUAA Br. 20, one of them undoubtedly would have said so.

Similarly, Delegate Kemp's statement that pensions had not been "altered or amended, even during those trying times during the days of the Depression" and that he "presume[d] that the purpose of this proposal is to make certain that irrespective of the financial condition of a municipality or even the state government, and that [pension system members] could at least expect to live in some kind of dignity during their golden years" does not show that he contemplated more than contractual protections. Proceedings at 2926. Delegate Kemp did not even mention police powers, let alone advocate for their abrogation. And even if he had, a single comment from a solitary delegate is entitled to little weight in interpreting the Clause. *People ex. rel. Ill. Fed'n of Teachers v. Lindberg*, 60 Ill. 2d 266, 271-72 (1975); *see also Client Follow-Up Co.*, 75 Ill. 2d at 221.

Indeed, consistent with Defendants' interpretation, the only judicial decision any delegate discussed, *Spina v. Consolidated Police and Firemen's Pension Fund Commission*, 197 A.2d 169 (1964), held that mandatory pensions are mere gratuities. The *Spina* decision, which Delegate Green described as "one of the overwhelming reasons to mandate this *contractual* status," held that New Jersey pensions could be reduced at the legislature's whim. Proceedings at 2931 (emphasis added). Delegate Green claimed that Illinois public

employees were "very fearful of" treating pensions as gratuities and that the Pension Clause would prevent that result. *Id.* The fear was not, as Plaintiffs now claim, that pensions would have "only" a contractual protection. *See* ISEA Br. 25. In fact, although *Spina* itself acknowledged that contractual protections for pensions were not absolute because contracts themselves are not absolute, 197 A.2d at 176, Delegate Green nonetheless did not seek greater-than-contractual status. Nor does Delegate Green's unfulfilled desire to require greater pension funding levels reveal that the Clause as enacted made pensions absolute. *Id.* at 2931. He offered those remarks about pension funding while proposing that the Pension Clause should explicitly require full funding of the pension system, a proposal that was not adopted. *Lindberg*, 60 Ill. 2d at 272. His comments did not convert pensions into super-contracts. *Contra* ISEA Br. 25-26; SUAA Br. 20.

As for Delegate Kinney, given the state of the law in 1970, her explanation that the use of both "diminish" and "impair" was not necessary for the Clause to achieve its purpose bolsters the view that the Pension Clause was intended to provide a contractual level of protection. Proceedings at 2929. The only distinction she drew between the two words was that the word "impaired" implied 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," *id.* at 2926, while "diminished" meant reduced, *id.* at 2929. She never suggested the unheard-of difference between the two words that Plaintiffs now promote: that the word "impaired" created traditional contractual protections and the word "diminished" added a novel form of super-contractual protection to pensions. *See* ISEA Br. 21; SUAA Br. 12-13.

In addition, if the Pension Clause really granted public pensions absolute protection, Delegate Whalen would not have objected to it. He worried that it did not go far enough, stating that "what . . . we may be doing by this provision is derogating in some way the rights of pensioners" by characterizing pensions as "contractual" instead of "proprietary."

Proceedings at 2929-30 (remarks of Delegate Whalen). And he complained that it made pensions "subject to . . . [contractual] contingenc[ies]." *Id.* at 2930. These remarks would make no sense if the Clause were absolute. Similarly, delegates who were opposed to the Pension Clause because it precluded the legislature from freely changing its spending priorities never suggested that the Clause went so far as to eliminate the State's police powers. *Id.* at 2927-28 (remarks of Delegates Parkhurst and Elward). If they thought the Pension Clause was absolute, they would have said so, loudly.

Plaintiffs thus finally resort to emphasizing actions the Convention did *not* take. Most notably, they note that the delegates did not act on Delegate Whalen's suggestion that a contractual protection for pensions be incorporated into the Contract Clause, which he described as a "hortatory" measure. ISEA Br. 27-28. But this proposal was part and parcel of his complaint that the Pension Clause was not strong enough. At best, its failure indicates that a majority of the delegates did not take up a suggestion by an opponent of the Clause to move the measure to a different part of the Constitution for no substantive purpose. Similarly, Plaintiffs wrongly attach significance to Delegate Green's refusal to act on an outside-the-proceedings request to amend the Pension Clause when non-delegates who were opposed to the Clause altogether approached him after the Convention already had approved it. *See id.* at 10, 29. There are numerous reasons Delegate Green could have decided not to act, including that the Clause already provided adequate flexibility. A claim that these non-occurrences shed light on the meaning of the Clause only reveals the flimsiness of Plaintiffs' argument. *See Morel*, 117 Ill. 2d at 24-25.

Moreover, it was clear to all delegates that the State's police power "applies to every section [of the Constitution], whether it is stated or not." Proceedings at 1689 (remarks of Delegate Foster). Plaintiffs try to dismiss this unequivocal statement, which no delegate ever contested or disputed either when it was made or in any later debate, by pointing out that it

was offered *before* the delegates debated the Pension Clause. ISEA Br. 28; SUAA Br. 18-19. But that fact supports Defendants, not Plaintiffs. By the time debate began on the Pension Clause, it was an established background principle that the State's police powers apply throughout the Constitution. *See* Proceedings at 1689 (remarks of Delegate Foster); *see also id.* at 1480-81 (remarks of Delegate Lawlor) (noting that the police powers limitations applies to right of assembly). There was no need to discuss it again in the context of the Pension Clause.

C. Precedent Confirms that the Pension Clause Does Not Eliminate the State's Police Powers.

Plaintiffs' reliance on case law suffers from similar flaws. For instance, they persist in denying that *Felt v. Board of Trustees of Judges Retirement System* considered the legitimacy of a police powers defense to a claim brought under the Pension Clause and rejected it on its facts, not as legally irrelevant. 107 Ill. 2d 158, 166 (1985). But if *Felt* had actually held that the Pension Clause is absolute, this Court would have declared that the Clause is not subject to the State's police power, explained that the statute at issue was thus unconstitutional, and refused to consider the merits of the plaintiffs' Contract Clause claim. *Felt* did none of those things. Nor are Plaintiffs correct that this Court in *Felt* must have concluded that the Pension Clause is absolute because it refused to follow precedent from "other 'jurisdictions which permit a reduction in retirement benefits.'" ISEA Br. 30 (quoting *Felt*, 107 Ill. 2d at 167-68). That refusal occurred in the context of this Court's rejection of a specific argument not at issue here: that the Pension Clause should be given the same scope as provisions in jurisdictions that, unlike Illinois, explicitly protect only "accrued" benefits. *Felt*, 107 Ill. 2d at 167-68 (citing *Kraus v. Bd. of Trs. of Police Pension Fund*, 72 Ill. App. 3d 833, 846-48 (1st Dist. 1979)) (explaining that "to accept the defendants' argument we would have to ignore the plain language of the Constitution of Illinois").

Plaintiffs' related claim that this Court's decision in *Kanerva* forecloses Defendants' reliance on the State's police powers is similarly flawed. *See* ISEA Br. 32-33. Plaintiffs do not dispute that *Kanerva* addressed only a question not relevant here: what types of benefits are protected by the Pension Clause — in that case, medical insurance benefits. 2014 IL 115811, ¶ 37. Plaintiffs instead rely on *Kanerva*'s unremarkable admonishment that this Court "may not rewrite the pension clause to include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve." *Id.*, ¶ 41. But Plaintiffs' claim that this language is dispositive, ISEA Br. 32, begs the question of what the plain meaning of the Pension Clause actually is.

Birnbaum v. New York State Teachers Retirement System, on which Plaintiffs also rely, ISEA Br. 27, is no different, as it decided only *what* was covered by the New York Pension Clause — in that case the retirement system's use of mortality tables to determine the amounts of annuities. 5 N.Y.2d 1, 11-12 (N.Y. 1958). The assertion that *Birnbaum* "specifically refused to permit its legislature to use the police power," SUAA Br. 23, is false; the court did not mention the police power. Indeed, *Birnbaum* emphasized that the New York pension clause was adopted to ensure that previously gratuitous public pensions *"became contracts."* 5 N.Y.2d at 9, 12 (emphasis added).

Finally, *Fields v. Elected Officials Retirement Plan*, 320 P.3d 1160 (Ariz. 2014), the only reported case in the history of American law to give super-contractual protection to pensions, does not aid Plaintiffs. Although that case has virtually no reasoning, it appears to rely upon a textual redundancy not present in the Illinois Constitution. The Arizona Constitution provides that "[m]embership in a public retirement system is a contractual relationship that is subject to [Arizona Constitution's contract clause], *and* public retirement system benefits shall not be diminished or impaired." Ariz. Const. art. 29, § 1(C) (emphasis added). Thus, the Arizona pension clause makes an explicit reference to its Contract Clause,

and its "diminished or impaired" language is in an independent clause, stated conjunctively, which therefore has an independent meaning. In the Illinois Pension Clause, by contrast, the words "diminished or impaired" appear in a dependent clause that refers back to the "contractual relationship" at the center of the provision. *Fields*, a 2014 case from another State interpreting a textually distinct provision that was not enacted until 1998, does not and cannot inform the meaning of the 1970 Illinois Constitution.

II. If the Pension Clause Prohibited the State from Exercising Its Police Powers, It Would Violate the Federal Constitution.

Defendants demonstrated in their opening brief that the reserved powers doctrine under the United States Constitution forbids a State from irrevocably surrendering "an essential attribute of its sovereignty," *U.S. Trust Co.*, 431 U.S. at 23, and, therefore, "that *a State is without power to enter into binding contracts not to exercise its police power in the future*," *id.* at 23, n.20 (emphasis added). The ISEA Plaintiffs acknowledge as much, ISEA Br. 41, but contend that their absolutist reading of the Pension Clause does not run afoul of this principle for two reasons.[8] First, they argue that a State's "attempt to reduce its financial obligations" can never constitute "an exercise of 'police powers.'" *Id.* Second, they claim that the reserved powers doctrine does not extend "to the specific limits which a state's constitution places on that state's legislature." ISEA Br. 39. Neither argument is valid.

Both this Court and the U.S. Supreme Court have rejected the first argument and have concluded the State's police power is "'not limited to health, morals, and safety. It extends to economic needs as well.'" *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 23 (1985)

---

[8] The SUAA Plaintiffs do not address the reserved powers doctrine at all. Their brief instead examines a different rule of federal constitutional law — the sovereign acts doctrine — which Defendants have not invoked. *See* SUAA Br. 24-29. The sovereign acts doctrine holds that there is no breach of contract if the government enacts a law of general application that impacts a contractual obligation. *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996); *compare id.* at 888-89 (discussing reserved powers doctrine), *with id.* at 891-910 (discussing sovereign acts doctrine). This is not Defendants' claim.

(quoting *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38-39 (1940)). "Ensuring the financial integrity of the [government] is a significant public purpose" that may justify an exercise of the State's police power. *Balt. Teachers Union v. Mayor & City Council of Balt.*, 6 F.3d 1012, 1019 (4th Cir. 1993); *see also Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 369 (2d Cir. 2006) ("[T]he legislative interest in addressing a fiscal emergency is a legitimate public interest."). These holdings follow from *U.S. Trust Company*, which explains that the Contract Clause's facially absolute proscription against contractual impairments "is not an absolute bar to subsequent modification *of a State's own financial obligations*." 431 U.S. at 25 (emphasis added). Plaintiffs' authorities are not to the contrary: *Independent Voters of Illinois Independent Precinct Organization v. Ahmad*, 2014 IL App (1st) 123629, ¶¶ 67-83, rejected a police powers argument because the City *retained* the authority to use its police powers to protect the general welfare, while *Faulkenberry v. Teachers and State Employees Retirement System of North Carolina,* 483 S.E.2d 422, 427-28 (N.C. 1997), held that the exercise of the State's police powers was not justified *on the facts* of that case.

Plaintiffs' argument ultimately relies on a mischaracterization of *U.S. Trust Company*. *See* ISEA Br. 41-43. In that case, the Supreme Court concluded that New York and New Jersey could not invoke their police powers to abrogate a contractual commitment in certain bonds. 431 U.S. at 3, 31. But that conclusion was not based on the notion that police powers were categorically unavailable to States to take such actions. Instead, the Court evaluated the police powers claim on the merits and explained its elements and its constitutional basis — even as it found that the asserted police powers claim was unjustified on the particular facts of that case. *Id.* at 21-31. As Defendants have explained, States can and do make binding financial contracts, and those contracts are enforced in the vast majority of cases. But a State cannot promise never to invoke police powers to modify its contracts.

Plaintiffs' unsupported and illogical argument that state *constitutions* are somehow exempt from the *federal* constitutional prohibition on a State's alienation of its police powers is also wrong. As the U.S. Supreme Court has explained, "[n]o legislature can bargain away" the police power, nor can "the people themselves." *Stone v. Mississippi*, 101 U.S. 814, 819 (1879). This express declaration that "the people themselves" cannot alienate the police power refutes any claim that they can do so through their state constitutions. *See also U.S. Trust Co.*, 431 U.S. at 23 n.20; *Atlantic Coast Line R.R. v. City of Goldboro*, 232 U.S. 548, 558 (1914).

This Court's precedents are equally firm on this vital aspect of our constitutional structure: "It is axiomatic that the police power is inherently necessary to the effective conduct and maintenance of government, thus we do not construe the constitutional provision at issue [the Illinois Contract Clause] as creating a bar to the *bona fide* exercise of that power." *City of Chi. v. Chi. & Nw. Ry. Co.*, 4 Ill. 2d 307, 317-18 (1954); *see also City of Chi. v. Chi. Union Traction Co.*, 199 Ill. 259, 270 (1902). As this Court has explained, the police power "is one of the great purposes for which the State government was brought into existence." *Parker v. People*, 111 Ill. 581, 599 (1884). Supervision of the general welfare "is continuing in its nature, and [it is] to be dealt with as the special exigencies of the moment may require," *Stone*, 101 U.S. at 819, meaning that a State must preserve the ability to respond in extreme circumstances. And contrary to Plaintiffs' argument, alienating the police powers in a constitutional provision is, if anything, even more suspect than doing so by statute or contract given a constitution's far reach and relative difficulty of amendment.

The New York Court of Appeals' decision in *Flushing National Bank v. Municipal Assistance Corporation for the City of New York*, 40 N.Y.2d 731 (1976), does not help Plaintiffs. *See* ISEA Br. 41 (arguing that *Flushing National Bank* held that because "the state's constitution, not a contract, limited the legislature's power, . . . the question of

reserved powers was beside the point"). That case was decided a year before the Supreme Court's comprehensive exposition of the reserved powers doctrine in *U.S. Trust Company*, does not mention that doctrine at all, and explicitly declined to decide any federal question. *Id.* at 733. And even if Plaintiffs were correct about what the case says, the case would be contrary to the binding precedent of *U.S. Trust Company*, 431 U.S. at 23 and *Stone*, 101 U.S. at 819.

In all events, the unmistakability doctrine should compel this Court to reject Plaintiffs' super-contract reading of the Pension Clause. The plain meaning of the term "contractual relationship," combined with Plaintiffs' inability to identify any declaration by any drafter that even mentions the State's police powers, precludes a finding that the alleged surrender of these powers "has been expressed in terms too plain to be mistaken." *United States v. Winstar Corp.*, 518 U.S. 839, 874-75 (1996). Plaintiffs' only response to the unmistakability doctrine (other than repeating some of its merits arguments) is to claim that it "'does not allow governments to undertake actions that are specifically aimed at voiding a contract or preventing performance of a contract.'" ISEA Br. 45 (quoting *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty., N.Y.*, 712 F.3d 761, 773 (2d Cir. 2013)). But the only case Plaintiffs rely on for that proposition involved the breach of a contractual promise not to veto a particular piece of legislation where the court, in dicta, made a comment about the "sovereign acts doctrine," which is not relevant here. *See* discussion *supra* at 16 n.8. That case did not involve, as this one does, a claim that the State has abdicated the exercise of a reserved sovereign power under any circumstance.

III. The Act is Severable.

Finally, even if Plaintiffs were correct that the Pension Clause alienates the State's police powers (and they are not), they are wrong that this Court must override the General Assembly's explicit direction about the severability of different parts of the Act. Plaintiffs

base their claim almost exclusively on a comment by a single senator stating that the Act represents "an integral bipartisan package." *See* ISEA Br. 46; SUAA Br. 32. Plaintiffs argue that this statement establishes that every provision of the Act is "inseparably connected in substance" and that the legislature "would [not] have enacted the valid portions without the invalid portions." *People v. Alexander*, 204 Ill. 2d 472, 484 (2003) (internal quotation marks and citation omitted); *see* ISEA Br. 46; SUAA Br. 32. Yet even if that single statement satisfied these criteria (and it does not, *see* Def. Br. 47-48), the comments of one legislator cannot trump the Act's explicit and carefully drawn severability provision, *see Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221, 237 (1986) (explaining that severability is "essentially [an exercise] of statutory construction").

CONCLUSION

For the foregoing reasons and those stated in Defendants' opening brief, the judgment of the circuit court invaliding Public Act 98–599 should be reversed and the matter remanded to the circuit court for further proceedings.

Dated: February 27, 2015

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

CAROLYN E. SHAPIRO
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Counsel for Defendants-Appellants

RICHARD S. HUSZAGH
GARY S. CAPLAN
CLIFFORD W. BERLOW
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2587

Rule 341(c) Certificate of Compliance

I certify that this Brief conforms to the form and length requirements of Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the cover and this certificate of compliance, is 20 pages.

Carolyn E. Shapiro