

No. 118585

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**IN THE SUPREME COURT OF ILLINOIS**

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IN RE: PENSION REFORM LITIGATION

DORIS HEATON, *ET AL.*, PLAINTIFFS-APPELLEES,

v.

PAT QUINN, GOVERNOR OF ILLINOIS, *ET AL.*, DEFENDANTS-APPELLANTS  
AND CONSOLIDATED CASES

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On Direct Appeal Pursuant to S. Ct. Rule 302(a)(1) from the Circuit Court for the  
Seventh Judicial Circuit, Sangamon County, Hon. John W. Belz, No. 2014 MR 1

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**MOTION OF THE INTERNATIONAL MUNICIPAL LAWYERS  
ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN  
SUPPORT OF DEFENDANTS-APPELLANTS**

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Proposed *amicus* International Municipal Lawyers Association respectfully moves this  
Court, pursuant to Illinois Supreme Court Rule 345, for leave to file the attached brief as *amicus  
curiae* in support of defendants-appellants. In support of its motion, the proposed *amicus* states  
as follows:

1. The defendants-appellants have directly appealed to this Court the judgment of  
the circuit court holding that Public Act 98-0599, commonly known as the Pension Reform Act,  
violates the Pension Clause of the Illinois Constitution.

**FILED**

JAN 15 2015

**SUPREME COURT  
CLERK**



2. The International Municipal Lawyers Association (“IMLA”) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. IMLA’s membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

3. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and in state supreme and appellate courts.

4. IMLA has a direct and tangible interest in the case before this Court because (a) many of the organization’s members are legal counsel of political subdivisions, including some in Illinois, that face financial hardship as the result of outstanding pension liabilities; (b) the precedent in this case may influence courts in other states that have pension clauses in their state constitutions; (c) a ruling in favor of plaintiffs may require municipalities to cut basic services such as police protection and education, some of which are constitutional responsibilities, in order to meet pension obligations; and (d) this Court’s decision may affect the degree to which political subdivisions can alienate their reserved sovereign powers.

4. ILMA members are called upon to advise political subdivisions on constitutionally permissible strategies to overcome pension shortfalls. A recent study by Pew Charitable Trusts of 61 cities found that only 74 percent of pension obligations were funded, leaving a \$99 billion gap. The Pew Charitable Trusts, A Widening Gap in Cities: Shortfalls in

Funding for Pensions and Retiree Health Care (Jan. 16, 2013), <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/a-widening-gap-in-cities>. This funding gap has increased five percentage points on average since the Great Recession, and half of the cities studied faced funding declines of at least eight percentage points. *Ibid.* These budget shortfalls may require some restructuring of pension benefits so that pension systems (and municipalities) remain financially solvent. Municipalities, including Illinois municipalities, may face critical funding shortfalls disabling them from adequately providing police and fire protection, education, public health, and other core governmental responsibilities if there are constitutional barriers to reforming their public employee pension schemes.

5. The proposed *amicus* brief will assist this Court's determination by illuminating the federal constitutional issues raised by this case. Since the nineteenth century, the U.S. Supreme Court has held that the police power is so fundamental that the State—indeed, even the people—cannot alienate it. By reading the Illinois Pension Clause as an absolute bar to modifying pension agreements and giving those agreements a “super-contract” status, the circuit court held that Illinois had parted with its reserve sovereign authority in violation of the federal constitution and over a hundred years of Supreme Court precedent. In addition, the *amicus* brief addresses the level of deference owed to the General Assembly's determination that the Pension Reform Act satisfies the Pension Clause of the Illinois Constitution. IMLA believes that its proposed brief likely addresses these specific issues in more detail than other briefs filed in this case and that this detailed discussion will assist the Court in its consideration of the questions before it.

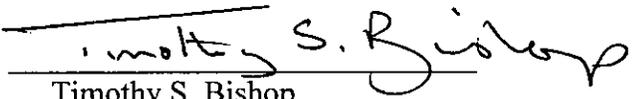
WHEREFORE, for the foregoing reasons as well as those set forth in the *amicus* brief, the Illinois Municipal Lawyers Association respectfully requests leave to file the attached brief *instanter*.

Dated: January 12, 2015 |

Respectfully submitted,

THE INTERNATIONAL MUNICIPAL LAWYERS  
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**NOTICE OF FILING**

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To: Counsel of Record  
(as listed on the attached Certificate of Service)

PLEASE TAKE NOTICE that on January 12, 2015, we filed with the Clerk of the Illinois  
Supreme Court the following documents: (a) Motion of the International Municipal Lawyers  
Association for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellants;  
(b) proposed *Amicus Curiae* Brief; and (c) Proposed Order. Copies of all documents are  
enclosed.

**FILED**

JAN 15 2015

**SUPREME COURT  
CLERK**

Dated: January 12, 2015

INTERNATIONAL MUNICIPAL LAWYERS  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 12, 2015, a true and correct copy of the foregoing Notice of Filing, and of the Motion of the International Municipal Lawyers Association for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellants, Proposed Order, and proposed *Amicus Curiae* Brief were served upon all counsel of record listed below by depositing same in the United States Mail with first-class postage fully prepaid, in properly-addressed envelopes.

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**FILED**

JAN 15 2015

**SUPREME COURT  
CLERK**

## CERTIFICATE OF MAILING

The undersigned hereby certifies that he is one of the attorneys for Amicus Curiae International Municipal Lawyers Association, and that he filed the foregoing Notice of Filing, Motion for Leave to File Amicus Curiae, Proposed Order, and Proposed Amicus Curiae Brief by causing the original of the Notice of Filing, Motion for Leave to File Amicus Curiae, Proposed Order, and 20 copies of the Brief to be deposited in the United States Mail at 71 S. Wacker Drive, Chicago, Illinois, before the hour of 5:00 PM on January 12, 2015, for delivery to the Clerk of the Court. Delivery charges were prepaid and the package was addressed to:

Carolyn Taft Grosboll  
Clerk of the Court  
Illinois Supreme Court  
Supreme Court Building  
200 East Capitol Avenue  
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Timothy S. Bishop

**FILED**

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**PROPOSED ORDER**

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This matter having come before the Court on the Motion for Leave to file Brief as *Amicus Curiae*, and the Court being duly advised;

IT IS HEREBY ORDERED THAT:

The Motion is granted/denied, and the International Municipal Lawyers Association is granted leave to file its brief as *amicus curiae instanter*.

Date: \_\_\_\_\_

\_\_\_\_\_  
Justice

\_\_\_\_\_  
Justice

\_\_\_\_\_  
Justice

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**BRIEF OF THE  
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION  
AS *AMICUS CURIAE* IN SUPPORT OF  
DEFENDANTS-APPELLANTS**

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## STATEMENT OF INTEREST

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

## QUESTIONS ADDRESSED

Amicus IMLA agrees with all of the arguments for reversal made by the Attorney General, but rather than repeat those arguments will address the following two questions:

1. Whether the Circuit Court's interpretation of Article XIII, § 5 of the Illinois Constitution violates the United States Constitution, which prohibits a State from alienating basic police powers necessary to the protection of its citizens.
2. Whether the Circuit Court should have given greater deference to the General Assembly's considered conclusion that the Pension Reform Act is "consistent with the Illinois Constitution."

## INTRODUCTION

Without repeating the facts laid out by the Attorney General, IMLA wishes to underline the dire emergency that the Illinois General Assembly used its police powers to address in Public Law 98-0599. That emergency was as unforeseen and unpredictable as the 2007-2008 economic meltdown and slow-motion recovery that caused it. It has dramatically altered the fiscal landscape of Illinois for decades to come, and its effects have been and continue to be felt by every resident of the State. A State's government may not stand at the sidelines while a fiscal disaster of this dimension plays out, trusting to luck that some economic miracle will come along and save the day. Government has an obligation to all the State's citizens—and to the United States of which it is an integral part—to use its police powers to avoid impending disaster. That is just what the General Assembly did when it passed the Pension Reform Law.

The adverse effects of the 2007-2008 collapse of the U.S. economy and its aftermath on Illinois's finances and prospects for the future cannot be exaggerated. The decline in funding levels of the pension benefits at issue from about 75% in 2000 to less than 50% today leaves an astonishing \$100 billion in benefit liabilities unfunded. Defs' Statement of Facts in Support of Mot. for Summary Judgment ("Facts") ¶¶ 32, 60, 71. Obligations under the 1994 law designed to fund current benefits and make up most of the shortfall by 2045 now consume 23%-27% of the State's general revenues annually and will require annual commitments of about 20% of general revenues every year for the next two decades. Facts ¶ 98. In an effort to meet these massive payments, the State increased individual and corporate taxes and slashed essential State programs, including education, corrections, police, and health and social services. Facts ¶¶ 145-154. Illinois borrowed \$7 billion through bond issues to pay pension obligations. Facts ¶ 111. And it

left \$7 billion of its bills unpaid in 2013, causing untold difficulties for its contractors, their employees, and the citizens who depend on their services. Facts ¶ 143.

Taxation, borrowing, and cutting expenditures offer no way out of this dire situation. Increasing Illinois's already high income, corporate, and sales taxes would decrease the State's competitiveness, driving away residents and businesses who have a choice about where to live, work, locate, and spend their money. Illinois's pension debts and poor fiscal situation have led ratings agencies to give it the lowest rating of all 50 states, so increasing borrowing to meet obligations would be costly and require more belt-tightening to meet interest payments. And further cutting basic services would disproportionately harm the most vulnerable segments of our society and make the State an unattractive place to live or do business. Additional cuts to education, public safety, and public health would undermine the State's chance to recover anytime in the foreseeable future. There is significant risk that the sort of combination of taxation increases, borrowing, and spending cuts necessary to fund a \$100 billion pension shortfall over the next 20 years would catapult the State into a death spiral in which higher taxes drive away taxpayers, reducing the tax base and necessitating ever deeper cuts and payments of ever higher premiums to lenders, which in turn would feed into a cycle of decline.

A city like Detroit can declare bankruptcy and—eventually—move on. But a State does not have that option. A State must address dire fiscal crisis by using its police powers to work its way out of the crisis, improve the lot of its citizens, and ensure that the prospects of its residents in the future are not destroyed by the bad luck or errors of the past. Otherwise it faces the prospect that, with more attractive options just across State



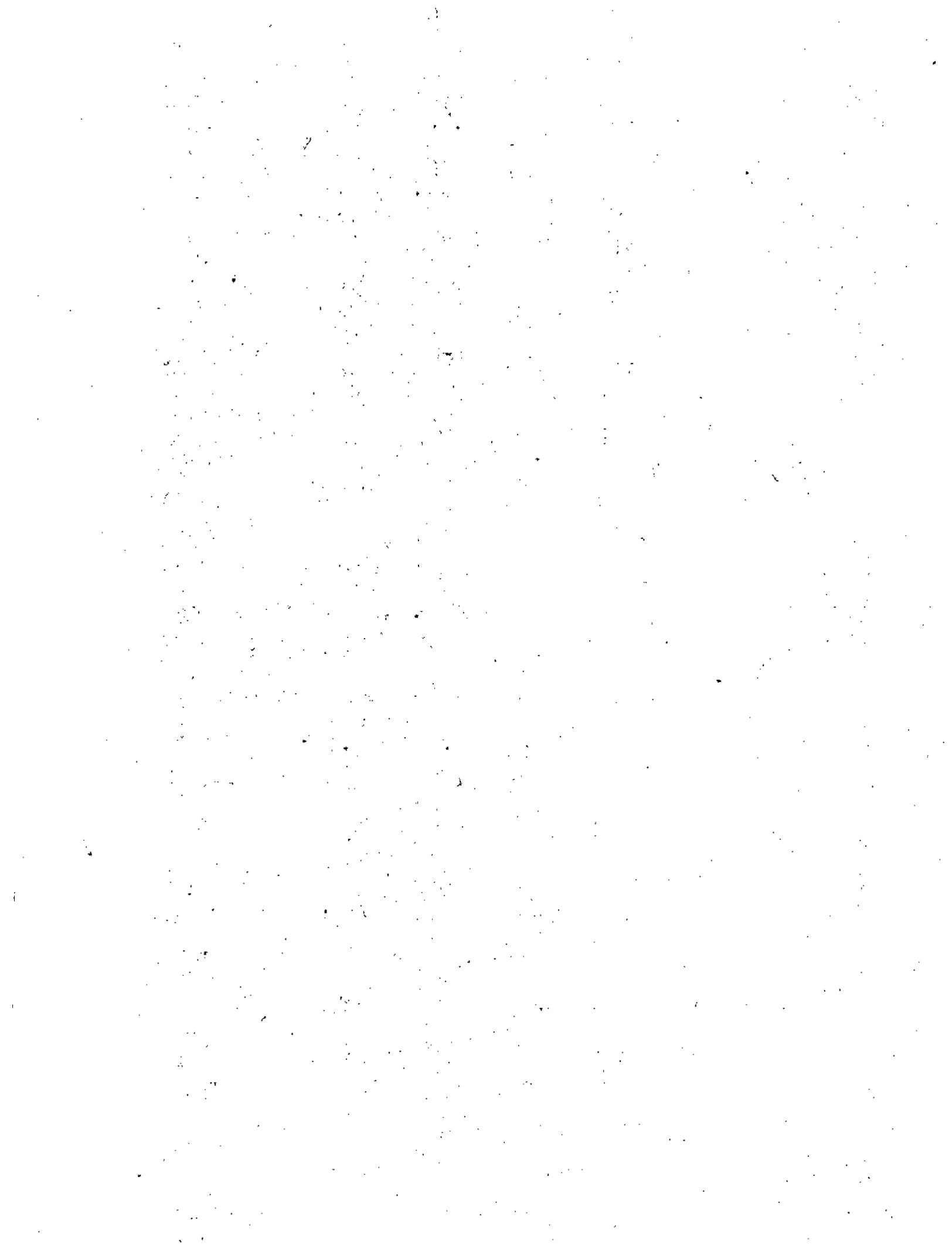
borders, businesses and individuals will simply take the exit option, thereby cementing the State's decline.

The General Assembly understood all of this and took reasonable and modest action, well within the ordinary scope of a State's police power authority, to protect Illinois citizens from the bleakest of futures. In curtailing some pension benefit increases while also decreasing employee contributions, guaranteeing funding, and giving pension funds the right to sue to enforce funding, the General Assembly was well aware of the language of the Pension Clause of the Constitution. But it interpreted that language to allow the modest changes it adopted, which it concluded were "consistent with the Illinois Constitution," as well as "advantageous to both the taxpayers and employees impacted by these changes." Pension Reform Act § 1, Legislative Statement.<sup>1</sup>

Among the errors the Circuit Court made in striking down the Pension Reform Law are the two discussed here. The first is of a federal dimension: the court curtailed Illinois's police powers in a way that the United States Constitution prohibits. The second

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<sup>1</sup> The General Assembly outlined the State's "atypically large debts and structural budgetary imbalances," the prospect of "greater and rapidly growing debts and deficits," the State's lowest-in-the-Nation credit rating, "the prospect of future credit downgrades that will further increase the high cost of borrowing," and the inadequacy to address these fiscal problems of its prior actions in "increasing the income tax" and making "deep cuts to important discretionary programs that are essential to the people of Illinois." Pension Reform Act § 1, Legislative Statement. The General Assembly then explained that the Reform Act "is intended to address the fiscal issues facing the State and its retirement systems in a manner that is feasible, consistent with the Illinois Constitution, and advantageous to both the taxpayers and employees impacted by these changes. Having considered other alternatives that would not involve changes to the retirement systems, the General Assembly has determined that the fiscal problems facing the State and its retirement systems cannot be solved without making some changes to the structure of the retirement systems. As a result, this amendatory Act requires more fiscal responsibility of State, while minimizing the impact on current and retired State employees. \* \* \* The General Assembly finds that this amendatory Act \* \* \* will lead to fiscal stability for the State and its pension systems." *Ibid.*



involves the respect due in our system of government to a coordinate branch's reading of a foundational provision. Although no one doubts that this Court is the ultimate arbiter of what the Illinois Constitution means, the General Assembly's considered interpretation of the Pension Clause and its determination that a statute it is adopting comports with that provision of the Constitution is entitled to considerable deference—but the Circuit Court gave it none. An appropriate degree of deference to the legislature's construction of the Pension Clause as leaving room for the exercise of emergency police powers requires upholding the Pension Reform Law.

## ARGUMENT

### I. **THE CIRCUIT COURT'S RULING STRIKING DOWN THE PENSION REFORM LAW VIOLATES THE FEDERAL CONSTITUTION, WHICH PROHIBITS STATES FROM ALIENATING THEIR POLICE POWERS**

#### A. **Police Powers Are An Inherent Attribute Of State Government That May Not Constitutionally Be Alienated**

For nearly 200 years, courts have held that legislatures lack the power to “surrende[r] an essential attribute of [their] sovereignty” or “bargain away the police power of a State.” *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977) (quoting *Stone v. Mississippi*, 101 U.S. 814, 817 (1880)). As the U.S. Supreme Court explained in *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 751 (1884), “[t]he preservation of [the public health and morals] is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.” See also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 436-437 (1934) (collecting Supreme Court authority).

This principle that a State may not alienate the basic police power that “is one of the great purposes for which the State government was brought into existence” has been recognized by this Court. *Parker v. People*, 111 Ill. 581, 599 (1884). It has been recognized by the courts of other states. *E.g.*, *Chicago, R. I. & P. Ry. Co. v. Taylor*, 192 P. 349, 356 (Okla. 1920) (“As neither the state nor the municipality can surrender by contract the [police] power \* \* \*, a contract purporting to do so is void ab initio, and, being void, it is impossible to speak of laws in conflict with its terms as impairing the obligations of a contract”); *Brick Presbyterian Church v. City of N.Y.*, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826). And it has been described in leading treatises. *E.g.*, Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 283 (1868) (hereinafter “Cooley, TREATISE”) (“the prevailing opinion” is “that the State could not barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments” and “that any contracts to that end cannot be enforced under the provision of the national Constitution now under consideration”); Christopher G. Tiedman, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 580-581 (1886) (it has “been often decided, in the American courts, Federal and State, that the State cannot \* \* \* in any way curtail its exercise of any of those powers, which are essential attributes of sovereignty, and particularly the police power”).

As these authorities demonstrate, the “national Constitution[al]” problem with alienating police power is that such power is an “essential”—indeed the “inherent” and defining—characteristic of a sovereign state. Cooley, TREATISE at 283. The very “maintenance of a government” *at all* requires that a State “retai[n] adequate authority to

secure the peace and good order of society”: the “necessary residuum of state power” is that “the state \* \* \* continues to possess authority to safeguard the vital interests of its people.” *Home Bldg. & Loan Ass’n*, 290 U.S. at 434-435. And those vital interests extend to the economic well-being of the state as well as to public order and safety. As the Supreme Court has said, “[t]he economic interests of the state may justify the exercise of its continuing and dominant protective power \* \* \*.” *Id.* at 437.<sup>2</sup>

The need for a State to maintain core police powers to protect the economic, social, and physical well-being of its citizens is inherent in the concept of government in general, as *Home Building & Loan Association* attests, and more specifically in the constitutional structure of the United States. Under the United States Constitution we are “one people, commercially as otherwise,” with an “economic interdependence” that is evidenced in the Commerce Clause, Art. I, § 8, and the Preamble. Charles L. Black, Jr., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 21 (1969) (“STRUCTURE AND RELATIONSHIP”). The Nation’s federalist structure depends on “every State in this Union” in fact governing, exercising its police powers so as to maintain the conditions for commerce, prevent the need for the United States to make good on its Article IV § 4

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<sup>2</sup> A State’s “police power” includes both “state power to deal with the health, safety and morals of the people” (*Dakota Cent. Tel. Co. v. S. Dakota ex rel. Payne*, 250 U.S. 163, 186 (1919)) and more broadly “the residuary sovereignty of the states.” Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 785 (2007) (quoting THE FEDERALIST NO. 39, at 186 (James Madison) (Terence Ball ed., 2003)). See *Cooley*, TREATISE at 572 (“The police power of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others”); *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 424 (1952) (the police power “extends \* \* \* to all the great public needs”).

“guarantee” to backstop a failure to govern with federal power, and enabling the State to participate in its vital roles in electing a President (Art. II § 1) and members of Congress (Art. I §§ 2, 3, 4) and amending the Constitution (Art. V). See THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961) (describing the “dependence” of the federal government on “[t]he State Governments” that are “constituent and essential parts of the federal Government”).

A failed or failing State—whether its failure involves financial insolvency or civil strife—is a drain on the federal government and the entire Nation and a disruption to the Union. And a State that failed to exercise its police powers—or gave them away to others, not subject to the democratic process, to exercise—would surely open itself up to Fourteenth Amendment claims from its own citizens that it had failed to govern. See *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122-123 (1928). A right to have state government govern, rather than abdicate essential police powers, is as “implicit in the concept of ordered liberty” as other rights “valid as against the states” under the Fourteenth Amendment—indeed is “the very essence of a scheme of ordered liberty” and “neither liberty nor justice would exist if [these powers] were sacrificed.” *Palko v. Connecticut*, 302 U.S. 319, 324-326 (1937). It is no exaggeration to say that government exercises of police powers to protect and enhance the lives of citizens are “the matrix, the indispensable condition, of nearly every other form of freedom.” *Id.* at 327.

In light of all these considerations, though the United States Constitution does not say in so many words that a state may not alienate its core police powers necessary to the economic and social functioning of the state and its citizens, that is “an inference from

structure and relation” in the constitutional scheme “just as sure as any constitutional inference could be.” Black, STRUCTURE AND RELATIONSHIP 40. See THE FEDERALIST NO. 45 at 313 (Jacob E. Cooke ed., 1961) (“The powers reserved to the several States \* \* \* concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State”); *City of New Orleans v. Bd. of Comm’rs of Orleans Levee Dist.*, 640 So. 2d 237, 249 (La. 1994) (“The principle of constitutional law that a state cannot surrender, abdicate, or abridge its police power has been recognized without exception by the state and federal courts. Because the police power is inherent in the sovereignty of each state, that power is not dependent for its existence or inalienability upon the written constitution or positive law”); *State ex rel. City of Minot v. Gronna*, 59 N.W.2d 514, 531 (N.D. 1953) (“The police power is an attribute of sovereignty inherent in the states of the American union, and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and provide for the safety and good order of society”) (internal quotation marks omitted).

**B. A State May Not Constitutionally Alienate Its Core Police Powers, And Certainly Not Without A Clear Statement Of Intent To Do So**

There is no doubt that the principles described above prohibit a State by contract conferring special immunities from its power to advance the public welfare. As Justice Holmes explained, “[o]ne whose rights \* \* \* are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter.” *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 549, 357 (1908). Allowing alienation of the police power would permit states to delegate too much authority to private persons, who may not act for the



best interests of the community. Matthew Titolo, *Leasing Sovereignty: On State Infrastructure Contracts*, 47 U. RICH. L. REV. 631, 653 (2013) (citing *Bald Head Island Utils. Inc. v. Vill. of Bald Head Island*, 599 S.E.2d 98, 100 (N.C. Ct. App. 2004) (“Limitations on these governmental body contractual powers exist to prevent too much authority being delegated away to parties that may not represent the people’s best interests”)). Courts have adopted two rules to implement this prohibition. First, where a contract is silent on alienating the State’s reserved powers, the contract will be understood as reserving them to the State. *Home Bldg. & Loan Ass’n*, 290 U.S. at 435 (“the reservation of essential attributes of sovereign power is \* \* \* read into contracts as a postulate of the legal order”). Second, clear and express contractual promises to alienate the State’s reserved power are void and unenforceable. *Butchers’ Union*, 111 U.S. at 751; *Stone*, 101 U.S. at 817-819.<sup>3</sup>

It is also clear from the case law and constitutional principles discussed above that the prohibition on alienating the police power has a broader federal constitutional dimension that prohibits a State from alienating basic police powers by *any* means, including by its legislation or constitution. A State simply lacks the authority to “surrende[r] an essential attribute of [the] sovereignty” that is granted and protected by

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<sup>3</sup> Of a State’s reserved powers, the police power is not unique in its inalienability. The U.S. Supreme Court has refused to allow states to alienate other great powers as well. As early as 1848, the Court held that states could not surrender the power of eminent domain by contract. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848); see also *Backus v. Lebanon*, 11 N.H. 19, 24 (1840). Likewise, the Supreme Court has prevented states, under the public trust doctrine, from abridging the public’s reasonable use of the waterways by granting title to submerged lands. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 460 (1892) (“There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it”). The only core state powers that clearly are alienable are the taxation and spending powers. *U.S. Trust Co.*, 431 U.S. at 24; *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812).

the federal Constitution. *U.S. Trust Co.*, 431 U.S. at 23; see *Bd. of Comm'rs*, 640 So. 2d at 249 (“the principle that the exercise of the police power of the state shall never be abridged needs no constitutional reservation to support it”). This sort of reservation of fundamental police powers from constitutionally or legislatively created rights is not unusual. The Contract Clause broadly provides that “[n]o State shall \* \* \* pass any \* \* \* Law impairing the Obligation of Contracts.” U.S. Const. Art. 1, § 10. Yet unquestionably a State may impair contractual rights and obligations by the exercise of its “necessary residuum of state power.” *Home Bldg. & Loan Ass'n*, 290 U.S. at 434-435; see *id.* at 426 (recognizing that “emergency may furnish the occasion for the exercise of power” impairing a contract “in response to particular conditions”); *City of El Paso v. Simmons*, 379 U.S. 497, 506-509 (1965) (“under federal law” a state “has the ‘sovereign right \* \* \* to protect the \* \* \* general welfare of the people’” and has “wide discretion” in “determining what is and what is not necessary”); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (“the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected”). Thus, although “the Contract Clause remains a part of [the United States’] written Constitution,” nevertheless it gives way to necessary exercises of state police powers that respond to “the existence of an emergency”: “The Contract Clause is not an absolute bar to subsequent modification of a State’s own financial obligations.” *U.S. Trust Co.*, 431 U.S. at 16, 22 n.19, 25.

Similarly, although the Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation,” the right to compensation does not extend to the loss of property as the result of necessary exercises of the police power. A State’s discretionary decision to take private land to build a road requires compensation; but taking private property in response to an emergency—even seizing or destroying property or rendering it completely valueless—does not. For example, a State’s action to prevent a public nuisance is categorically never a taking requiring compensation. David A. Dana & Thomas W. Merrill, *PROPERTY: TAKINGS* 111 (2002). Nor, more broadly, is a State’s destruction of private property “to forestall \* \* \* grave threats to the lives and property of others.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992). The test is whether there is an “actual necessity” for the State to take property to forestall threats to its citizens. *Ibid.* Examples of public necessity include “to prevent the spreading of a fire” (*Bowditch v. City of Boston*, 101 U.S. 16, 18-19 (1880)); preventing the spread of disease (*Juragua Iron Co. v. United States*, 212 U.S. 297, 308-309 (1909)); or preventing property falling into the hands of an enemy. *United States v. Caltex, Inc.*, 344 U.S. 149, 155-156 (1952).

One more example. The public trust doctrine generally forbids states from alienating trust property to the prejudice of the general public. *Illinois Cent. R.R. Co.*, 146 U.S. at 453-454. Indeed, the U.S. Supreme Court has specifically analogized the public trust to reserved sovereign police powers in holding that a State may alienate neither. See *id.* at 453 (“The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them

entirely under the use and control of private parties \* \* \* than it can abdicate its police powers in the administration of government and the preservation of the peace”).

Even the most powerful constitutional protections are subject to implicit exceptions. The Bill of Rights, though it expresses most rights in absolute terms, is “subject to certain well-recognized exceptions, *arising from the necessities of the case.*” *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (emphasis added). Freedom of speech gives way when the speech is a libel, a true threat, fighting words, or crying “fire” in a crowded theater. See, *e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Schenck v. United States*, 249 U.S. 47, 52 (1919). The Fifth Amendment right against double jeopardy and Sixth Amendment right to jury trial, though expressed in absolute terms, have been held to have many exceptions. There is nothing unusual or questionable about the U.S. Supreme Court’s repeated holdings over two centuries that states may not by any means alienate so essential an attribute of sovereignty as their right to exercise their police power. Indeed, the Supreme Court has clearly explained that “reserved \* \* \* state power must be consistent with the fair intent of [any] constitutional limitation of that power,” such that “*the [constitutional] limitation cannot be construed so as to destroy \* \* \* the reserved power in its essential aspects.* They must be construed in harmony with each other,” especially “*where vital public interests would otherwise suffer.*” *Home Bldg. & Loan Ass’n*, 290 U.S. at 439-440 (emphasis added). The Supreme Court confirmed in *Stone v. Mississippi* that it is not just legislatures that may not alienate their police power, but also the people of the State (as by a constitutional provision like the Pension Clause):

No legislature can bargain away the public health or the public morals. *The people themselves cannot do it*, much less their servants. \* \* \* Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.

*Stone*, 101 U.S. at 819 (emphasis added).

This Court has similarly recognized exceptions to seemingly absolute provisions when interpreting the Illinois Constitution. For example, Article 1, section 10 provides in absolute terms that “[n]o person shall be \* \* \* twice put in jeopardy for the same offense.” Yet, this Court has held that a person may be retried “where a conviction has been set aside because of an error in the proceedings leading to the conviction.” *People v. Lopez*, 229 Ill. 2d 322, 367 (2008). And the Appellate Court has held that a person may be subjected to a second trial when the first proceeding ended in a mistrial due to manifest necessity. *People v. Andrews*, 364 Ill. App. 3d 253, 265 (2d Dist. 2006). Likewise, the Contract Clause provides, in absolute terms, that “[n]o \* \* \* law impairing the obligation of contracts \* \* \* shall be passed.” Ill. Const. Art. I, § 16. But this Court has 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.*” *George D. Hardin, Inc. v. Vill. of Mount Prospect*, 99 Ill. 2d 96, 103 (1983) (emphasis added).<sup>4</sup> The Pension Clause is no more “absolute and without exception”—as the Circuit Court wrongly held—than these other constitutional provisions. See, e.g., *Borden v. La. St. Bd. of Educ.*, 123 So. 655, 661 (La. 1929) (“the [state] Constitution presupposes the existence of the police power and is to be construed

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<sup>4</sup> The ruling in *Hardin* is especially pertinent because the official Commentary on the Illinois Constitution recognizes that the Pension Clause “states explicitly what is found in the more general language of Section 16 of Article I,” the Contracts Clause. Ill. Const. Art. XIII, § 5 (constitutional commentary by Robert A. Helman & Wayne W. Whalen) (Smith Hurd 1971).

with reference to that fact”); *Gronna*, 59 N.W.2d at 532 (same). This Court recognized as much in *Felt v. Board of Trustees of Judges Retirement System*, 107 Ill. 2d 158, 165 (1985), when it held that contractual pension rights are not “immunize[d] \* \* \* from every conceivable kind of impairment” or “from the effect of a reasonable exercise by the States of their police power.”

At the very least, even if a State does have the power to alienate the police power by constitutional or statutory provision, in light of these authorities there must be a strong presumption that the State did not intend to do so, which can be overcome only by the use of explicit language. Only a “clear statement” that the police powers do not apply to public pension contracts would suffice. As this Court held in *City of Chicago v. Chicago Union Traction Co.*, 199 Ill. 259, 270 (1902), no government should be “assume[d] to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public,” and “[t]his is especially true of the police power, for it is incapable of alienation” (quoting Byron Kosciusko Elliot & William Frederick Elliot, *A TREATISE ON THE LAW OF ROADS AND STREETS* 564 (1890)). See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547-548 (1837) (“A state ought never to be presumed to surrender this power, because \* \* \* the whole community have an interest in preserving it undiminished”); *Home Tel. & Tel. Co. v. City of L.A.*, 211 U.S. 265, 273 (1908) (the “existence and the authority” to “extinguish[*h*] *pro tanto* an undoubted power of government \* \* \* must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power”); *Winfield v. Pub. Serv. Comm’n of Ind.*, 118 N.E. 531, 533 (Ind. 1918) (“inasmuch as such grant of freedom is in derogation of common right, it is never presumed to have been made by the state, and the state will

not be held to have abandoned the right to exercise its police power, unless the state's intention so to do is expressed in terms so clear and unequivocal as to exclude doubt; and if doubt exists, it must be resolved in favor of the state"). A clear statement requires that the language be "plain to anyone reading the [provision]." *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991). The Pension Clause, in providing that pension rights are contract rights that may not be diminished or impaired, contains no such clear statement of an intent to override the State's police powers.

IMLA believes that under these principles, Illinois did not divest itself of its police power to regulate the public pension system, including its power to adopt emergency measures when the solvency of the system and financial future of the State became endangered. It did not do so explicitly in the Pension Clause. And it certainly may not be held to have done so *sub silentio* through a constitutional provision that creates affirmative rights but does not even mention the police power. The dire financial straits the State finds itself in as a consequence of the financial crisis, described in the Attorney General's brief and by other amici, is exactly the type of emergency situation in which police powers survive even clearly expressed contractual, statutory, and constitutional obligations. The Circuit Court's ruling that the Pension Clause alienated those police powers is inconsistent with the U.S. Constitution. See *Charles River Bridge*, 36 U.S. at 548 ("While the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation").

## II. THIS COURT SHOULD DEFER TO THE GENERAL ASSEMBLY'S UNDERSTANDING OF THE PENSION CLAUSE

In adopting the Pension Reform Act, the General Assembly gave close attention to the Illinois Constitution and determined that the Act was within its constitutional authority, and Governor Quinn signed the Act into law. Although this Court has the ultimate authority to determine what the Constitution means, it should defer to the considered interpretation of the Pension Clause by the coordinate legislative and executive branches of the State's government. It should carry considerable weight in this Court's analysis that the General Assembly—acting only 40 years after the Constitution was adopted—interpreted the Pension Clause to allow the Act's modest changes, which it concluded were “consistent with the Illinois Constitution” and “advantageous to both the taxpayers and employees impacted by these changes.” Pension Reform Act § 1, Legislative Statement.

### A. **Although This Court Ultimately Decides What The Constitution Means, Deference Is Due To The Views Of Coordinate Legislative And Executive Branches Of Government That The Pension Reform Act Is Constitutional**

As in the federal system, in Illinois “[i]t is emphatically the province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see *People v. Gersch*, 135 Ill. 2d 384, 399 (1990). Nevertheless, the courts' interpretative role is not an exclusive one. In the federal system, the principle of *Marbury v. Madison* sits alongside the recognition that courts “owe some deference to Congress' judgment after it has given careful consideration to the constitutionality of a legislative provision.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). When “Congress [enacts a law] after giving substantial consideration to

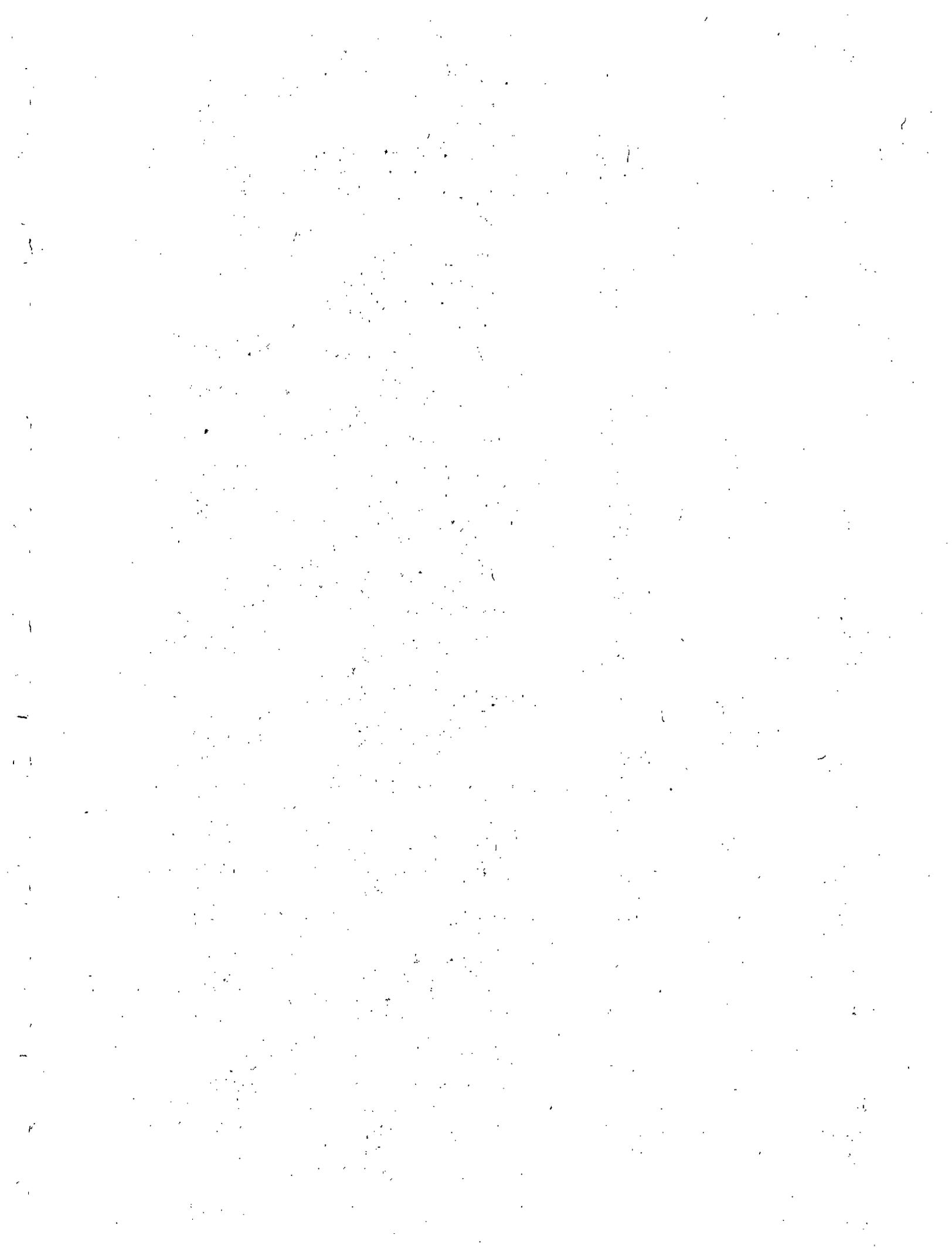
the constitutionality of the Act,” that “is of course reason to respect the congressional conclusion.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 61 (1982) (plurality opinion). See also, e.g., *Palmore v. United States*, 411 U.S. 389, 409 (1973) (deferring to Congress’s determination, “after careful consideration,” that it constitutionally “had the power to utiliz[e] a local court system staffed by judges without lifetime tenure”). And it is “the legislature, not the judiciary,” that “is the main guardian of the public needs to be served by social legislation” enacted under the “police power.” *Berman v. Parker*, 348 U.S. 26, 31-32 (1954).

There is of course no doubt that “State legislatures are as capable as Congress of making such determinations within their respective spheres of authority.” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). Those who enact Illinois’s laws have the obligation faithfully to interpret the law, including the Constitution, and have many occasions to do so when passing or signing new legislation. Indeed, Article XIII, Section 3 of the Constitution mandates that the Governor and every member of the General Assembly swear or affirm, upon taking office, to uphold the Illinois Constitution.<sup>5</sup> The General Assembly spent four years studying the State’s pension system and fiscal problems, and considered multiple alternatives, before it arrived at a solution it believed to be constitutional.

Every legislator was aware, when enacting the Pension Reform Act, that the constitutionality of the Act was in issue and would be challenged. E.g., House Transcription Debate, Dec. 3, 2013, at 40-41 (Bill “is going to have a constitutional

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<sup>5</sup> “I do solemnly swear (affirm) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of [my office] to the best of my ability.” Ill. Const. Art. XIII, § 3.



challenge, we all know that”) (statement of Rep. Brady). The legislature gave consideration to whether the Act satisfied the Pension Clause and expressly concluded that the Act is “consistent with the Illinois Constitution.” Pension Reform Act § 1, Legislative Statement. See, e.g., House Transcription Debate, Dec. 3, 2013, at 12 (“this Bill is constitutional”) (statement of Rep. Nekritz, Chair of Pensions Cmte. and member of Conference Cmte.); *id.* at 16 (same) (statement of Rep. Sente); *id.* at 28-29 (“constitutionality [is] always the question of concern to all conscientious Legislators”) (statement of Rep. Sandack); Senate Transcription Debate, Mar. 20, 2013, at 21-22 (“in committee, when this bill was heard \* \* \* there was extensive conversation about the prospective constitutionality of the bill”) (statement of Sen. Raoul); *id.* at 21-26 (constitutional debate between Sen. Raoul and Sen. Biss). The General Assembly’s awareness that the constitutionality of the Act was in issue and its considered and express determination that the law satisfied the Pension Clause takes this case out of the ordinary and requires that this Court give considerable deference to the legislature’s view. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010) (Supreme Court, in upholding the constitutionality of a federal statute against First Amendment challenge, “[f]ound it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns”).<sup>6</sup>

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<sup>6</sup> That constitutionality was a central concern of the General Assembly is evidenced by Senator Biss’s statement (Senate Transcription Debate, Mar. 20, 2013, at 14, 17-18) that

Article XIII, Section 5, is not the only part of the Illinois Constitution. The Preamble of the Constitution says explicitly that the whole point of the document is to provide for the health, safety and welfare of the people; to eliminate poverty and inequality; to assure legal, social and economic justice. Article X, Section 1, on education, says the State shall provide for an efficient system of high quality public educational institutions and services and that the State has the primary responsibility for financing the system of public education. We’re not doing those

Judicial restraint in review of the constitutionality of a state statute has a long history. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136, 144, 148 (1893) (legislatures have the “primary” authority to interpret the Constitution as part of enacting legislation; judges “fi[x] the outside border of reasonable legislative action” under the Constitution; judges should only overturn legislative action when its unconstitutionality is “so clear that it is not open to rational question”). Such restraint derives particular force from the State’s constitutional structure. Unlike the federal Constitution, which grants Congress specific enumerated powers, state constitutions are akin to “‘certificates’ of limitation.” Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 603 (2009). State legislatures are endowed with “plenary power” that is “limited only by the expressed provisions of each state’s constitution.” *Ibid.* Thus, the structure of state constitutions dictates that any limitation “be strictly construed in favor of the power” of the state legislature. *Ibid.*; see, e.g., *Bd. of Educ. v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. 1994) (because a state

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things. We're not. And the question that we have to ask ourselves, and I freely admit that it's not an obvious question or an easy question, but the question we have to ask ourselves is whether the pension clause, by virtue of its strong, clear language, takes clear precedence above and beyond all of those other priorities that are themselves articulated in the Constitution and elsewhere in statute and so forth, or instead is it our responsibility, given the emergency fiscal position that we're in and given its consequences for those very other constitutionally articulated priorities that I mentioned, is it our responsibility to balance these things against one another and find the most equitable distribution of the pain that we possibly can in getting out of this difficult situation? It is my view—understanding the difficulty of this question, understanding the legitimacy of other views—it is my view that the best thing we can do is to balance these priorities against one another. And it is my view that Senate Bill 35 achieves that balance.

legislature's plenary legislative power is limited only by the express provisions of the constitution, "[a]ny constitutional limitation \* \* \* must be strictly construed in favor of the power of the General Assembly").

State courts therefore "generally defer to the legislature." Buenger, *Friction by Design*, 43 U. RICH. L. REV. at 603; see Robert F. Williams, THE LAW OF AMERICAN STATE CONSTITUTIONS 346-347 (2009) (observing that state courts have "expressed deference to interpretation of the state constitution by the state legislature," including "specific legislative interpretations of the state constitution"); *Nelson v. Miller*, 170 F.3d 641, 653 (6th Cir. 1999) (state legislatures are charged with "understanding" and "interpreting" state constitutions and are presumed to have "acted within the scope of their authority" in passing legislation); *Sturgeon v. County of L.A.*, 167 Cal. App. 4th 630, 644 (2008) ("We recognize we owe deference to interpretations of constitutional provisions enacted by the Legislature"); cf. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997) (affording Congress "an additional measure of deference out of respect for its authority to exercise the legislative power").

In Illinois, these principles of deference are reflected in a "strong presumption that legislative enactments are constitutional" as well as in a rule that challengers of statutory enactments must "clearly establis[h] the constitutional violation"—standards that certainly call for reversal here. *Bernier v. Burriss*, 113 Ill. 2d 219, 227 (1986). But IMLA submits that beyond this presumption and the allocation of a heavy burden on plaintiffs, an appropriate level of judicial deference to the General Assembly's interpretation of a state constitutional provision—at least when that interpretation is

reflected in an express determination by the legislature that a statute it is passing is constitutional—can be expressed more clearly in other terms.

Like courts in Indiana and other States, this Court should make clear that it will “observe a high level of deference with respect to the General Assembly’s decision-making” and that “any doubts are resolved in favor of constitutionality.” *Smith v. State*, 8 N.E.3d 668, 676 (Ind. 2014). See also, e.g., *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005) (applying an “extremely deferential standard” in evaluating the constitutionality of State legislature’s enactments; a plaintiff must demonstrate that the challenged statute “clearly, palpably, and plainly violates the Constitution”); *In re Spivey*, 480 S.E.2d 693, 698 (N.C. 1997) (a reviewing court “gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute”); *Arganbright v. State*, 2014 OK CR 5, ¶ 15 (“We defer to our sister branch of the government and indulge every presumption in favor of the constitutionality of an act of the Legislature”).

Indeed, where, as here, the legislature has made an *express* determination that a statute is constitutional, in the face of arguments that it is not, the statute should be upheld “unless it is clear beyond reasonable doubt that it is violative of the fundamental law.” *Ala. State Fed’n of Labor v. McAdory*, 18 So. 2d 810, 815 (Ala. 1944), cert. dismissed, 325 U.S. 450 (1945); see also *Huber v. Colorado Mining Ass’n*, 264 P.3d 884, 889 (Colo. 2011) (“We presume legislative enactments \* \* \* to be constitutional. Overcoming this presumption requires a showing of unconstitutionality beyond reasonable doubt”); *Nelson*, 170 F.3d at 651 (under Michigan law “a statute should not be

declared unconstitutional unless the conflict between the Constitution and the statute is *palpable and free from reasonable doubt*") (emphasis original); *State v. Muhammad*, 678 A.2d 164, 173 (N.J. 1996) ("whenever a challenge is raised to the constitutionality of a statute, there is a strong presumption that the statute is constitutional. \* \* \* Thus, any act of the Legislature will not be ruled void unless its repugnancy to the Constitution is clear beyond a reasonable doubt"); *Sch. Dists' Alliance for Adequate Funding of Special Educ. v. State*, 244 P.3d 1, 5 (Wash. 2010) ("the legislature is entitled to great deference and \* \* \* a party challenging a statute's constitutionality must therefore prove the statute unconstitutional beyond a reasonable doubt"); *Chappy v. Labor & Indus. Review Comm'n*, 401 N.W.2d 568, 573-574 (Wis. 1987) ("there is a strong presumption that a legislative enactment is constitutional. \* \* \* [T]he party challenging the statute carries a heavy burden of persuasion [and] must prove beyond a reasonable doubt that the act is unconstitutional"). In this context, "beyond a reasonable doubt" does not refer to an evidentiary standard, but rather emphasizes the court's "respect for the legislature" and the importance of conducting a "searching legal analysis" before determining that a statute violates the constitution. *Sch. Dists' Alliance*, 244 P.3d at 5. Courts have held that this deferential standard of review is prudent because "declaring a statute \* \* \* to be unconstitutional is one of the gravest duties impressed upon the courts," *Huber*, 264 P.3d at 889, and because courts "do not act as a super-legislature." *Muhammad*, 678 A.2d at 173. Where the General Assembly has confronted and resolved the question of a statute's constitutionality, IMLA believes that the "beyond any reasonable doubt" standard is an appropriate expression of the presumption and burden set forth by this Court in *Bernier v. Burris*.

**B. Deference To The Views Of The General Assembly Is Especially Appropriate Because The Pension Clause Is A Recent Enactment**

As the decisions cited above show, and as one commentator has remarked, a “key feature that distinguishes state constitutionalism from federal constitutionalism is the greater deference to the legislature that state courts generally manifest.” Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 661, 680 (2001). One reason for this deference is that “state legislatures tend to have a close and interactive relationship with state constitutions.” *Id.* at 681.

By contrast to current members of Congress, who stand more than two centuries removed from the adoption of the U.S. Constitution and Bill of Rights, the General Assembly members who voted to enact the Pension Reform Act were interpreting a constitutional provision adopted only some 40 years ago. Their views of the intent of the citizens who ratified the Pension Clause 40 years ago are informed by shared experiences and concerns, not weakened by the intervention of a dozen generations. See *Kalodimos v. Vill. of Morton Grove*, 103 Ill. 2d 483, 492 (1984). Indeed, Speaker Michael Madigan both voted for the Pension Clause in 1970 and co-sponsored the Pension Reform Act. Transcript of July 21, 1970, at 2933; House Transcription Debate, Dec. 3, 2013, at 1-8. This sort of dual participation gives special weight to Speaker Madigan’s view, as evidenced by his sponsorship and vote, that the Pension Reform Law comports with the Constitution. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 555 (2012) (noting the authority given to the views of Members of Congress who participated in the Constitutional Convention); *Town of Greece v.*

*Galloway*, 134 S. Ct. 1811, 1819 (2014) (explaining the importance of reconciling the Establishment Clause with the views of the Framers as evidenced by their actions in the First Congress).

**C. Deference To The General Assembly's Determination That The Pension Reform Law Is Constitutional Is Especially Appropriate Given The Language Of The Pension Clause**

The General Assembly's interpretation of the Pension Clause is a reasonable one that merits deference—far more reasonable, in fact, than the Circuit Court's view that the Clause is “absolute and without exception.”

First, we have already shown in Part I that the State's police power, especially its power to address emergencies like the fiscal emergency now facing Illinois, is implicit in the Pension Clause as in other constitutional provisions. The Circuit Court failed even to consider the well established law concerning the State's reserved or background right to exercise its police power. Second, the Pension Clause on its face (1) specifies that pension rights are contract rights rather than public gratuities and (2) borrows the Contract Clause concept that contract rights are not to be diminished or impaired. Both of these elements of the Clause's language allow for the exercise of core police powers.

Under ordinary contract law, promises are not always binding. Extraordinary conditions sometimes excuse performance. Illinois law recognizes that contracts, far from being sacrosanct, are subject to the doctrine of impossibility, which excuses performance of a contract when “performance is rendered objectively impossible \* \* \*.” *Innovative Modular Solutions v. Hazel Crest Sch. Dist. 152.5*, 2012 IL 112052, ¶ 37. The defense of commercial impracticability, also known as “commercial frustration,” provides that a contract is unenforceable if “a party's performance under the contract is rendered meaningless due to an unforeseen change in circumstances.” *Ill.-Am. Water Co. v. City of*

*Peoria*, 332 Ill. App. 3d 1098, 1106 (2002). More broadly, the doctrine of frustration of purpose recognizes a defense to performance of a contract where “changed conditions, not existing when the contract was entered into,” have “thwarted” the purpose of the contract. *Leonard v. Autocar Sales & Serv. Co.*, 392 Ill. 182, 189 (1945). Contracts may also be set aside on the basis of “mutual mistake” of the parties. *Fisher v. State Bank of Annawan*, 163 Ill. 2d 177, 182 (1994). And Illinois courts refuse to enforce contracts that are “illegal or against public policy.” *First Trust & Sav. Bank v. Powers*, 393 Ill. 97, 103 (1946). These exceptions, even if not explicitly written into the contract, are part of the contract itself. See *Home Bldg. & Loan Ass’n*, 290 U.S. at 436-437 (“into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise, not out of the literal terms of the contract itself. \* \* \* Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur”). In short, however “absolute and without exception” they may appear on their face, contract rights are never sacrosanct in the face of changed circumstances. As the New York Court of Appeals recognized when discussing its constitutional pension clause, a “retirement plan like any other human contract is not inscribed on tablets of stone.” *Kleinfeldt v. New York City Emp. Ret. Sys.*, 324 N.E.2d 865, 869 (N.Y. 1975).

The language of the Pension Clause guaranteeing that pension contract rights will not be diminished or impaired confirms rather than contradicts the State’s police power authority to modify pension contracts when the necessity arises. As we have shown in Part I, the Contract Clause includes similar guarantees, but nevertheless has been held to be subject to the reserved police power. Simply put, a State *does* have the authority to



impair contractual rights and obligations by exercising its “necessary residuum of state power.” *Home Bldg. & Loan Ass’n*, 290 U.S. at 434-435. The exercise of the police power (modestly) to modify pension terms was reasonable and necessary here, as the General Assembly determined and Attorney General has explained in detail, and well within the scope of the reserved police power. For that reason the Pension Reform Act should be upheld.

**D. A Principle Of Liberal Construction In Favor Of Pensioners Does Not Overcome The Right And Obligation Of The State To Exercise Police Power To Address A Fiscal Emergency**

We respectfully suggest that this Court erred in *Kanerva v. Weems* when it held that the Pension Clause “must be liberally construed in favor of the rights of the pensioner.” 2014 IL 115811, ¶ 55. To the contrary, because the Pension Clause operates in derogation of the plenary powers of the State, it must be narrowly construed. And applying a “liberal construction” canon here would contradict the strong presumption that a statute is constitutional, undercut the heavy burden the plaintiff would otherwise bear to show the statute unconstitutional, and nullify the principle that deference is owed to the General Assembly’s interpretation of the Constitution.

A rule of liberal construction would set in stone pension rights of current and former generations at the expense of future generations who lack the resources to pay for them, through no fault of their own. Constitutional interpretation must be “informed by a sense of intergenerational humility.” Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons*, 26 *Quinnipiac L. Rev.* 599, 617 (2008). The Pension Clause results from one generation guaranteeing itself income regardless of changing circumstances—a form of self-dealing—to the detriment of future generations unrepresented at the Constitutional Convention of 1970. In those circumstances there is

ample reason for this Court to apply the familiar maxim from contract law that contract terms “will be strictly construed against the drafter.” *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004).

In any event, *Kanerva* does not hold that liberal construction in favor of pensioners is the sole or controlling principle at work in the interpretation of the Pension Clause. The precedents involving statutory interpretation show that this judge-made canon of statutory interpretation does not trump the paramount principle that a court is to determine the actual intent of the provision at issue. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 16; see *People v. Giraud*, 2012 IL 113116, ¶ 6 (canons of “statutory construction are not rules of law” but “aids in determining legislative intent and must yield to such intent”). Indeed, this Court has specifically subordinated liberal construction to legislative intent in construing a pension statute. *Roselle Police Pension Bd. v. Vill. of Roselle*, 232 Ill. 2d 546, 552-553 (2009) (the principle that “pension statutes [are] to be liberally construed” is “no exception” to the “court’s primary goal” to “ascertain the intent of the legislature”). As we have described above, all other pointers to the intent of the Pension Clause show that it was intended to reserve to the State the familiar power to address dire fiscal emergencies.

### CONCLUSION

This Court should reverse the judgment of the Circuit Court and remand with the direction to enter summary judgment for defendants-appellants.

Dated: January 12, 2015

Respectfully submitted,

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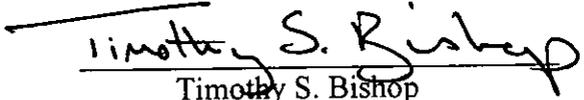
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I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 29 pages.

  
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I, Timothy S. Bishop, certify that on January 12, 2015, three (3) true and correct copies of the foregoing Brief of The International Municipal Lawyers Association as *Amicus Curiae* in support of Defendants-Appellants were served upon all counsel of record listed below by depositing same in the United States Mail with first-class postage fully prepaid, in properly-addressed envelopes.

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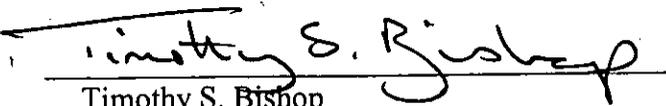
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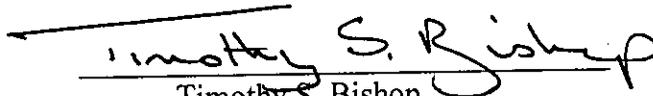
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