IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

IN RE: PENSION REFORM LITIGATION	)	No. 2014 MR 1 Hon. John W. Belz
DORIS HEATON, *et al.*, Plaintiffs, v. PAT QUINN, Governor of Illinois, *et al.*, Defendants.	)	Originally Filed as Cook County Case No. 2013 CH 28406
RETIRED STATE EMPLOYEES ASS'N RETIREES, *et al.*, Plaintiffs, v. PATRICK QUINN, Governor of Illinois, *et al.*, Defendants.	)	Originally Filed as Sangamon County Case No. 2014 MR 1
ILLINOIS STATE EMPLOYEES ASS'N, *et al.*, Plaintiffs, v. BOARD OF TRUSTEES OF STATE EMPLOYEES RETIREMENT SYSTEM OF ILLINOIS, *et al.*, Defendants.	)	Originally Filed as Sangamon County Case No. 2014 CH 3
GWENDOLYN A. HARRISON, *et al.*, Plaintiffs, v. PATRICK QUINN, Governor of Illinois, *et al.*, Defendants.	)	Originally Filed as Sangamon County Case No. 2014 CH 48
STATE UNIVERSITIES ANNUITANTS ASS'N, *et al.*, Plaintiffs, v. STATE UNIVERSITIES RETIREMENT SYSTEM, *et al.*, Defendants.	)	Originally Filed as Champaign County Case No. 2014 MR 207

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT, FOR JUDGMENT ON THE PLEADINGS, AND TO STRIKE DEFENDANTS' AFFIRMATIVE MATTER

Defendants respectfully submit this memorandum in opposition to Plaintiffs' motions for summary judgment, for judgment on the pleadings, and to strike the affirmative matter in Defendants' Answer to the extent they contend that the Pension Clause of the Illinois Constitution (art. XIII, § 5) categorically prohibits the modification of public pension benefits *under any circumstances*, including circumstances that would be sufficient to support the modification of other types of public contracts pursuant to the State's police powers.

Introduction and Summary of Argument

More than a century of Illinois precedent holds that, notwithstanding the constitutional protection of contract rights, "*[a]ll contracts*," including those "made by the state itself, . . . are subject to . . . subsequent statutes enacted in the *bona fide* exercise of the police power." *Hite v. Cincinnati, Indpls. & W. R.R. Co.*, 284 Ill. 297, 299 (1918) (emphasis added); see also *Sanelli v. Glenview State Bank*, 108 Ill. 2d 1, 23 (1985). Yet the common premise of Plaintiffs' motions is that the Pension Clause elevated contractual pension obligations to the status of "super-contracts," uniquely exempt from the General Assembly's inherent authority to enact measures necessary to protect the public health, safety, and welfare — often referred to as the State's "police powers." That premise is without any support, as the text, history, and legal precedent surrounding the Pension Clause all make clear.

In only one case has the Illinois Supreme Court ever addressed the extent to which the Pension Clause is subject to the State's ability to modify public pension benefits pursuant to its "police powers." That case is *Felt v. Board of Trustees of Judges Retirement System*, 107 Ill. 2d 158 (1985). And in *Felt*, the Court (1) recognized well-established precedent holding that the rights protected by the Contracts Clauses of both the Illinois and United States Constitutions are subject to the State's police powers to modify its own obligations and (2) applied that precedent to a contractual right secured by the Pension Clause. *Id.* at 165-67. Tellingly, Plaintiffs' motions fail to

even mention this aspect of *Felt*, which has never been overturned and remains binding precedent.

Felt, in turn, follows directly from the 1970 Constitutional Convention debates. At the debates, the delegates were explicit: the police power of the State "applies to every section [of the Constitution], whether it is stated or not." 3 Record of Proceedings, Sixth Illinois Constitutional Convention ("Proceedings") at 1689 (comments of Delegate Foster). No delegate ever asserted that the Pension Clause was uniquely exempt from this otherwise sacrosanct principle. In fact, what the debates at the Constitutional Convention reveal is that the Clause was designed to overturn a specific line of pre-1970 Illinois Supreme Court precedent holding that most public pension rights were mere "gratuities" that the legislature could modify or abolish at will. It is well established that the purpose of the Pension Clause was to give all public pension obligations the *same* legal status as other public contracts. See *Buddell v. Bd. of Trs., State Univ. Ret. Sys.*, 118 Ill. 2d 99, 102 (1987); *Kraus v. Bd. of Trs. of Police Pension Fund*, 72 Ill. App. 3d 833, 848 (1st Dist. 1979); see also *People ex rel. Sklodowski v. State of Ill.*, 162 Ill. 2d 117, 147 (1994) ("*Sklodowski I*") (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 under article I, section 16, of the constitution."). That is why the debates regarding the Pension Clause focused solely on the dichotomy between typical statutes, which the General Assembly could change freely, and contracts, which it could not. There was no mention of the then-unheard of dichotomy between traditional public contracts subject to modification under police-powers principles and a new breed of "super-contracts" for pensions completely exempt from the State's police powers.

Moreover, while Plaintiffs make the Supreme Court's recent decision in *Kane* [illegible] *ems*, 2014 IL 115811, the centerpiece of their unprecedented interpretation, that case provides no support for their position because it does not even mention, much less address or decide this issue. See also *Heaney v. N.E. Park Dist. of Evanston*, 360 Ill. 254, 260 (1935) ("A decision by a court of review

is not an authority upon a question neither considered nor decided by it."). At issue in *Kanerva* was whether benefits granted to retirement system members by a statute located outside the Pension Code are included within the *scope* of the "contractual relationship" protected by the Pension Clause. The Court did not consider whether benefits within the scope of that protection are exempt from traditional police-powers limits on contractual rights. That the Court in *Kanerva* did not mention its opinion in *Felt*, much less overturn it, confirms the limited reach of *Kanerva*'s holding.

Of course, the State's police powers do not allow the State to modify its own contracts whenever it prefers not to fulfill its contractual obligations. See generally *Sanelli*, 108 Ill. 2d at 27. To the contrary, it is clear that this authority permits such modifications only in appropriate circumstances and that it is the courts' responsibility to ensure respect for this constitutional limitation. *Felt*, 107 Ill. 2d at 165-67. But the Pension Clause does not abdicate that authority altogether by making contractual pension rights immune from all other legal considerations.

In sum, Plaintiffs' novel theory that the State can never reduce a pension benefit by any amount, no matter how small, regardless of any other consideration affecting the public welfare, is contrary to controlling Illinois Supreme Court precedent, as well as foundational law defining the nature of state sovereignty and the limits of contractual rights in light of that sovereignty. Because this absolutist view of the Pension Clause cannot be reconciled with the Constitution, governing legal authority, and sound policy, Plaintiffs' motions should be denied.[1]

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[1] Defendant, Illinois Comptroller Judy Baar Topinka, is a nominal party to this litigation. While recognizing the authority and representation of the Office of the Attorney General, Comptroller Topinka does not join the arguments in this memorandum of law. Comptroller Topinka will abide by any ruling of this court or by any reviewing court.

Argument

I. Standards Governing Plaintiffs' Motions

Although Plaintiffs' motions are brought under different sections of the Code of Civil Procedure, each is based on the common proposition that Defendants' reliance on the State's police powers to uphold various parts of Public Act 98-599 Act is misplaced as a matter of law because the Pension Clause "absolutely protects pension benefits from any unilateral diminishment and impairment by the State *under any circumstance*." Plfs. Aug. 21, 2014 Mem. in Support of Mot. for Jdgt. on Pleadings ("Pleadings Mem.") at 1-2 (emphasis added).[2] Each motion assumes the truth of Defendants' factual allegations but maintains that these facts are irrelevant as a matter of law based on Plaintiffs' proposed interpretation of the Pension Clause. See *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330 (2006) (section 2-1005 motion for summary judgment); *Raprager v. Allstate Ins. Co.*, 183 Ill. App. 3d 847, 854 (2d Dist. 1989) (section 2-615(a) motion to strike); *DeWitt Pub. Bldg. Comm'n v. County of DeWitt*, 128 Ill. App. 3d 11, 17 (4th Dist. 1984) (section 2-615(e) motion for judgment on the pleadings). Each motion also is subject to the principle that "statutes carry a strong presumption of constitutionality," and to the rule that a party challenging a statute "bears the burden of rebutting the presumption by clearly demonstrating the statute's constitutional infirmity." *In re Marriage of Miller*, 227 Ill. 2d 185, 195 (2007) (internal quotation marks and citations omitted).

II. The "Contractual" Status of Public Pension Benefits Does Not Put Them Beyond the State's Police-Powers Authority to Protect the Public Interest.

It is beyond reasonable dispute that all contractual benefits, including all benefits conferred by contracts with the government, are subject to the State's police-powers authority to enact laws

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[2] The contention by two groups of plaintiffs that the Court should enter summary judgment invalidating Public Act 98-599 on the theory that it violates the Equal Protection Clause of the Illinois Constitution is addressed in Defendants' own motion for summary judgment.

necessary to protect the public welfare. *Meegan v. Vill. of Tinley Park*, 52 Ill. 2d 354, 357-58 (1972); see *George D. Hardin, Inc. v. Vill. of Mt. Prospect*, 99 Ill. 2d 96, 103 (1983). Plaintiffs contend, however, that the benefits protected by the Pension Clause are uniquely exempt from this rule, effectively arguing that the Pension Clause does not create contractual rights at all. Instead, their view is that the Pension Clause establishes super-contracts: inviolable legal rights that cannot be altered "under any circumstance." Pleadings Mem. at 1-2. That sweeping contention has no support in the Pension Clause itself and is contradicted by clear precedent from the Illinois Supreme Court.

A. Binding Illinois Supreme Court Precedent Rejects Plaintiffs' Theory that the Contractual Relationship Established for Pension Benefits Is Uniquely Exempt from Exercise of the State's Police Powers.

The *only* Supreme Court decision addressing the application of the State's police powers to rights under the Pension Clause is *Felt*. Notably, the Court in that case treated benefits protected by the Pension Clause as being subject to the State's police powers. *Felt*, 107 Ill. 2d at 166. That alone defeats Plaintiffs' motions.

In *Felt*, the Court considered an amendment to the statutory formula used to calculate judicial pension benefits, which changed the time for determining a judge's pensionable salary from the last day of service to the last year of service. 107 Ill. 2d at 160-61. This had the effect of decreasing the pension of any judge who retired less than a year following a salary increase. *Id.* The Court held that, for judges in service before the change, the amendment violated both the Contracts Clause and the Pension Clause. *Id.* at 168.

Critically, the Supreme Court in *Felt* did not hold that the statutory change was *per se* invalid under the Pension Clause. Instead, it ruled that the *factual* basis offered to justify the change could not sustain the amendment as a proper exercise of the State's police powers. *Id.* at 166. Citing a multitude of state and federal cases, the Court "recognized that 'the contract clause does not

immunize contractual obligations from every conceivable kind of impairment or from the effect of a reasonable exercise by the States of their police power.'" *Id.* at 165-66 (quoting *George D. Hardin, Inc.*, 99 Ill. 2d at 103, and citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978), *City of El Paso v. Simmons*, 379 U.S. 497, 509 (1965), and *Meegan*, 52 Ill. 2d at 358). It then observed that "presumably the defendants would offer a similar contention" based on the State's police powers "regarding section 5 of article XIII on the question of diminution and impairment of benefits." 107 Ill. 2d at 166. Of course, absent such a contention, the plaintiffs' claim under the Pension Clause would have been dispositive. But the Court did not reject that argument as *legally* irrelevant, which it would have been under Plaintiffs' theory here. It reached the State's police powers argument on the merits and found it insufficient on the *factual* record, stating:

> The impairment of benefits was obviously substantial. . . . There is *no indication in the record before us*, however, that a significant number of judges, or the plaintiffs themselves, retired shortly after salary increases or that such retirements are a cause of the retirement system's underfunding. . . . The conclusion to be drawn is that the amendment severely impairs the retirement benefits of the plaintiffs and those similarly situated and *on the record here* is not defensible as a reasonable exercise of the State's police powers.

Id. at 166-67 (emphasis added). The Court's discussion of police powers in *Felt* thus makes clear that the State's police powers are not "fictional," as Plaintiffs maintain. Pleadings Mem. at 4.

Incredibly, Plaintiffs' only response to this key part of *Felt* is to ignore it. Plaintiffs then attempt to obscure this omission by taking parts of the *Felt* opinion out of context, arguing that *Felt* "squarely decided that, in order to find that a 'reduction in retirement benefits' is constitutionally permitted, it would have to 'ignore the plain language of the Constitution of Illinois.'" Plfs. June 25, 2014 Mem. in Support of Mtn. for Sum. Jdgt. ("Sum. Jdgt. Mem.") at 18, quoting *Felt*, 107 Ill. 2d at 167-68. Plaintiffs take this language out of context. They disregard that the Court made this statement only *after* it considered the State's police powers argument and concluded that, on the

factual record, the amendment was "not defensible as a reasonable exercise of the State's police powers." *Felt*, 107 Ill. 2d at 167. Plaintiffs also ignore that this comment arose only as a separate response to the State's unrelated argument that the Court should conform to precedent from Alaska, Hawaii, and Michigan, whose constitutions each expressly prohibited reductions only in "accrued" pension benefits. *Id.* at 167; see also Alaska Const. art. XII, § 7 (1959); Hawaii Const. art. XVI, § 2 (1959); Mich. Const. art. IX, § 24 (1963). Plaintiffs therefore are relying on language the Court used only to explain that, to the extent this additional limitation in these States' constitutions meant that "pension rights do not vest until retirement," applying that principle in Illinois would be inconsistent with the intent of the Pension Clause. *Felt*, 107 Ill. 2d at 167-68 (citing *Kraus*, 72 Ill. App. 3d at 846-48 & nn. 2-4).

Because the Supreme Court in *Felt* recognized that the State's police powers may justify an impairment to pension benefits in appropriate circumstances, that precedent defeats Plaintiffs' far-reaching interpretation of the Pension Clause. Further, because no other Supreme Court decision has overturned *Felt*, this Court must adhere to that precedent by considering whether the factual record here shows that Public Act 98–599 represents a legitimate exercise of the State's police powers. See *Barry v. Ret. Bd. of Firemen's Annuity & Benefit Fund of Chi.*, 357 Ill. App. 3d 749, 763 (1st Dist. 2005) (lower courts are obligated to follow Supreme Court precedent until it has been abandoned explicitly); accord *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

B. The Text of the Pension Clause Does Not Support Plaintiffs' Interpretation Under Which Contractual Pension Rights, Unlike All Other Contract Rights, Are Exempt from the State's Exercise of Its Police Powers.

Contrary to Plaintiffs' argument, the text of the Pension Clause bolsters the Court's analysis in *Felt*. It is true that the language of the Pension Clause is unqualified on its face, stating that the benefits of the protected "contractual relationship" established by membership in a public pension system "shall not be diminished or impaired." Ill. Const. art. XIII, § 5. But the same is true of the

Contracts Clauses of the Illinois and United States Constitutions, both of which prohibit every law "impairing the obligation of contracts." U.S. Const. art. I, § 5; Ill. Const. art. I, § 16. Yet it has long been recognized that although the terms of both Contract Clauses are "facially absolute," the prohibition they establish "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)); see *George D. Hardin, Inc.*, 99 Ill. 2d at 103 (holding that Contracts Clause in Illinois Constitution is "interpreted in the same fashion" as its federal counterpart and "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"); see also *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934) ("[L]iteralsim in the construction of the Contract Clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection.").

This accommodation derives from the fundamental principle that a State's police powers are "an essential attribute of its sovereignty" that cannot be surrendered. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977); see *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (discussing "the sovereign right of the government to protect the . . . general welfare of the people"). Indeed, "the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community . . . can neither be abdicated nor bargained away, and is inalienable even by express grant." *Atl. Coast R.R Co. v. City of Goldsboro*, 232 U.S. 548, 558 (1914). As a result, courts have long held that the State's right to exercise this authority constitutes "an implied condition of every contract and, as such, as much part of the contract as though it were written into it." *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945),

accord *Schiller Piano Co. v. Ill. N. Utils. Co.*, 288 Ill. 580, 584-85 (1919).[3]

Given the fundamental nature of a sovereign government's police powers, the United States Supreme Court has held that a contract with the United States may be interpreted as limiting that authority only when the purported limitation is expressed in "unmistakable terms." *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality) (citation and internal quotation marks omitted). The same principle applies when a State — which may *limit* but not *eliminate* its ability to use its police-powers authority, see *U.S. Trust Co.*, 431 U.S. at 22-26 — purports to have committed to restricting the future exercise of its police powers. *N.Y. Rapid Transit Corp. v. City of N.Y.*, 303 U.S. 573, 590 (1938). Any such commitment must be "clear and unmistakable," and even then "read narrowly and strictly." *Id.* at 591 (citations and internal quotation marks omitted). So while Plaintiffs argue that "unless . . . expressly provided otherwise, the State . . . [has] no reserved police power or other authority," they have it backwards. See Pleadings Mem. at 8. Under the "unmistakability doctrine," Plaintiffs' interpretation of the Pension Clause fails precisely because the Pension Clause does not express a clear and unmistakable intention to nullify the State's police powers.

It is axiomatic that a state constitutional provision should be construed to avoid any conflict with the United States Constitution. *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 485 (Or. 2001); *US W. Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 34 P.3d 351, 355 (Ariz. 2001). As an interpretive rule, the unmistakability doctrine implements this principle of constitutional avoidance. *Cuyahoga Metro. Hous. Auth. v. United States*, 57 Fed. Cl. 751, 774-75 (Fed. Cl. 2003). Plaintiffs' view is that

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[3] Black's Law Dictionary 1276 (9th ed. 2009) thus defines "police power" as a manifestation of the "inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice," and as "a fundamental power essential to government and it cannot be surrendered by the legislature or irrevocably transferred away from government."

the Pension Clause prohibits "*any* unilateral diminishment and impairment by the State *under any circumstance*." Plfs. Aug. 21, 2014 Mem. in Support of Mot. to Strike ("Strike Mem.") at 1-2 (emphasis added). That reading of the Pension Clause would not only disregard the unmistakability doctrine, but also violate the "reserved powers doctrine" under the United States Constitution. That doctrine stipulates that "a state government may not contract away an essential attribute of its sovereignty," *Winstar*, 518 U.S. at 888 (internal quotation omitted), and the Supreme Court has held that a State's limited police-powers authority to modify contracts is "an essential attribute of its sovereignty," *U.S. Trust Co.*, 431 U.S. at 23 & n.20 ("[A] State is without power to enter into binding contracts not to exercise its police power in the future."); see *Commonwealth v. Widovich*, 145 A. 295, 318 (Pa. 1929) ("If the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail."). Because the Pension Clause, under Plaintiffs' interpretation, plainly runs afoul of that doctrine, this Court is obligated to reject Plaintiffs' reading. See *City of Chi. v. Chi. City Ry. Co.*, 272 Ill. 245, 249 (1916) (holding that government cannot alienate "the right to exercise the police power to secure and protect the morals, safety, health, order, comfort, or welfare of the public"); see also *Md. State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1362 (D. Md. 1984) (irrevocable pension contract "would be void *ab initio* since it would have 'surrendered an essential element of [the State's] sovereignty'" (quoting *U.S. Trust Co.*, 431 U.S. at 23)).

In short, longstanding rules of constitutional interpretation permit only one result: this Court must reject Plaintiffs' extreme interpretation of the Pension Clause.

C. The History Surrounding the Adoption of the Pension Clause Refutes Plaintiffs' Claim that the Drafters of the Illinois Constitution Specifically Intended to Abolish the State's Authority to Exercise Its Police Powers.

Longstanding case law and the history surrounding the adoption of the Pension Clause demonstrate that pension benefits remain subject to the State's exercise of its police powers.

1. **Both Illinois and Federal Law Have Long Recognized that All Contractual Rights Are Subject to the General Assembly's Proper Exercise of Its Police-Powers Authority to Protect the Public Interest.**

Plaintiffs' claim that "[i]t was settled long before the 1970s that the State cannot invoke inherent or 'reserved' powers" is simply wrong. Pleadings Mem. at 5. To the contrary, it was settled long before Illinois' 1970 Constitutional Convention that the State's sovereign power to protect the public permits it to modify contractual obligations, both among private parties and with the government itself. See *Hite*, 284 Ill. at 299; see also *U.S. Trust Co.*, 431 U.S. at 22-26; *West River Bridge Co. v. Dix*, 47 U.S. 507, 530-33 (1848). As the Illinois Supreme Court explained in *Hite*:

> *All contracts*, whether made by the state itself, by municipal corporations or by individuals, are subject to be interfered with or otherwise affected by subsequent statutes enacted in the *bona fide* exercise of the police power, and do not, by reason of the contracts clause of the federal Constitution, enjoy any immunity from such legislation.

284 Ill. at 299 (emphasis added) (citing, inter alia, *Manigault*, 199 U. S. at 480); see *Sanelli*, 108 Ill. 2d at 23 ("All contracts are made subject to the authority of the State to safeguard the interests of the people."); see also *Atl. Coast R.R. Co.*, 232 U.S. at 558; *Felt*, 107 Ill. 2d at 165-67; *Meegan*, 52 Ill. 2d at 357-58; *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 398 Ill. App. 3d 510, 531 (2d Dist. 2009).

At least as early as 1848, the United States Supreme Court confirmed that the federal Contracts Clause is not absolute and that a State always may depart from the strict terms of one of its contracts when doing so represents a valid exercise of its police powers. *West River Bridge Co.*, 47 U.S. at 530-33; see also *Ogden v. Saunders*, 25 U.S. 213, 286 (1827) ("To assign to contracts, universally, a literal purport and exact for them a rigid literal fulfillment, could not have been the intent of the constitution."). State courts recognized the same principle. See, e.g., *Corp. of Brick Presbyterian Church v. City of N.Y.*, 5 Cow. 538 (N.Y. 1826); *Thorpe v. Rutland & Burlington R.R.*,

27 Vt. 140, 149 (1854).

By the 1880s it was beyond dispute that the Contracts Clause did not foreclose a State's ability to exercise its police powers. See *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 32-33 (1877); *Boyd v. Alabama*, 94 U.S. 645, 650 (1876) ("We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals."). Most prominently, in *Stone v. Mississippi* the United States Supreme Court upheld a state constitutional provision prohibiting lotteries, even though just a year earlier the State, in consideration of $5,000, granted a company a 25-year charter to operate a lottery. 101 U.S. 814, 820 (1880). The Court explained:

> Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; *but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.* . . . No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. *Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.*

Id. at 817-19 (emphasis added) (citation and internal quotation marks omitted).

This line of cases continued through the 20th century and recognized that States may modify contractual obligations, including their own, based on economic necessity. See *Manigault*, 199 U.S. at 480. In particular, the United States Supreme Court upheld a Minnesota statute imposing a moratorium on mortgage foreclosures in light of the dire events of the Great Depression. *Blaisdell*, 290 U.S. at 433-34. Declaring it "beyond question that the prohibition [in the Contracts Clause] is not an absolute one and is not to be read with literal exactness like a mathematical formula," the

Court emphasized that a State's duty to "safeguard the vital interests of its people" must be "read into contracts as a postulate of the legal order," which "presupposes the maintenance of a government . . . which retains adequate authority to secure the peace and good order of society." *Id.* at 428, 434-35.

Eight years later, in *Faitoute Iron & Steel Company v. Asbury Park*, the Court upheld state legislation authorizing the modification of public bonds, resulting in a lowering of the interest rate and extension of the maturity. 316 U.S. 502, 506 (1942). As it did in *Blaisdell*, the Court emphasized that "[t]he necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation." *Id.* at 511.

Just five years before Illinois adopted the 1970 Constitution, the United States Supreme Court made clear in *City of El Paso*, that a State's sovereign authority permits modification of its own contractual obligations when that is necessary to protect the public interest. 379 U.S. at 506-09. There, the Court upheld, against a Contracts Clause challenge, a law shortening the redemption period under contracts for the sale of public land where the purchasers had failed to make the annual payments. *Id.* at 516. With the discovery of oil and gas below the lands, properties in default for many years were being redeemed, leading to benefits to the purchasers that were neither "expected or foreseen" and created "a costly and difficult burden on the State." *Id.* at 515. Upholding the challenged law, the Court relied on the State's police powers, stating that "it is not every modification of a contractual promise that impairs the obligation of contract," and that "[l]aws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." *Id.* at 506-07, 515.

Illinois law is in full accord with the same principles. In 1845, the Illinois Supreme Court held that contract rights conferred by the State are not absolute, but instead are "subject to an implied

reservation, in favor of the sovereign power, that whenever the public good requires, or the exigencies of the state demand it." *Mills v. St. Clair Cnty.*, 7 Ill. 197, 228 (1845). In 1869, the Court again acknowledged the fundamental nature of a government's police powers by upholding a state law authorizing the City of Chicago to grant licenses to sell alcohol within one mile of the University of Chicago, even though the University's state-issued charter barred the sale of alcohol within one mile of its campus. *Dingman v. People*, 51 Ill. 277, 280 (1869) (validating contractual modification because new state law "emanat[es] from the police power of the State," which is not "subject [to] irrevocable grant"). *Id.* By the turn of the century, the Illinois Supreme Court had become even more emphatic: "No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power, for it is incapable of alienation." *City of Chi. v. Chi. Union Trading Co.*, 199 Ill. 259, 270 (1902) (internal quotation omitted); see also *City of Chi. v. O'Donnell*, 278 Ill. 591, 606-07 (1917).

Significantly, the Illinois Supreme Court repeatedly has rejected the notion that the State's police powers may not be used to affect its own contracts or be justified by economic circumstances. In *Ruggles v. People*, the Supreme Court held that a railroad charter issued by the State allowing the railroad to set its own rates did not prevent the State from enacting a statute setting a maximum rate in order to protect the public from monopoly pricing. 91 Ill. 256 (1878). In *Town of Cheney's Grove v. VanScoyoc*, the Court held that a state law limiting the recovery on publicly issued bonds did not violate the Contracts Clause of the Illinois or United States Constitution because it "was intended to meet a distressed financial condition prevalent throughout the State." 357 Ill. 52, 55, 61-62 (1934). And in *City of Chicago v. Chicago and Northwestern Railway Company*, the Court held that a statute altering the allocation of a contractual debt obligation did not violate the Contracts Clause because the Clause "does not prevent a proper exercise by the State of its police power of

enacting regulations reasonably necessary to secure the health, safety, morals, or general welfare of the community, even though contracts may thereby be affected, for such matters cannot be placed by contract beyond the power of the State to regulate and control them." 4 Ill. 2d 307, 317-18 (1954); see also *Hite*, 284 Ill. at 299. Not surprisingly, modern Illinois precedent consistently has reaffirmed these principles. See, e.g., *Sanelli*, 108 Ill. 2d at 23 ("All contracts are made subject to the authority of the State to safeguard the interests of the people. Such authority . . . extends to economic needs as well.") (citation and internal quotation marks omitted).

Put simply, the State's police-powers authority to promote the public welfare — which has an interrupted lineage that predates the Civil War — has long stood as an important limitation on the terms of both public and private contracts. Its settled existence thus served as the backdrop upon which the 1970 Constitutional Convention took place.

2. The Constitutional Convention Debates Establish that the Pension Clause Was Adopted to Make All Statutory Rights to Pension Benefits Contractual.

There is no evidence that the Pension Clause, which was added to the Illinois Constitution in 1970, was intended to cast aside the century-old, fundamental legal principle that a State can *always* modify its contractual obligations pursuant to its police powers. Rather, the historical record confirms that the unmistakable purpose of the Pension Clause was to give all public pension benefits, most of which were previously held to be "gratuities" the legislature could change or repeal at will, the same contractual status that applied to the few retirement systems in which the members' participation was voluntary.

The Illinois Supreme Court consistently held before 1970 that public pension benefits prescribed by law created only statutory rights that the General Assembly could revise at will, rather than contractual rights, except for the few pension systems in which participation and member contributions were optional. Accordingly, as the Supreme Court explained in *McNamee v. State*, 173

Ill. 2d 433, 440 (1996): "The primary purpose behind the inclusion of [the Pension Clause] was to eliminate the uncertainty surrounding public pension benefits created by the distinction between mandatory and optional pension plans." See also *Buddell*, 118 Ill. 2d at 102 (stating that the Pension Clause "guarantees that all pension benefits will be determined under a contractual theory rather than being treated as 'bounties' or 'gratuities,' as some pensions were previously"); accord *Sklodowski I*, 162 Ill. 2d at 147 (Freeman, J., concurring in part and dissenting in part).

For example, Delegate Green, a sponsor of the provision, explained that "pension benefits under mandatory participation plans" were held to be "in the nature of bounties which could be changed or even recalled as a matter of complete legislative discretion," and that the Pension Clause was intended to make pension system memberships "enforceable contracts." 4 Proceedings at 2925. Delegate Lyons added his support for the provision by offering that he was "not shocked at the notion of vesting contractual rights in beneficiaries of pension funds." *Id.* at 2929. And Delegate Whalen reiterated that the purpose of the provision was to "lock in the contractual line of cases into the constitution." *Id.* The historical record therefore shows that the delegates at the 1970 Constitutional Convention were aware that most pension rights at that time were legally classified as non-contractual, and that their objective was to grant them contractual protection. See *Buddell*, 118 Ill. 2d at 102; *Kraus*, 72 Ill. App. 3d at 848.

Despite this clear record, Plaintiffs maintain that the Pension Clause was intended to do far more than confer a contractual status on the benefits of membership in a public pension plan, arguing that it was specifically intended to provide special rights that put pension benefits categorically beyond the State's police-powers authority to protect the public. E.g., Sum. Jdgt. Mem. at 1. But the sole focus of the Constitutional Convention debates was on the distinction between statutory rights, "which could be changed . . . as a matter of complete legislative discretion," 4 Proceedings at 2925 (comments of Delegate Green), and rights that were "contractual," *id.* at 2929 (comments

of Delegates Lyons and Whalen); see also *id.* at 2525 (comments of Delegate Green). There was no mention whatsoever of the distinction advanced by Plaintiffs here between contracts subject to the State's police powers (which, under longstanding precedent, included *all* contracts) and an unprecedented class of contracts beyond any exercise of the State's police powers. Given the longstanding recognition that all contracts are subject to a *bona fide* exercise of the States's police powers, that silence is powerful evidence that the delegates did not intend to discard that principle for pension benefits. See *Kanerva*, 2014 IL 115811, ¶ 41 ("[T]he drafters of a constitutional provision are presumed to know about existing laws and constitutional provisions and to have drafted their provisions accordingly."); see also *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-19 (1987) ("[W]e think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted").

The drafting history of the Pension Clause thus supplies no evidence that the drafters believed they were transforming pension benefits into "super-contracts" that would be exempt entirely from the State's exercise of its police powers. In fact, the debates surrounding a different constitutional provision confirm that Plaintiffs' interpretation conflicts with the delegates' shared understanding. Section 22 of Article I of the 1970 Constitution establishes that "[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." Yet when asked whether the explicit mention of "the police power" in the Right to Arms provision implied that the State's police powers would not apply to any constitutional provision that did not mention it expressly, Delegate Foster, a sponsor of Section 22, forcefully rejected the notion:

> [T]he freedom and independence of men granted under section 1 is subject to the police power of the state, and that exercise must be reasonable under certain circumstances, just as we went through this thing on habeas corpus. The state can suspend habeas corpus, impose martial law, take over your

> house, and do a lot of things; but they are going to be prepared to justify it.
>
> *Now, you can go through this whole constitution and say, "What if we applied [police powers] to that section?" It applies to every section, whether it is stated or not*, because the state's right to prepare — to provide for the public health, safety, welfare, and morals infringes on your right to free speech, infringes on your right of assembly, infringes on your right to be secure in your own home. If a policeman follows you down the street and then you run into your house, he has the right to run in after you without a warrant; and that's an exercise of the police power of the state. So even though all these questions might seem to be beside the point, it applies to the whole bill of rights; and we have made it explicit on this one to make sure that nobody thinks we are trying to pull a fast one, and that we realize that the right to bear arms is subject to that specific restriction. . . . I may agree . . . that it is redundant, but we think it is a useful redundancy.

3 Proceedings at 1689 (emphasis added); see also *id.* at 1480-81 (Delegate Lawlor explaining that failure to mention limitations on right of assembly from police powers expressly did not denote their non-existence). In light of that representation, which was not disputed by any other delegate, it is beyond reasonable debate that the delegates understood that the State's police powers apply to every provision of the Constitution "whether it is stated or not," which by necessity includes the Pension Clause.

Plaintiffs highlight Delegate Green's concern about a recent decision by the New Jersey Supreme Court, *Spina v. Consolidated Police and Firemen's Pension Fund Commission*, 197 A.2d 169 (N.J. 1964). Strike Mem. at 1-2 at 4; Sum. Jdgt. Mem. at 8. But that observation supports Defendants, not Plaintiffs. In *Spina*, the court noted that "[i]n a minority of the jurisdictions the rights of a member are called 'contractual,'" and held that because mandatory membership in a New Jersey pension plan did not create contractual rights, a change in the terms of the plan could not be an unconstitutional impairment of contractual obligations. 197 A.2d at 172-75 (citing, inter alia, *Dodge v. Bd. of Educ.*, 302 U.S. 74, 78 (1937)). The security Delegate Green sought to provide to Illinois pension beneficiaries was the type of security the New Jersey Court refused to provide in

Spina: the security of a contractual right. He did not intend, as Plaintiffs suggest, to give them super-contractual rights.

Nor do the remarks of Delegate Kemp, who was not a sponsor of the Pension Clause, sustain Plaintiffs' novel interpretation of the Clause. He said, among other things, that he "presume[d]" its purpose was "to make certain that irrespective of the financial condition of a municipality or even the state government, that those persons who have worked for often substandard wages over a long period of time could at least expect to live in some kind of dignity during their golden years." 4 Proceedings at 2926. This isolated remark falls far short of establishing a collective agreement with the extraordinary proposition advanced by Plaintiffs. As the Court recognized in *Client Follow-Up Co. v. Hynes*, "[i]t is possible to lift from the constitutional debates on almost any provision statements by a delegate or a few delegates which will support a particular proposition; however, such a discussion by a few does not establish the intent or understanding of the convention." 75 Ill. 2d 208, 221 (1979).

Indeed, as discussed above, the other delegates understood that the effect of the Pension Clause would be to eliminate the distinction between contractual and non-contractual pension obligations. Nothing suggests that they shared Plaintiffs' absolutist understanding of the Pension Clause. And even Delegate Kemp did not declare that he sought to supersede the State's police powers. Given its century-long and unimpeded recognition, his failure to mention it explicitly provides little reason to believe that even he embraced Plaintiffs' sweeping view of the Clause. As explained in Defendants' motion for summary judgment, a State's police powers may be used to modify contractual obligations in only limited circumstances. Delegate Kemp's understanding that members in public pension systems could "expect to live in some kind of dignity" regardless of the government's financial condition is fully consistent with the prevailing view that pension benefits should be given the same level of protection afforded to all public contracts, not more. See *id.*

Similarly tenuous is Plaintiffs' reliance on the Appellate Court's decision in *Kraus*. There, the court held that a statutory amendment reducing benefits for police officers who switch from disability retirement to regular retirement could not be applied to a police officer who retired before the amendment's effective date. 72 Ill. App. 3d at 851. In doing so, it noted that at the Constitutional Convention an external body, the Pension Laws Commission, unsuccessfully attempted to add language to the Pension Clause "allowing a reasonable power of legislative modification." *Id.* That approach would have been similar to the flexibility recognized for public pensions in California at that time, which were treated both as a protected contract right and also "flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy." *Kern v. City of Long Beach*, 179 P.2d 799, 803 (Cal. 1947).[4] Placed in its proper context, the proposal, which was not even presented to the delegates before they approved adoption of the Pension Clause and proposed separately by a non-delegate only after the Pension Clause had been adopted, merely sought to lessen the degree of contractual protection for pension benefits by preserving some of the legislative discretion applicable to statutory rights generally. It did not address the altogether different issue of whether the Pension Clause would go beyond the creation of contractual rights, and instead create super-contractual rights.

Plaintiffs' super-contract theory thus goes far beyond the stated purpose of the Pension Clause's proponents. If the drafters had intended for the Clause permanently to preclude the legislature from exercising its sovereign authority to modify pension contracts where doing so is necessary to protect the health, safety, and welfare of the general public, surely they would have said

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[4] In *Kern*, 179 P.2d at 803, the California Supreme Court explained this standard: "[A]n employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves.... The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension."

so. They did not. There is no basis to conclude that the drafters intended to do what they never expressed. The drafters' statements, taken as a whole, indicate that they sought to give pension benefits contractual status, not to elevate pension rights above the legal status afforded to all other contractual rights.

D. The Authorities Plaintiffs Rely Upon for Their Unprecedented Interpretation of the Pension Clause Are Wholly Inapposite.

It is revealing that Plaintiffs' motions ignore entirely that in *Felt* the Supreme Court treated benefits protected by the Pension Clause as being subject to the State's police powers. See 107 Ill. 2d at 165. Instead, they urge the Court to interpret a series of Illinois and non-Illinois cases broadly in a way that is fundamentally at odds with *Felt*. None of these authorities purport to overturn *Felt* and, in all events, are easily distinguishable.

1. *Kanerva v. Weems*

There is no basis to conclude, as Plaintiffs claim, that the recent *Kanerva* decision *sub silentio* overturned *Felt* and "changes the playing field." Strike Mem. at 1-2 at 2 n.5. The only question presented in *Kanerva* was whether, for purposes of the Pension Clause, retiree health care subsidies are within the *scope* of the "contractual relationship" established by membership in a state pension system. *Kanerva*, ¶¶ 1, 38. The Court did not address whether such benefits are immune from the State's exercise of its police powers. That issue was not before the Court.

The plaintiffs in *Kanerva* challenged reductions in the level of health care subsidies for retired pension system members. The defendants moved to dismiss, arguing that health care subsidies were not retirement benefits subject to the Pension Clause. The defendants did not file an answer raising the State's police powers or any other affirmative defense. That means the Supreme Court had no occasion to consider the issue raised by Plaintiffs in their motions here — a fact Justice Burke noted in her dissent. *Id.* at ¶¶ 91-93. *Kanerva* cannot be deemed precedent on an issue it did

not discuss or decide, and had no basis to decide. See *People v. Garcia*, 199 Ill. 2d 401, 408 (2002); *Heaney*, 360 Ill. at 260; *Sanner v. Champaign Cnty.*, 88 Ill. App. 3d 491, 495 (4th Dist. 1980). This is especially true where *Kanerva* did not even mention *Felt*, the one case to consider that issue.

The Court's statements in *Kanerva* about the *scope* of the Pension Clause's contractual protection for benefits of membership in a public pension system — that it does not "include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve," 2014 IL 115811, ¶ 41, and that doubts about its meaning should be resolved "in favor of the rights of the pensioner," *id.*, ¶ 55 — do not address whether those benefits could ever be modified consistent with the State's police powers. Further, because Plaintiffs' proposed reading of the Pension Clause represents such an extraordinary departure from long-established jurisprudence regarding the constitutional protection afforded to contractual rights, more is necessary to sustain that reading than broad judicial pronouncements directed at a different issue. See *Cates v. Cates*, 156 Ill. 2d 76, 81 (1993) (an opinion acts as precedent on specific issues before a court based on facts before it and subsequent courts "must examine the authority cited by defendant within the context in which it arose").

2. *Jorgensen v. Blagojevich* and *People ex rel. Lyle v. City of Chicago*

Plaintiffs' reliance on *Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004), and *People ex rel. Lyle v. City of Chicago*, 360 Ill. 25 (1935), see Pleadings Mem. at 6, is even more misplaced because those cases did not even concern the Pension Clause. In fact, neither case involved contract rights at all. And *Lyle*, on which *Jorgensen* specifically relied, emphasized the distinction between contractual rights, which it held are inherently subject to the State's reserved sovereign powers, and the distinct constitutional protection for judicial salaries, which are noncontractual and implicate unique separation of powers concerns relevant to the judiciary.

Jorgensen involved an application of Article VI, Section 14 of the Illinois Constitution,

sometimes referred to as the Compensation Clause, which provides: "Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office." The Court held that a statute eliminating previously approved cost-of-living increases for judicial salaries violated this provision. *Jorgensen*, 211 Ill. 2d at 305. In language Plaintiffs seize upon here, the Court, relying on its earlier opinion in *Lyle*, stated that "[e]xigent circumstances are not enough. 'Neither the legislature nor any executive or judicial officer may disregard the provisions of the constitution even in case of a great emergency.'" *Id.* at 304 (quoting *Lyle*, 360 Ill. at 29).

Yet this discussion in *Jorgensen* explains why Plaintiffs' absolutist interpretation of the Pension Clause misses the mark. First, the Court in *Jorgensen* grounded its analysis in separation of powers principles, which do not apply to contracts involving non-judicial public employees. *Id.* at 302-05 (citing, inter alia, *O'Donoghue v. United States*, 289 U.S. 516 (1933)). Second, what Plaintiffs fail to acknowledge, but the Court in *Jorgensen* recognized, is that judges are state "officers" whose positions are created by the Constitution and who serve by election or appointment according to law. *Id.* at 308-09. Judges are not, in the constitutional sense, public "employees" whose services are established and determined by an employment contract. Consequently, their salaries are not based on an employment contract protected by the Contracts Clause, but instead are determined according to statute and relevant constitutional limitations. See *People ex rel. Akin v. Loeffler*, 175 Ill. 585, 608 (1898) (following *Butler v. Pennsylvania*, 51 U.S. 402 (1850)); *Crumpler v. County of Logan*, 38 Ill. 2d 146, 150 (1967); *Illinois Cnty. Treasurers Ass'n v. Hamer*, 2014 IL App (4th) 130286, ¶ 28; see also *Lyle*, 360 Ill. at 26, 28 (noting that salaries for plaintiff judges for Chicago municipal court were set by ordinance, and that defendant invoked financial difficulties to justify across-the-board salary cuts "for all officers and employees" of the City). It is significant, therefore, that *Jorgensen* never refers to judicial salaries as being based on a contractual right and never mentions police-powers principles applicable to public contracts.

Lyle further highlights this crucial distinction. In that case, the Court held that although *contract* rights protected by the Constitution are subject to a State's valid exercise of its police powers, the direct constitutional right of judges not to suffer any reduction in their salaries during their terms of office contains no such limitation. *Lyle*, 360 Ill. at 29. In addition, *Lyle* specifically relied on the United States Supreme Court's opinion in *Blaisdell* to contrast the qualified nature of the constitutional protection for *contractual* rights, which are always subject to the valid exercise of the State's reserved sovereign powers, and the distinct constitutional protection for judicial salaries, which stand on a different footing. *Id.* at 29; see also *Blaisdell*, 290 U.S. at 435 (holding that "[n]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also *read into contracts* as a postulate of the legal order" (emphasis added)). *Lyle* thus distinguished the contracts at issue in *Blaisdell* from judicial salary rights because only contact rights are, "by necessary implication," subject to the State's police powers. 360 Ill. at 29; see also *People ex rel. Northrup v. City Council of City of Chi.*, 308 Ill. App. 284, 289 (1st Dist. 1941).

3. *Miscellaneous Illinois cases*

The other Illinois cases that Plaintiffs mention in support of their position, including *Arnold v. Board of Trustees*, 84 Ill. 2d 57 (1981), *Buddell*, 118 Ill. 2d 99, and *Kuhlman v. Board of Trustees*, 106 Ill. App. 3d 603 (1st Dist. 1982), are completely inapposite. *Arnold* was decided as a matter of statutory interpretation and did not even discuss the Pension Clause. 84 Ill. 2d at 63. The same is true of *Buddell*. 118 Ill. 2d at 102-06. And the Appellate Court in *Kuhlman* merely examined the threshold issue of whether a retirement system member could avail himself of an amendment to the Pension Code allowing certain conversion benefits where he was not regularly employed and did not make contributions to the system after the amendment took effect. 106 Ill. App. 3d at 606-08. None of these cases entertained Plaintiffs' unprecedented super-contract theory that the Pension Clause

surrenders the State's police powers entirely.

4. ***The Sklodowski I dissent***

Plaintiffs' invocation of Justice Freeman's partial concurrence and dissent in *Sklodowski I* is particularly puzzling. Beyond the fact that a dissent has no precedential value, *Sanner*, 88 Ill. App. 3d at 495, this dissent undermines Plaintiffs' position here. The majority held that a mootness exception did not permit judicial review of an amendment to a statute providing for escheat-type funds to be contributed to the State's retirement systems. *Skoldowski I*, 162 Ill. 2d at 130-33. Dissenting on this point, Justice Freeman proceeded to consider the issue on the merits of whether the amendment violated the Pension Clause. *Id.* at 134-35 (Freeman, J., concurring in part and dissenting in part). His dissent was unambiguous: "the primary reason the drafters of our constitution elevated pension membership to contract status was simply to eliminate distinction between mandatory and optional participation plans," *id.* at 148; "[t]he protection against impairment of State pension benefits is *co-extensive* with the protection afforded all contracts under article I, section 16, of the constitution," *id.* at 147 (emphasis added); and that he was "unaware of any material difference between the contract clause and the protection afforded under our own constitution," *id.* at 148. Indeed, the dissent recognized the police powers limitation on contractual rights under the Contracts Clause and treated it as being applicable to rights under the Pension Clause. *Id.* at 150-51 (discussing *U.S. Trust Co.*, 431 U.S. at 23-26; *Allied Structural Steel Co.*, 438 U.S. at 244-45).

Quoting a passage from this dissent summarizing precedent concerning the police powers doctrine, however, Plaintiffs assert that Justice Freeman concluded that the Pension Clause eliminated that doctrine for pension rights. Pleadings Mem. at 7. That assertion is untenable. Ignoring most of the dissent, Plaintiffs focus on a single remark — "the need for money is simply no excuse for affecting a State's contractual obligations" — as evidence that the dissent adopted their

view that financial considerations can *never* support the government's modification of its own contract. *Id.* But Plaintiffs' reading of that remark is inconsistent with the purpose of the footnote from *U.S. Trust Co.* that this quotation was paraphrasing. 431 U.S. at 26 n.25 (the "need for money is no excuse for repudiating contractual obligations"). In *U.S. Trust Co.*, the footnote served only as elaboration on Supreme Court's pivotal declaration that, although "modification of a State's own financial obligations . . . may be constitutional if it is reasonable and necessary to serve an important public purpose[,] *complete deference* to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 25-26 & n.25 (emphasis added). And in *Lynch v. United States*, cited both in the *U.S. Trust Co.* footnote and the *Sklodowski I* dissent for this proposition, the Court specifically noted that the United States "does not suggest . . . that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power." 292 U.S. 571, 580 (1934).

Moreover, Plaintiffs' reading also is inconsistent with the rest of the *Sklodowski I* dissent. The dissent emphasized the established rule that the mere existence of other desirable uses for scarce public funds is not itself enough to sustain the substantial impairment of a State's own contract. *Skoldowski I*, 162 Ill. 2d at 150-51 (Freeman, J., concurring in part and dissenting in part). In other words, "a State is not *completely* free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *U.S. Trust Co.*, 431 U.S. at 30-31 (emphasis added). That is why the dissent proceeded to address whether the proffered justification for the challenged law could be sustained under the circumstances presented in that case as a valid exercise of the State's police powers. *Sklodowki I*, 162 Ill. 2d at 151 (Freeman, J., concurring in part and dissenting in part) (stating that "balancing the State budget . . . is not to be *elevated above* concern for impairing pension benefits" (emphasis added)). It never suggested, as Plaintiffs contend, that all factual considerations are wholly irrelevant.

5. *Out-of-State Caselaw*

To Defendants' knowledge, only two cases — both recent, and neither from Illinois — specifically address whether a state constitutional provision giving contractual protection for pension benefits establish legal rights superior to those generally recognized for other contracts.[5] In the first, *In re City of Detroit*, pension plans for the City of Detroit sought to avoid the bankruptcy court's power to modify obligations to system members by "asserting that under the Michigan Constitution, pension debt has greater protection than ordinary contract debt." 504 B.R. 97, 150 (Bankr. E.D. Mich. 2013). The plans linked their view to a distinction in the Michigan Constitution between a constitutional provision stating that "pension rights may not be 'impaired or diminished,'" and another provision establishing that contract rights were protected only from laws "impairing" them. *Id.* at 151.

The court rejected the argument. After surveying relevant state court precedent and analyzing the relevant constitutional language, it concluded that the effect of the Michigan Constitution was to give pension rights, which like Illinois were formerly treated as "gratuitous allowances that could be revoked at will," the status of a "contractual right." *Id.* (citations and internal quotation marks omitted). Finding no merit in the plans' argument about the language of the Michigan Constitution, the court explained that, "linguistically, there is no functional difference in meaning between 'impair' and 'impair or diminish.'" *Id.* at 152-53. In a subsequent order, the court summarized the question it had resolved previously as whether "the pension clause of the Michigan Constitution

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[5] *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, which Plaintiffs assert addresses that issue, in fact represents a straightforward application of the police powers test applicable to an alleged impairment by a State of its own contractual obligations. 483 S.E.2d 422, 427 (N.C. 1997) ("An impairment of contract such as is involved in this case can only be upheld if it is both reasonable and necessary to serve an important public purpose." (citing *U.S. Trust Co.*, 431 U.S. 1)); see also *Washington Educ. Ass'n v. Wash. Dep't of Ret. Sys.*, 332 P.3d 428, 437 (Wash. 2014) (holding that when reviewing statute repealing yearly cost-of-living adjustments, court would "apply the same three-part test governing all public contracts").

establish protections for pension rights that are *greater* than contract rights" before reiterating that "the pension clause in the Michigan Constitution gives pension rights the protection of contract rights," not greater rights. *In re City of Detroit*, 504 B.R. 191, 194, 196 (Bankr. E.D. Mich. 2013) (emphasis added).

To the extent Plaintiffs seek to advance the same argument as to the Pension Clause of the Illinois Constitution, this Court should reach the same result. As in Michigan, there is no indication that the drafters of the Illinois Pension Clause intended for the terms "diminished" and "impaired" to have different meanings. The only relevant discussions of these terms at the 1970 Constitutional Convention indicated that they were interchangeable, with one delegate explaining that while this phraseology did not require protection against inflation or any particular level of pension system funding, both components of this phrase would apply if a pension fund were faced with "imminent bankruptcy." 4 Proceedings at 2926 (comments of Delegate Kinney).

The drafters' understanding is consistent with the relevant case law. For example, in *Allied Structural Steel Company*, the United States Supreme Court also treated the terms as interchangeable by disapproving the view that the Contracts Clause, which prohibits state laws *impairing* the obligation of contracts, "forbids only state laws that *diminish* the duties of a contractual obligor and not laws that increase them." 438 U.S. at 244 n.16 (emphasis added). Similarly, a pre-1970 Illinois Supreme Court decision held that a law violated the constitutional protection against *impairment* of the obligation of contracts because it "*diminishe[d]*" the obligor's performance. *Geweke v. Vill. of Niles*, 368 Ill. 463, 466 (1938). And before the 1938 adoption of a similar provision in the New York Constitution, which was the model for the Illinois Pension Clause, the expression "diminish or impair" was used to convey a single meaning, not two separate meanings (like the expressions "cease and desist," "aid and abet," "free and clear," or "residue and remainder"). See, e.g., *Metro. Trust Co. v. Tonawanda Valley & C.R. Co.*, 8 N.E. 488, 489 (N.Y. 1886); *Eddy v. London Assur.*

Corp., 38 N.E. 307, 311 (N.Y. 1894). Any suggestion that either term is redundant is rebutted by this consistent usage. Cf. *Sklodowski I*, 162 Ill. 2d at 147-48 (Freeman, J., concurring in part and dissenting in part) (concluding that term "enforceable" in Pension Clause adds no substantive meaning to it).

Standing in contrast with the Detroit bankruptcy decision is the Arizona Supreme Court's opinion in *Fields v. Elected Officials' Retirement Plan*, 320 P.3d 1160 (Ariz. 2014). *Fields* interpreted the provision in the Arizona Constitution that states: "Membership in a public retirement system is a contractual relationship that is subject to article II, § 25 [the Arizona Contracts Clause], and public retirement system benefits shall not be diminished or impaired." The court's entire discussion of the issue was as follows:

> We first address the argument that because Article 29, § 1(C) [the Pension Clause of the Arizona Constitution] references the Contract Clause of Article 2, § 25 of the Arizona Constitution, we should resolve this case by using a Contract Clause analysis similar to that employed by the Supreme Court in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697 (1983), which held that although the federal Contract Clause is facially absolute, it allows the impairment of contracts under certain conditions. Section 1(C) not only references the Contract Clause, but also uses similar language. Compare Ariz. Const. art. 29, § 1(C) ("Membership in a public retirement system is a contractual relationship that is subject to article II, § 25, and public retirement system benefits shall not be diminished or impaired."), with Ariz. Const. art. 2, § 25 ("No . . . . law impairing the obligation of a contract, shall ever be enacted."). But accepting this argument would *render superfluous the latter portion of § 1(C)*, the Pension Clause, *which prohibits diminishing or impairing public retirement benefits*. Because the legislature generally avoids redundancy, we reject this argument. *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) (noting court construes statutes to avoid rendering portions superfluous); *Vega v. Morris*, 184 Ariz. 461, 463, 910 P.2d 6, 8 (1996) (rejecting an interpretation that would render the statute in question "essentially meaningless").

Id. at 1164 (emphasis added).

Even if this Court were free to follow Arizona precedent, rather than the Illinois Supreme Court's decision in *Felt*, *Fields*' reasoning has little relevance regarding the Pension Clause in the Illinois Constitution. *First*, the canon of interpretation under which language ordinarily should not be read as superfluous or redundant is not a rigid rule of law, but an aid for determining the drafters' intention, which is always the ultimate goal of the interpretative process. See *People v. Todd*, 59 Ill. 2d 534, 543 (1975); see also *People v. Giraud*, 2012 IL 113116, ¶ 6 ("The traditional canons or maxims of statutory construction are not rules of law, but rather are merely aids in determining legislative intent and must yield to such intent."); see generally *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (holding that general principle under which "use of . . . different language . . . can indicate that different meanings were intended, . . . like other canons of construction, is no more than a rule of thumb") (citations, brackets, and internal quotation marks omitted); *In re City of Detroit*, 504 B.R. at 150-53.

Second, the *Fields* decision relied on language in the Pension Clause of the Arizona Constitution that is absent from the Pension Clause in the Illinois Constitution. As noted above, the Arizona provision, unlike the Illinois' Pension Clause, first provides that membership rights in a public pension system are a contractual relationship subject to the Contracts Clause of the Arizona Constitution, and then goes on to state that those rights shall not be diminished or impaired. The potential redundancy the court identified in *Fields* as the basis for its holding was the second clause, stating that pension benefits shall not be "diminished or impaired," because the first clause *already* provided that they were a contractual relationship explicitly protected by the Contracts Clause of the Arizona Constitution. 320 P.3d at 1164. Consistent with the Detroit bankruptcy decision, the court did not interpret the terms "diminished" and "impaired" as separately redundant, so that each must be given a distinct meaning from the other. *Fields*, therefore, offers no meaningful support to

Plaintiffs.[6]

* * *

In the end, *Felt* is controlling here. There, the Court applied to the Pension Clause the same police-powers test applicable to claims arising under the Contracts Clauses of the United States and Illinois Constitutions. *Felt*, 107 Ill. 2d at 166-67. No other Supreme Court decision — including *Kanerva* — purports to overturn *Felt* on this issue. In fact, no other decision even addresses that question. In effect, Plaintiffs' motions are based on the hope that this Court will overrule *Felt*, which it cannot do. See *Agric. Transp. Ass'n v. Carpentier*, 2 Ill. 2d 19, 27-28 (1953). Accordingly, Plaintiffs' motions must fail.[7]

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[6] Any persuasive value that *Fields* might warrant is further reduced by its failure even to consider whether the drafters of the provision in question would have made such a momentous change to longstanding principles regarding the relationship between contract rights and state sovereignty, and the substantial federal question raised by treating the Arizona Constitution as having changed the effect of such sovereignty, especially without an unmistakable indication of an intention to take such a far-reaching step.

[7] Even if Plaintiffs are correct that the Pension Clause creates "super-contracts," the relief they seek in their motion for summary judgment of having Public Act 98-599 declared void "in its entirety" is overbroad. See Sum. Jdgt. Mem. at 23. As Defendants explain in their motion for summary judgment, the Act includes a severability clause and Plaintiffs do not explain how their "super-contract" theory would preclude application of *every* provision included in the Act. See Pub. Act 98-599, § 97. In fact, Plaintiffs' motion for summary judgment identifies a limited subset of changes to the Pension Code that they believe would be invalidated if their motion is granted. Sum. Jdgt. Mem. at 10-16 (listing "reduction of automatic annuity increases," "new cap on pensionable salaries," "increase in minimum retirement age," and "diminishment of the rate of interest to calculate pension benefits" as statutory changes impacted by motion).

Conclusion

For the foregoing reasons, Plaintiffs' respective motions to strike, for judgment on the pleadings, and for summary judgment should be denied.

Date: October 3, 2014

Respectfully Submitted,

LISA MADIGAN
Illinois Attorney General

Counsel for Defendants

Brent D. Stratton
R. Douglas Rees
Richard S. Huszagh
Clifford W. Berlow
Assistant Attorneys General
100 W. Randolph Street, 12th Floor
Chicago, IL 60601
(312) 814-3000

CERTIFICATE OF SERVICE

I, Joshua D. Ratz, an attorney, hereby certify that on October 3, 2014, true and correct copies of the foregoing Memorandum in Opposition to Plaintiffs' Motions for Summary Judgment, for Judgment on the Pleadings, and to Strike Defendants' Affirmative Matter was served by United States Mail, first class postage prepaid, upon all counsel of record as follows:

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

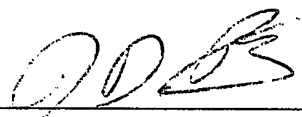
John M. Myers
Barbara K. Myers
Rabin & Myers, PC
1300 South 8th Street
Springfield, Illinois 62703

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

Michael D. Freeborn
John T. Shapiro
Jill. C. Anderson
Freeborn & Peters LLP
31 1 South Wacker Drive
Suite 3000
Chicago, Illinois 60606

Gino L. DiVito
John M. Fitzgerald
Brian C. Haussmann
Tabet DiVito & Rothstein LLC
209 S. La Salle Street, 7th Floor
Chicago, Illinois 60604

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



Joshua D. Ratz
Assistant Attorney General
500 South Second Street
Springfield, IL 62706
Phone: (217) 782-9094
Fax: (217) 524-5091