IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Mary J. Jones, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 14 CH 20027
	)	
Municipal Employees' Annuity and Benefit Fund of Chicago, *et al.*	)	Honorable Rita M. Novak
	)	
Defendants.	)	
	)	
Jeffrey Johnson, *et al.*	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 14 CH 20668
	)	
Municipal Employees' Annuity and Benefit Fund of Chicago, *et al.*	)	Honorable Rita M. Novak
	)	
Defendants.	)	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on **Friday, June 19, 2015**, I caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, the **City of Chicago's Opposition to Plaintiffs' Motions for Summary Judgment**, a copy of which is hereby served upon you.

Richard J. Prendergast, Esq.
Michael T. Layden, Esq.
Lionel W. Weaver, Esq.
RICHARD J. PRENDERGAST, LTD. (#11381)
111 W. Washington St., Suite 1100
Chicago, Illinois 60602
(312) 641-0881

CERTIFICATE OF SERVICE

Richard J. Prendergast, an attorney, certifies that he caused a copy of the foregoing **Notice** and **City of Chicago's Opposition to Plaintiffs' Motions for Summary Judgment** to be served upon the following Service List via electronic delivery & Messenger Delivery, on this **19th** day of **June**, 2015.

SERVICE LIST

Jones, et al. v. Municipal Employees' Annuity and Benefit Fund of Chicago, et al., Case No. 14 CH 20027/Johnson, et al. v. Municipal Employees' Annuity and Benefit Fund of Chicago, Case No. 14 CH 20668

Michael D. Freeborn
John T. Shapiro
Jill C. Anderson
Terrence J. Sheahan
Garry L. Wills
Freeborn & Peters LLP
311 S. Wacker Dr., Suite 3000
Chicago, Illinois 60606
(312) 360-6000
mfreeborn@freeborn.com
jshapiro@freeborn.com
janderson@freeborn.com
tsheahan@freeborn.com
gwills@freeborn.com

Brent D. Stratton (312-814-3498)
Chief Deputy Attorney General
R. Douglas Rees
Gary S. Caplan
Richard S. Huzagh
Assistant Attorneys General
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601
(312) 814-3000
bstratton@atg.state.il.us
drees@atg.state.il.us
gcaplan@atg.state.il.us
rhuszagh@atg.state.il.us

John E. Stevens
Freeborn & Peters LLP
217 East Monroe St., Suite 202
Springfield, Illinois 62701
(217) 535-1060
jstevens@freeborn.com

John F. Kennedy
Cary E. Donham
Graham Grady
Taft Stettinius & Hollister LLP
111 E. Wacker Dr., Suite 2800
Chicago, Illinois 60601
(312) 527-4000
jkennedy@taftlaw.com
cdonham@taftlaw.com
ggrady@taftlaw.com

Mary Patricia Burns
Vincent D. Pinelli
Burke Burns & Pinelli Ltd.
Three First National Plaza
Chicago, Illinois 60602
(312) 541-8600
mburns@bbp-chicago.com
vpinelli@bbp-chicago.com

Clinton A. Krislov
KRISLOV & ASSOCIATES, LTD.
20 N. Wacker Drive, Suite 1300
Chicago, Illinois 60606
(312) 606-0500
clint@krislovlaw.com

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CITY OF CHICAGO'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Stephen R. Patton
Corporation Counsel
Jane Elinor Notz
Deputy Corporation Counsel
City of Chicago
121 North LaSalle Street
Chicago, Illinois 60602
Telephone: 312-744-0200

Richard J. Prendergast
Michael T. Layden
Lionel W. Weaver
Richard J. Prendergast, Ltd.
111 W. Washington St., Suite 1100
Chicago, Illinois 60602
Telephone: 312-641-0881

Michael B. Slade
R. Chris Heck
Kirkland & Ellis LLP
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: 312-862-2000

Counsel for the City of Chicago

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INTRODUCTION

Plaintiffs do not, and cannot, seriously dispute that Senate Bill 1922 ("SB1922") rescues the Municipal Employees Annuity and Benefit Fund ("MEABF") and Laborers Retirement Board Employees Annuity Benefit Fund ("LABF") from certain insolvency and thereby makes fund participants better off than they were prior to SB1922's enactment. Thus, under the plain language of the Pension Clause, SB1922 does not "diminish or impair" pension benefits; it preserves and protects them and, under any reasonable reading, does not violate that Clause.

Without SB1922, MEABF and LABF will run out of money, and the consequences to participants will be devastating. 40 ILCS 5/22-403, which has been Illinois law for more than 50 years, could not be more clear and unequivocal: "[a]ny pension payable" by MEABF and LABF "shall not be construed to be a legal obligation" of the City, the State, or any other entity besides the Funds.[1] This provision has been part of the pension contract for MEABF and LABF participants since the Pension Clause was enacted. This is not, to use Plaintiffs' rhetoric, "doublespeak," "cynical," or "disingenuous."[2] It is reality—based on the express and unambiguous terms of the Pension Code.

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[1] 40 ILCS 5/22-403 ("Any pension payable under any law hereinbefore referred to shall not be construed to be a legal obligation or debt of the State, or of any county, city, town, municipal corporation or body politic and corporate located in the State, other than the pension fund concerned, but shall be held to be solely an obligation of such pension fund, unless otherwise specifically provided in the law creating such fund."). As described in the City's motion for summary judgment, prior to SB1922, there was no law even suggesting that pensions are the obligation of anyone other than MEABF or LABF.

[2] Jones Pls' Mem. in Support of Their Motion for Summary Judgment ("Jones Mem.") 1, 10, 21; *see also* Johnson Pls' Mem. in Support of Their Motion for Summary Judgment ("Johnson Mem.") 20.

Plaintiffs' summary judgment motions are premised on the mistaken and wholly unsupported assumption that part of the "contractual relationship" agreed to by MEABF and LABF participants was a right to have their pensions paid by their "employer" (the City) before SB1922 was enacted. Plaintiffs point to nothing that supports such a right, nor could they, because the contractual relationship to which MEABF and LABF members agreed—as defined in the terms of the Pension Code—says exactly the opposite.

Instead, Plaintiffs' motions rely on a fundamental misconception about what the Pension Clause does. Contrary to Plaintiffs' argument, the Pension Clause does not *create* benefits. Rather, it *protects* the benefits of the contractual relationship into which participants enter, which includes the limits provided in the Pension Code. Put differently, the Pension Clause makes the promises of the Pension Code enforceable, but does not alter those promises.

Thus, the core question presented by the parties' motions is straightforward: what terms define the contractual relationship protected by the Pension Clause? For MEABF and LABF participants, the contract includes the proviso that *no* entity other than the Funds is obligated to pay their pensions. SB1922 therefore provides a massive net benefit for participants, because it takes Funds that would otherwise become insolvent and obligates the City to fund them on an actuarial basis, ensuring that they will be able to meet their obligations. For this and other reasons described below, SB1922 does not violate the Pension Clause, Plaintiffs' motions for summary judgment should be denied, and the City's motion should be granted.

ARGUMENT

I. THE PENSION CLAUSE DOES NOT CREATE BENEFITS, FUNDING OBLIGATIONS, OR OTHER TERMS OF THE PENSION CONTRACT; RATHER, IT PROTECTS THE RIGHTS AND OBLIGATIONS THE LEGISLATURE HAS ENACTED FROM BEING DIMINISHED OR IMPAIRED.

Plaintiffs' motions rely on the Pension Clause to create, out of whole cloth, a pre-SB1922 participant right and a City obligation to funding that is directly at odds with two settled principles of Pension Clause jurisprudence: *first*, that the "contractual relationship" creating a right to pension benefits protected by the Clause is defined in, and limited by, the Pension Code, and, *second*, that the Clause itself does not create pension benefits, funding obligations or other terms of the pension contract, but instead protects the rights enacted by the Legislature from being diminished or impaired. Thus, while Plaintiffs try to ride the coattails of the plaintiffs' victory in *Pension Reform Litigation*, in fact, their challenge to the very different legislation and factual circumstances here is contradicted by the Supreme Court's analysis in that case and the precedent upon which it is based.

A. The "Contractual Relationship" Protected By The Pension Clause Is Defined In And Limited By The Pension Code.

As the Supreme Court recently confirmed in *Pension Reform Litigation*, the pension rights protected by the Pension Clause are defined in and limited by the terms and provisions of the Pension Code in effect while participants pay into the system.[3] This was not new ground for the Court. The principle that the terms and

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[3] *In re Pension Reform Litig.*, 2015 IL 118585, ¶ 46 & n.12 (confirming that employees must "compl[y] with any qualifications imposed" when benefits were first offered in

conditions of the "contractual relationship" concerning pension benefits protected by the Pension Clause are set forth in the Pension Code has been the law for decades.

For example, in *Kerner v. State Employees Retirement System*,[4] a former governor convicted of a felony sued when his pension fund revoked his benefits pursuant to a provision of the Pension Code denying benefits to persons convicted of a felony arising out of state service. The Supreme Court held that the revocation did not violate the Pension Clause because the forfeiture provision was contained in the Pension Code when the governor paid into the pension system. The Court held that the Pension Clause creates "an enforceable contractual relationship," and the Pension Code's limitation on the receipt of benefits by felons was "a condition of the contractual relationship to which he consented by applying for membership."[5]

The Supreme Court has repeatedly reaffirmed this principle: the terms of the Pension Code in effect while an employee pays into the system determine the employee's pension rights under the Pension Clause. Thus, "the 'contractual relationship' [established by the Pension Clause] is governed by the actual terms of the Pension Code at the time the employee becomes a member of the pension system."[6]

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order to be eligible for them) (citing *Di Falco v. Bd. of Trs. of the Firemen's Pension Fund of the Wood Dale Fire Prot. Dist.*, 122 Ill. 2d 22, 26, 521 N.E.2d 923 (1988)).

4 72 Ill. 2d 507, 510-11, 382 N.E.2d 243, 244-45 (1978).

5 *Id.* at 514, 382 N.E.2d at 246-47.

6 *Di Falco*, 122 Ill. 2d at 26, 521 N.E.2d at 925 (citing *Kerner*, 72 Ill. 2d at 514, 382 N.E.2d at 247). *See also People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 227, 695 N.E.2d 374, 376-77 (1998) (same); *McNamee v. State*, 173 Ill. 2d 433, 446, 672 N.E.2d 1159, 1165 (1996) (same); *Buddell v. State Univ. Ret. Sys.*, 118 Ill. 2d 99, 105-06, 514 N.E.2d 184, 187-88 (1987) (same).

B. The Pension Clause Protects The "Contractual Relationship" Provided By Statute Against Diminishment Or Impairment, But Does Not Create New Terms To That Contract.

While Plaintiffs rely exclusively on the Pension Clause,[7] that clause does not itself create any rights at all. Rather, as the Supreme Court confirmed in *Pension Reform Litigation*, the Pension Clause protects the rights of "[m]embership" in a public pension system by making the rights set forth in the Pension Code an "enforceable contractual relationship, the benefits of which shall not be diminished or impaired."[8] Critically, the terms of the "enforceable contractual relationship" conferring those rights are not defined in the Pension Clause, but rather in the Pension Code.[9]

In other words, the Pension Clause, as interpreted by the Supreme Court, turns the terms of the Pension Code in effect while a participant pays into the system into an "enforceable contractual relationship." The Pension Clause protects those terms from being "diminished or impaired"—without taking a position on what they are.[10] Instead, the drafters of the Pension Clause envisioned that the

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7 Jones Compl. ¶¶ 2, 34-36, 52; Johnson Am. Compl. ¶¶ 8-19, 27-34.

8 *Pension Reform Litig.*, 2015 IL 118585, ¶ 45.

9 *Kanerva v. Weems*, 2014 WL 115811, ¶¶ 38-41 held that the Pension Clause also protects statutory retirement benefits that are expressly conditioned on membership in a retirement system for public employees even if those benefits are provided in a statute other than the Pension Code. But this case concerns only pension benefits claimed under the Pension Code, which therefore determines the nature of those rights.

10 *Id.* ¶ 46 (citing *Di Falco*, 122 Ill. 2d at 26, 521 N.E.2d at 923); *see also Kerner*, 72 Ill. 2d at 514, 283 N.E.2d at 247 (every part of the Pension Code, including limits on receiving benefits, is "a condition of the contractual relationship to which [each fund participant] consented by applying for membership."); *Di Falco*, 122 Ill. 2d at 26, 521 N.E.2d at 925 (same); *Sklodowski*, 182 Ill. 2d at 227, 695 N.E.2d at 376-77 (same); *McNamee*, 173 Ill. 2d at 446, 672 N.E.2d at 1165 (same).

rights protected by the Pension Clause would be created, defined, and limited by the General Assembly.[11]

Accordingly, under basic principles of separation of powers, the courts cannot, under the guise of applying the Pension Clause, create or enforce rights or obligations that have not been created by the General Assembly. And the courts certainly cannot create a right—such as the employer funding that Plaintiffs simply *assume* exists here—in circumstances where the General Assembly, in the Pension Code, has explicitly stated that the right does *not* exist.

II. PRIOR TO SB1922, THE PENSION CONTRACT WITH MEABF AND LABF PARTICIPANTS DID NOT INCLUDE AN OBLIGATION ON THE PART OF THE CITY TO ACTUARIALLY OR FULLY FUND MEABF AND LABF.

For MEABF and LABF participants, the Pension Code has *always* explicitly provided that any benefits owed are solely the obligation of the Funds, and not the State, the City, or any other entity. The Pension Code could not be clearer on this point:

> Any pension payable under any law hereinbefore referred to *shall not be construed to be a legal obligation or debt of the State, or of any county, city, town, municipal corporation or body politic and corporate located in the State, other than the pension fund concerned, but shall be held to be solely an obligation of such pension fund*, unless otherwise specifically provided in the law creating such fund.

40 ILCS 5/22-403 (emphasis added). This term of the contractual relationship can be modified by the General Assembly—as it has been for many other state and municipal pension funds—if "specifically provided in the law creating such fund."

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[11] *Pension Reform Litig.*, 2015 IL 118585, ¶ 47; *Kerner*, 72 Ill. 2d at 510, 283 N.E. 2d 245; *Di Falco*, 122 Ill. 2d at 26, 521 N.E. 2d at 925.

But Section 22-403 is clear that, unless the portion of the Pension Code creating the fund states otherwise, no government entity other than the pension fund itself has an obligation to pay the pensions. For MEABF and LABF, the relevant statutory provisions do not impose any such obligation on any other government entity.

The Jones Plaintiffs ignore Section 22-403 until page 17 of their 22-page brief, and the Johnson Plaintiffs do not mention it at all. But Section 22-403 is just as much a part of the contractual relationship agreed to by MEABF and LABF participants as other parts of the Pension Code defining their annuities, annual adjustments, and the circumstances under which they forfeit their right to receive benefits. Thus, part of the contract that all of the Plaintiffs (and all fund participants) accepted is that *only* the Funds, and *not* the City or any other government entity, are obligated to pay their pension benefits, unless the Pension Code provides otherwise. And prior to SB1922, *nothing* in the Pension Code provisions governing MEABF and LABF provided that pension benefits were an obligation of anyone other than the Funds.

Plaintiffs ignore this fundamental and key distinction between the contractual relationship at issue here and those at issue in the prior Illinois Supreme Court cases on which Plaintiffs rely to claim a right to City-guaranteed pensions notwithstanding the limitation contained in Section 22-403. For example, the Pension Code provisions governing the four state pension funds at issue in *Pension Reform Litigation* all expressly provided that pension payments *are* the

State's obligation. Since at least 1963, the Pension Code provisions creating the General Assembly Retirement System ("GRS") have stated:

> Obligations of State. The payment of (1) the required State contributions, (2) all benefits granted under this system and (3) all expenses of administration and operation are obligations of the State to the extent specified in this Article.

40 ILCS 5/2-125. Likewise, the provisions creating the State Employees' Retirement System ("SERS"):

> Obligations of State. The payment of the required department contributions, all allowances, annuities, benefits granted under this Article, and all expenses of administration of the system are obligations of the State of Illinois to the extent specified in this Article.

40 ILCS 5/14-132. So, too, the provisions creating the State University Retirement System ("SURS"):

> Obligations of State. The payment of (1) the required State contributions, (2) all benefits granted under this system and (3) all expenses in connection with the administration and operation thereof are obligations of the State of Illinois to the extent specified in this Article.

40 ILCS 5/15-156. And, finally and similarly, the provisions creating the Teachers' Retirement System ("TRS"):

> Payment of the required State contributions and of all pensions, retirement annuities, death benefits, refunds, and other benefits granted under or assumed by this System, and all expenses in connection with the administration and operation thereof, are obligations of the State.

40 ILCS 5/16-158(c).

The same was true in the trilogy of cases in which the Supreme Court held that a claimed right to a particular level or rate of funding of pension benefits was *not* constitutionally protected, while stating in dicta that the absence of that right

did not "foreclose the possibility that a direct action could be brought by pension system members to compel funding if a pension fund were on the verge of default or imminent bankruptcy." *Pension Reform Litig.*, 2015 IL 118585, ¶16 n.3 (citing *Sklodowski*, 182 Ill. 2d at 232-33, 695 N.E.2d at 379, and *McNamee*, 173 Ill. 2d at 433, 672 N.E.2d at 1163; *see also People ex rel. Ill. Fed'n of Teachers, AFT, AFL-CIO v. Lindberg*, 60 Ill. 2d 266, 272-73, 326 N.E.2d 749, 752 (1975)). In each, the statutes governing the pension funds at issue—unlike the provisions governing the Funds at issue here—had explicit language stating that all obligations of the fund in question were obligations of the governmental employer, that the governmental employer was obligated to fund on an actuarial basis, or both.[12]

Plaintiffs concede that the Funds are separate and independent legal entities from the City.[13] Plaintiffs also appear to recognize that the obligation to make pension payments lies with the Funds: when they initiated these lawsuits, Plaintiffs sued the only Funds, not the City or the State. Accordingly, absent legislation making the City or some other entity responsible for the Funds' obligations, those obligations are solely the obligations of the Funds. Courts cannot

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[12] *See McNamee*, 173 Ill. 2d at 433, 695 N.E.2d at 379-80 (involving police pension funds, *see* 40 ILCS 5/3-125, 5/3-127); *Sklodowski*, 172 Ill 2d. at 232-33, 695 N.E.2d at 376-77 (involving SERS, SURS, JRS, *see* 40 ILCS 5/18-132, TRS, and GARS, *see* 40 ILCS 5/2-125); *Lindberg*, 60 Ill. 2d at 368, N.E.2d at 752 (involving SURS and TRS).

[13] *See, e.g.*, 40 ILCS 5/1-101; *People ex rel. Madigan v. Burge*, 2014 IL 115635 (pension funds are independent legal entities created by the State); *Eschbach v. McHenry Police Pension Bd.*, 2012 IL App (2d) 111179, ¶ 25 ("A municipality and a pension board are two separate entities"); *Rhoads v. Board of T'ees of Calumet City Policemen's Pension Fund*, 293 Ill. App. 3d 1070, 1075, 689 N.E.2d 266, 270 (1st Dist. 1997) (municipality and fund's trustees lacked privity for purposes of collateral estoppel, a conclusion supported by the "distinct identit[ies], constituenc[ies], and interest[s]" of those parties).

judicially create such an obligation. That is particularly true where, as here, the General Assembly expressly foreclosed any such result through legislation expressly providing that those obligations were *not* those of the City, the State, or any entity other than the Funds.

III. PLAINTIFFS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

A. The Fact That SB1922 Alters Annual Adjustments Does Not Automatically Make SB1922 Unconstitutional.

Plaintiffs begin with an argument that because SB1922 reduces automatic annual adjustments by linking them to inflation in most years, and eliminating them in three years, SB1922 is unconstitutional for that reason alone.[14] Plaintiffs thus assume that the Court should analyze the constitutionality of SB1922 in pieces and that, if any one piece of the statute standing alone reduces any pension benefits, the entire statute is unconstitutional. Plaintiffs' approach is inconsistent with the prior cases interpreting the Pension Clause and common sense.[15]

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[14] *See* Jones Mem. 1-4; Johnson Mem. 1-10.

[15] Plaintiffs take a similar approach to the parts of SB1922 that provide for increased employee contributions. *See* Jones Mem. 5-6; Johnson Mem. 10-13. Plaintiffs do not cite, nor are we aware of, any case holding that increases in employee contributions are prohibited by the Pension Clause, let alone where, as here (*see infra* at Section IV), they were agreed to by the unions representing participants and are supported by consideration. Those questions were not presented in *Pension Reform Litigation*—the question in that case was whether a "reduction [in] annuity benefits" violated the Clause. 2015 IL 118585, ¶ 43; *see also id.* at ¶¶ 27, 47 (specifying the "five different ways" in which Public Act 98-599 reduced benefits, none of which was by increasing employee contributions). And the sole reference in *Pension Reform Litigation* to increases in employee contributions—dicta in a footnote—undermines Plaintiffs' argument here. In the context of endorsing pension modifications by agreement supported by consideration, the Court cited an increase in employee contributions as an example of the consideration that might support such an agreement: "Additional benefits may always be added . . . and the State may require additional employee contributions or other consideration in exchange . . .." *Id.* ¶ 20 n.12 (citations omitted). Of course, as we explain in Section IV, that is exactly what occurred here. Moreover, in

Prior Illinois decisions, including cases Plaintiffs cite, preclude considering SB1922's provisions in isolation. As explained in the City's memorandum in support of its motion for summary judgment, most of the prior cases involved statutes that merely reduced pension benefits and did not provide any additional rights to participants—*i.e.*, statutes that addressed only one side of the pension ledger.[16] Thus, there was no call in these cases for the court to undertake the analysis required here.[17] By contrast, in *Pension Reform Litigation*, the Supreme Court was asked to decide the constitutionality of a statute (SB1) that, while "directly reduc[ing] the value of retirement annuities . . . in five different ways,"[18] also provided some benefits to participants. Critically, the Court did *not* declare SB1 unconstitutional merely because it altered the manner of calculating automatic annual adjustments. Instead, the Court conducted a detailed review of the statute's "numerous provisions," including those that benefitted fund participants.[19] That is,

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the case cited with approval by the Supreme Court in that very footnote, *Kraus v. Bd. of Trs. of Police Pension Fund of Village of Niles*, 72 Ill. App. 3d 833, 849 N.E.2d 1281, 1289 (1st Dist. 1979), the Illinois Appellate Court held that legislative action that has an indirect effect on pensions is permissible, and noted that it was possible (although the court did not decide the question) "that an increase in the contribution rates of some employees to equalize their contributions with those of others would not be prohibited."

16 *City of Chicago's Mem. in Support of Its Motion for Summary Judgment*, June 3, 2015 (the "City Mem.") 26-28.

17 *See, e.g., Kraus*, 72 Ill. App. 3d at 844, 390 N.E.2d at 1289 (considering Pension Code amendment that reduced the pension benefits of police officers on disability from a percentage of salary at the date of retirement to a percentage of salary as of the earlier date of disability); *Felt v. Bd. of Trs. of the Judges Ret. Sys.*, 107 Ill. 2d 158, 162-63, 481 N.E.2d 698, 700 (1985) (considering Pension Code amendment that changed how retirement benefits for judges were calculated).

18 *In re Pension Reform Litig*, 2015 IL 118585, ¶ 47.

19 *E.g., id.* ¶¶ 25-27.

the Court considered SB1 *in its entirety* before ultimately determining that it was unconstitutional because, *as a whole*, it diminished or impaired pension benefits.

Plaintiffs' approach also defies common sense. Consider, for example, a statute that has 100 separate provisions, 99 of which benefit fund participants and one of which requires participants to allocate $1 of their annual annuity to charity. Alternately, consider a statute providing that each participant will receive a $20,000 bonus, payable immediately, in exchange for reducing pensions by $1 each month. Under Plaintiffs' logic, these statutes would be unconstitutional "on their face" merely because one of their provisions reduces benefits. As these examples demonstrate, such a result would be absurd and cannot be what either the drafters of the Pension Clause, or the courts interpreting the clause, contemplated.

B. Plaintiffs' Attacks On The City's "Net Benefit" Theory Are Unsupported And Wrong.

The City's memorandum in support of its motion for summary judgment explained that SB1922 preserves and protects pension benefits because it changes the Funds' trajectory from inevitable insolvency to full funding by imposing on the City a new, actuarial funding obligation and enforcement mechanisms that did not previously exist and will not exist if SB1922 is invalidated.[20] Because SB1922 saves the Funds from insolvency, and ensures that pensions will be paid for all time, SB1922 does not diminish or impair pension benefits.[21] Plaintiffs' attacks on what they call the "net benefit theory" are misplaced.

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[20] City Mem. at 6-15.

[21] City Mem., Ex. A, Affidavit of Michael Schachet (the "Schachet Aff.") ¶¶ 32, 38-40.

First, Plaintiffs simply *assume* that, prior to SB1922, the City had an obligation to fund and pay benefits to MEABF and LABF participants.[22] As explained in Parts I-II, they point to no Pension Code or other provision creating, or case finding, such an obligation because there is none. In fact, Section 22-403 of the Pension Code explicitly says the opposite, and the Pension Clause cannot create benefits. The City's payment obligations thus are limited to those provided in the Pension Code, and the City has satisfied every one of those obligations.[23]

Next, Plaintiffs cite *In re Pension Reform Litigation* for the proposition that SB1922 is not constitutional merely because it includes some provisions that benefit pension participants.[24] But that is *not* the City's argument. As explained above, *see*

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[22] *See*, e.g., Jones Mem. 9 (claiming that the City's argument "characterize[es] its own solemn pension obligations as an 'illusory set of promises"); *id* at 9-10 (the City is "willing to cast aside their constitutional obligation as 'illusory'").

[23] Contrary to the Johnson Plaintiffs' contention, the City did not "skip funding whenever the City desired." Johnson Mem. 19. Rather, as the Pension Code requires, the City did not make contributions to LABF in years in which it was fully funded. Section 5/11-178 of the Pension Code defines the contributions that the City "shall make" to LABF and provides that: "When the balance of this reserve equals its liabilities. . . , the *City shall cease to contribute* the sum stated in this section." 40 ILCS 5/11-178 (emphasis added). Thus, when, in 2006, LABF's actuarial consultant determined that LABF's liabilities were "100 percent funded," that actuary instructed that "no City contribution [was] required" for that year and, based on those instructions, no contribution was made. Johnson Mem., Ex. 5, p. 5. The Johnson Plaintiffs' further argument that the City has been short "by a small amount" in each year's MEABF contributions, Johnson Mem. 19, is likewise incorrect. Under the Pension Code, the City is required to levy a property tax each year "at a rate that will produce . . . an amount not to exceed" a specified multiple of the amount of employee contributions in the calendar year two years prior. 40 ILCS 5/8-173. While the City has complied with this provision at all times, in some years there has been a shortfall when the full amount of taxes levied was not collected. But it is impossible for the City to predict in advance the amount of this shortfall and to adjust the levy accordingly. And the Pension Code neither permits the City to levy an amount that "exceed[s]" the multiplier amount nor authorizes the City to make up any shortfall.

[24] Jones Mem. 10-12.

Part III.A, the question is not whether individual provisions of SB1922 operate to the benefit of participants, but whether the statute *as a whole* benefits them. *Pension Reform Litigation* proves this point—the Supreme Court there looked at SB1 as a whole before deciding that it diminished pension benefits—even though some of its provisions would have benefitted participants.[25]

Third, Plaintiffs incorrectly characterize the funding obligation imposed on the City by SB1922 as "ephemeral," because it supposedly is "capable of revocation upon legislative whim."[26] To the contrary, if SB1922 is upheld, the Pension Clause would preclude any effort by the General Assembly to statutorily revoke the requirement that the City actuarially fund MEABF and LABF. This is because the actuarial funding requirement will become a benefit of membership in the pension system, and, as such, it will be entitled to the protections of the Pension Clause. While, as Plaintiffs point out, the schedule or time period over which full actuarial funding would occur might be adjusted without implicating the clause, *see, e.g., Lindberg*, 60 Ill. 2d at 272-73; *McNamee*, 173 Ill. 2d at 436; *Sklodowski*, 182 Ill. 2d at 229, the requirement that the City actuarially fund and pay pensions could not be. If there were any doubt about that, it would be eliminated by SB1922, which makes clear that the requirement of full, actuarial funding is an enforceable right of pension membership.

Similarly, legislation recently passed by the General Assembly which adjusts the funding schedule (but leaves intact the City's obligation to actuarially fund)

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[25] *In re Pension Reform Litig.*, 2015 IL 118585, ¶ 27.

[26] Jones Mem. 11-12.

with respect to the Policemen's Annuity and Benefit Fund of Chicago ("PABF") and the Firemen's Annuity and Benefit Fund of Chicago ("FABF")[27] is fully consistent with these authorities and the City's position here. A 2010 statute, which first imposed an obligation on the City to actuarially fund PABF and FABF, required that the City reach actuarially-based funding in a single year, which would have required a $539 million increase in the City's contribution in 2016, from $300 million in 2015 to $839 million in 2016.[28] Pursuant to the recently passed legislation, this increase will occur over a five-year ramp period, *without* changing the previously imposed requirement that the City reach actuarial funding over time. Thus, this legislation is completely consistent with the principle that once a requirement to fully fund pensions is imposed, it becomes a term of the pension contract and cannot be repealed without implicating the Pension Clause.

Equally baseless is Plaintiffs' suggestion that the City is ignoring the drafters' intent that the Pension Clause would "shield municipal as well as State retirement systems" from legislation that diminishes or impairs pension benefits.[29] The City agrees that where the Pension Code provisions governing the funds at issue make the pension benefits the obligation of the government employer (whether the State or a municipality), or the government responsible for actuarially or otherwise fully funding pension benefits, or both, those statutes create rights that are protected by the Pension Clause. But, contrary to Plaintiffs' argument, the

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[27] Jones Mem. 12 n.5.

[28] *See* Schachet Aff. ¶¶ 27-29.

[29] Jones Mem. 14; *see also id.* 13-15.

Pension Clause does not make anyone responsible to fully fund or pay pensions under circumstances where that obligation is not provided in the Pension Code, as was the case for MEABF and LABF prior to SB1922. The absence of such an obligation here distinguishes the cases on which Plaintiffs rely (*Pension Reform Litigation* and *McNamee*). The provisions at issue in *Pension Reform Litigation* explicitly made the "benefits granted" to state employees "obligations of the State," *e.g.*, 40 ILCS 5/14-132, and the provisions in *McNamee* expressly imposed an actuarial funding requirement, *see* 173 Ill. 2d at 435, 672 N.E.2d at 1160-61 (discussing 40 ILCS 5/3-127).[30]

Finally, Plaintiffs argue that SB1922 is unconstitutional because, while on a "macro level over time" fund participants are clearly better off (because the new funding obligations will save the Funds from insolvency and secure pensions for all time), some individuals—depending on when they retire and how long they live—may not reap the benefits of the City's new funding obligations.[31] This argument turns the Pension Clause's prohibition on "diminishment or impairment" of pension obligations on its head.

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[30] The City also agrees that the Illinois Pension Clause would, as intended, provide for a different result than in *Spina v. Consolidated Police and Firemen's Pension Fund Commission*, 197 A.2d 169 (N.J. 1964). In *Spina*, the New Jersey Supreme Court upheld a law that reduced pension benefits to avoid fund insolvency, even though the controlling statutes imposed an actuarial funding obligation on the municipal employer. *See id.* at 172. As Plaintiffs point out, Jones Mem. 14, the Pension Clause was designed to avoid the result in *Spina*, and the City's position is fully consistent with that intent.

[31] Jones Mem. 11 n.4.

The City agrees that the Pension Clause permits individual fund participants to bring claims when they believe their pensions are being reduced.[32] But that does not mean that a statute that saves a pension fund from imminent and inevitable insolvency "diminishes or impairs" benefits merely because, depending on how long some individuals live, they might not personally benefit. The Pension Clause provides that the "benefits" of "membership" shall not be "diminished or impaired," and it has always been the case that statutory changes that affect all fund participants are not unconstitutional merely because they might ultimately—depending on individual personal circumstances—affect how much that person receives in pension payments during his or her lifetime.

The Supreme Court held exactly that in *Peters v. City of Springfield*, a case where firemen argued that reductions in the mandatory retirement age could not apply to them because it meant—by definition—that some of them would not receive the full pension funding promised. The Court rejected that argument:

> The firemen's pension fund formula is based on salary and length of service and *obviously any change in these variables will affect the amount of the pension.* Municipal employment is not static and a number of factors might require that a public position be abolished, its functions changed, or the term of employment modified. . . . . [W]e conclude that the purpose and intent of the constitutional provision was to insure that pension rights of public employees which had been earned should not be 'diminished or impaired' but that it was not intended, and did not serve, to prevent the defendant City from reducing the maximum retirement age, *even though the reduction might affect the pensions which plaintiffs would ultimately have received.*

57 Ill. 2d 142, 151-52, 311 N.E.2d 107, 112 (1974) (emphasis added).

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[32] *Pension Reform Litig.*, 2015 IL 118585, ¶ 46.

Peters reflects the reality that when looking at whether legislation "diminishes or impairs" pension benefits in violation of the Pension Clause, it is inappropriate to simply analyze whether a single person might receive less as a result of the change. While every participant in the fund is different—and is affected differently by the various variables provided in the Pension Code—the "benefits" of "membership" in a public pension system are collective. After all, no one knows how long he or she—or his or her surviving spouse—will live. Thus, every fund participant benefits from having a secure pension system. On some level, Plaintiffs recognize this; they bring a "facial challenge"[33] to SB1922 even though, at a bare minimum, the overwhelming number of participants will ultimately benefit from it. While SB1922 will have varying effects on individuals—depending on their personal situations past and future—the question is whether SB1922, *as a whole*, diminishes or impairs pension benefits. It does not.

To hold otherwise would eliminate any chance of saving the Funds, even under a "consideration" theory. As described in the City's memorandum in support of its motion for summary judgment, the Supreme Court suggested in *Pension Reform Litigation* that modifications to pension benefits were permissible as part of an agreement for consideration.[34] But if the personal circumstances of a single dissenter could invalidate legislation that inures to the benefit of the overwhelming majority of annuitants, then modifications by agreement, for consideration, would

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[33] Jones Mem. 2; Johnson Mem. 1.

[34] City Mem. 28-33.

be impossible. And if that were the law, the Pension Clause's protections would have little value in a case like this one, where the legislation was passed with the purpose and effect of saving pension funds that would otherwise become insolvent.[35]

Only the City's interpretation of the Pension Clause faithfully applies the terms "diminish or impair" in that provision. It must be the case that the General Assembly can take action that massively benefits the overwhelming majority of fund participants *even if* a few might ultimately be worse off (which, still, Plaintiffs have not demonstrated here). Where, as here, there is a huge net benefit to fund participants overall—where the otherwise inevitable insolvency of the Funds is replaced by an actuarial funding requirement—it would entirely put form over substance to hold that SB1922 nonetheless "diminishes or impairs" pension benefits.[36]

C. Plaintiffs Have No Answer To Section 22-403 Of The Pension Code.

At bottom, Plaintiffs recognize that to defeat the City's "do not diminish or impair" argument, they must show that SB1922 does *not* result in a new actuarial

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[35] *See* CX14, SB 1922 Leg. Findings, ¶ 1 ("[T]he overall financial condition of these two City pension funds is so dire, even under the most optimistic assumptions, [that] a balanced increase in funding, both from the City and from its employees, combined with a modification of annual adjustments for both current and future retirees, is necessary to stabilize and fund the pension funds."); *id.* ¶ 4 (without SB1922, MEABF and LABF and their participants "are at risk").

[36] *Faitoute Iron & Steel Co. v. Asbury Park*, 316 U.S. 502, 516 (1942). ("To call a law so beneficent in its consequences on behalf of the creditor who, having had so much restored to him, now insists on standing on the paper rights that were merely paper before this resuscitating scheme, an impairment of the obligation of contract is indeed to make of the Constitution a code of lifeless forms instead of an enduring framework of government for a dynamic society.")

funding obligation, the effect of which is to save the Funds from insolvency. But Plaintiffs' challenge runs headlong into not only the absence of any pre-SB1922 funding obligation, but also a statute, Section 22-403 of the Pension Code, that provides exactly the opposite—that the City, prior to SB1922, was *not* obligated.

As stated above, the Jones Plaintiffs ignore Section 22-403 until page 17 of their 22-page brief, and the Johnson Plaintiffs never mention it at all. For good reason, as Plaintiffs have no real response to that express and unambiguous provision. The Jones Plaintiffs' principal response is that Section 22-403 was somehow overturned by the Pension Clause.[37] But they cite no statute, constitutional language, or case to support this theory. The framers of the Pension Clause are presumed to have known the existing law at the time of their deliberations and did not once mention Section 22-403; if they intended to overturn it, they certainly would have said so.[38] Moreover, Plaintiffs' argument, taken to its logical end, is inconsistent with decades of Supreme Court precedent confirming that statutory provisions that pre-date enactment of the Pension Clause in 1970 are, in fact, part of the "contractual relationship" covered by that clause.[39]

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[37] Jones Mem. 18 ("whatever merit the City's statutory construction might have had in 1963, it cannot have survived ratification of the Illinois Constitution of 1970 and the adoption of the Pension Protection Clause").

[38] *Kanerva v. Weems*, 2014 IL 115811, ¶ 41 ("the drafters of a constitutional provision are presumed to know about existing laws").

[39] *See Kerner*, 72 Ill. 2d at 507, 382 N.E.2d at 243 (enforcing pre-1970 Pension Code provisions that prohibited felons from receiving benefits); *Buddell*, 118 Ill. 2d at 104-05, 514 N.E.2d at 187 ("The right to purchase pension credit for military service was contained within the Pension Code when the plaintiff entered the employment in 1969, and was contained in the Pension Code on the effective date of our 1970 Constitution. Whether the plaintiff's pension rights were, at the time of his initial employment,

Kanellos v. Cook County, 53 Ill. 2d 161, 290 N.E. 240 (1972), and *Rockford v. Gill*, 75 Ill. 2d 334, 388 N.E.2d 384 (1979), the two cases on which Plaintiffs rely,[40] undermine rather than support their argument, because each case concerned a pre-1970 statute that was in fact inconsistent with the new Constitution. These cases concerned pre-1970 statutes that limited the power of home rule units to issue debt, *see Kanellos*, 53 Ill. 2d at 163-64, 290 N.E.2d at 241-42, and to tax, *see Gill*, 75 Ill. 2d at 341-42, 388 N.E.2d at 386-87. Having been enacted before home rule was even contemplated and without the requirements of a three-fifths majority and a specific expression of restrictive purpose imposed by the 1970 Constitution, these statutes could not have manifested a legislative intent to restrict home rule powers. Accordingly, the statutes at issue in *Kanellos* and *Gill* were, as the Supreme Court held in *Kanellos*, "inconsistent" with the Illinois Constitution and therefore unenforceable. 53 Ill. 2d at 167, 290 N.E.2d at 244. That is not the case with Section 22-403.

Plaintiffs' remaining, scattershot efforts to avoid the plain language of Section 22-403 are also makeweights.

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contractual or noncontractual is not important. There can be no doubt, however, that upon the effective date of article XIII, section 5, of our 1970 Constitution, the rights conferred upon the plaintiff by the Pension Code became contractual in nature and cannot be altered, modified or released except in accordance with usual contract principles."); *Holland v. City of Chicago*, 289 Ill. App. 3d 682, 686-87, 682 N.E.2d 323, 325-26 (1st Dist. 1997) (enforcing pre-1970 Pension Code provisions that defined salary for purposes of pension benefits); *Jahn v. City of Woodstock*, 99 Ill. App. 3d 206, 208-09, 425 N.E.2d 490, 491-92 (2d Dist. 1981) (enforcing pre-1970 Pension Code provisions that defined salary for purposes of pension benefits); *City of De Kalb v. Int'l Ass'n of Fire Fighters, Local 1236*, 182 Ill. App. 3d 367, 372-73, 538 N.E.2d 867, 870-71 (2d Dist. 1989) (enforcing pre-1970 Pension Code provisions that prohibited municipalities from providing pension benefits that differ from the Pension Code).

[40] Jones Mem. 18.

First, the fact that the City has the home rule power to tax[41] is irrelevant. The question is whether, prior to SB1922, the City had the obligation to actuarially fund MEABF and LABF. Section 22-403 makes clear that it did not. This is a question of state law, not home rule authority.

Second, Plaintiffs' related claim that the City has "the power to contribute more" than the amounts required by the Pension Code[42] is also a red herring. The question is whether, prior to SB1922, the City had any *obligation* to do so. It did not.[43]

Third, contrary to Plaintiffs' contention, the City does not argue that Section 22-403 "override[s] the contractual relationship 'between employer and employee' mandated by the Pension Protection Clause."[44] Rather, Section 22-403, like other provisions of the Pension Code, is part of the contractual relationship protected by the Pension Clause. As described above, numerous cases have held that pre-1970 provisions of the Pension Code are part of the contractual relationship enforced

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[41] Jones Mem. 16-17.

[42] *Id.*

[43] Moreover, it is, at best, an open question whether the City may voluntarily make larger contributions to the Funds than the Pension Code requires. The Illinois Appellate Court's statement in *Houlihan v. City of Chicago*, 306 Ill. App. 3d 589, 595, 714 N.E.2d 569, 573 (1st Dist. 1999), that "[t]he maximum allowable tax levy authorized by the Pension Code is the maximum amount that the City may contribute to the funds" would appear to prohibit the City from using its home rule powers to levy and pay into the Funds more than the Pension Code authorizes. At a minimum, any effort by the City to make hundreds of millions of dollars in contributions to MEABF and LABF beyond what the law requires would subject the City to the risk of taxpayer suits. *See, e.g., W. Lion Ltd. v. City of Mattoon*, 123 Ill. App. 3d 381, 462 N.E.2d 891 (4th Dist. 1984); *Booth v. Metro. Sanitary Dist. of Greater Chicago*, 79 Ill. App. 2d 310, 224 N.E.2d 591 (1st Dist. 1967); *McPike v. Ill. Terminal R. Co.*, 305 Ill. 298, 302, 1137 N.E. 235, 236 (1922).

[44] Jones Mem. 5-8.

under the Pension Clause.[45] And Plaintiffs do not cite, and the City cannot find, any cases suggesting that Section 22-403 is no longer good law. In short, the City's position would not "negate" the "contractual relationship" between employer and employee; rather, it would enforce that relationship. Plaintiffs, by contrast, would re-write the Pension Code to include obligations that the Pension Code explicitly says do not exist.

Finally, Plaintiffs rely on dicta in *Pension Reform Litigation* and three prior Supreme Court cases suggesting that participants might be able to file a group action to compel funding if a fund is "on the verge of default or imminent bankruptcy."[46] As discussed above, these cases are factually distinguishable; in each, the applicable Pension Code provisions gave participants someone to sue and a funding obligation to enforce.[47] In that respect, Plaintiffs' efforts to equate MEABF and LABF with the funds at issue in these cases expose the fatal flaw in their theory. Plaintiffs claim that participants could sue to compel funding in the case of an imminent default or bankruptcy.[48] Such a lawsuit might be cognizable against an entity that is required by the Pension Code to fund—for example, with

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[45] *See supra* n. 39.

[46] Jones Mem. 19-20; Johnson Mem. 20-21.

[47] *Pension Reform Litig.*, 2015 IL 118585, ¶ 11 n.3 (involving GRS, *see* 40 ILCS 5/2-125, SERS, *see* 40 ILCS 5/14-132, SURS, *see* 40 ILCS 5/15-156, and TRS, *see* 40 ILCS 5/16-158(c)); *McNamee*, 173 Ill. 2d 433, 672 N.E.2d at 1159 (involving police pension funds, *see* 40 ILCS 5/3-125, 5/3-127); *Sklodowski*, 172 Ill 2d. 232, 695 N.E.2d at 379 (involving SERS, SURS, JRS, *see* 40 ILCS 5/18-132, TRS, and GARS, *see* 40 ILCS 5/2-125).

[48] Jones Mem. 19-20; Johnson Mem. 20-21 (citing *McNamee*, 173 Ill. 2d at 446-47, 672 N.E.2d at 1161, *Sklodowski,* 182 Ill. 2d at 232, 695 N.E.2d at 379, and *Pension Reform Litig.*, 2015 IL 118585, at ¶ 16 n.3).

respect to the four State funds at issue in *Pension Reform Litigation*, the State. But if MEABF and LABF were on the verge of imminent bankruptcy or insolvency, who would participants sue to compel funding? The answer is clear—they would not have a right to sue anyone. Participants could certainly not sue the City, given that by law the obligations to pay benefits are *solely* those of the Funds and *not* of the City.[49]

In sum, the Pension Clause protects the benefits of "membership" in public pension systems from being "diminished or impaired." These benefits and that membership are set forth in the Pension Code.[50] And the Pension Code is explicit that, for MEABF and LABF, any pension payments are solely the obligations of the funds and of no one else, and this restriction has been part of the "contractual relationship" since the Pension Clause was enacted. Thus, if SB1922 is declared unconstitutional, MEABF and LABF will run out of money within 10-13 years, and the money available to pay pensions will be limited to the contributions required by pre-SB1922 law. If this were to come to pass, participants will receive only 30% of the benefits promised.[51] If SB1922 is upheld, by contrast, the City will be obligated to fund MEABF and LABF on an actuarial basis and participants will be assured

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[49] Plaintiffs' suggestion that "[i]f defendants are correct . . . then not only Chicago but all of the State's municipalities may escape their pension obligations," Jones Mem. 20, is likewise wrong. As even a quick check of the Pension Code provisions relating to other funds involving municipal employees would have disclosed, many impose an express funding obligation on the municipality. *See, e.g.,* 40 ILCS 5/2-125; 40 ILCS 5/4-132; 40 ILCS 5/15-156; 40 ILCS 6/16-158(c).

[50] *See Kerner*, 72 Ill. 2d at 514, 283 N.E.2d at 247 (every part of the Pension Code, including limits on receiving benefits, is "a condition of the contractual relationship to which [each fund participant] consented by applying for membership.").

[51] *See* Schachet Aff. ¶ 34.

that the Funds will have the money to pay benefits as they become due. SB1922 therefore makes participants far better off, and does not "diminish or impair" pension benefits in violation of the Pension Clause.

IV. SB1922 IS ALSO CONSTITUTIONAL BECAUSE IT WAS A BARGAINED-FOR EXCHANGE FOR CONSIDERATION.

While Plaintiffs' motions suggest SB1922 was an imposition by the General Assembly, in fact, the statute passed by the General Assembly was the result of two years of arms-length negotiations between the City and fund participants.[52] Plaintiffs' motions simply ignore the fact that SB1922 was a bargained-for exchange, supported by consideration, and adopted by the General Assembly. The Supreme Court confirmed in *Pension Reform Litigation* that the Pension Clause does not prohibit reducing benefits in an agreement in which "consideration in exchange[d]."[53] And that is exactly what occurred here.

As explained in the City's memorandum in support of its motion for summary judgment,[54] before the package of reforms that became SB1922 were presented to the General Assembly, elected representatives of each of the 31 unions with members in MEABF and LABF voted on whether to accept or reject the proposed legislation, and a committee representing retirees had an opportunity to object to the proposal. Twenty-eight of the 31 unions (including one of the Plaintiffs in this lawsuit) voted in favor of the proposed legislation, no retiree objected, and based on

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[52] City Mem., Ex. B, Affidavit of Matthew Brandon ("Brandon Aff."), ¶¶ 3-9.

[53] 2015 IL 118585, ¶ 46 n.12.

[54] City Mem. 10-12, 28-33 & Brandon Aff.

these results, union representatives met with state legislators to urge support for SB1922.[55]

There can be no doubt that any reductions in benefits in SB1922 were a bargained-for exchange adopted by the General Assembly for which the City provided valuable consideration—billions of dollars in new funding that the City was not previously obligated to provide. As described in detail in the City's memorandum in support of its motion for summary judgment, SB1922 is constitutional for that reason as well *even if* it diminished or impaired pension benefits (which it does not). To avoid repetition, the City adopts the arguments in its prior memorandum on this point, which provide a separate and independent basis to sustain SB1922.

CONCLUSION

For the reasons stated here and in the City's motion for summary judgment, Plaintiffs' motions should be denied and the City's motion should be granted.

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[55] Brandon Aff. ¶¶ 8-10.

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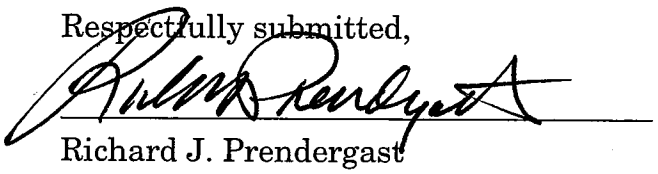
Respectfully submitted,



Richard J. Prendergast
Michael T. Layden
Lionel W. Weaver
RICHARD J. PRENDERGAST, LTD.
111 W. Washington St., # 1100
Chicago, Illinois 60602

Michael B. Slade
R. Chris Heck
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: 312-862-2000

Counsel for the City of Chicago

Stephen R. Patton
Corporation Counsel
Jane Elinor Notz
Deputy Corporation Counsel
City of Chicago
121 North Salle Street
Chicago, IL 60602
Telephone: 312-744-0200