

No. 2-22-0198

**IN THE APPELLATE COURT OF ILLINOIS
FOR THE SECOND JUDICIAL DISTRICT**

ARLINGTON HEIGHTS POLICE)	Appeal from the Circuit Court of the
PENSION FUND, <i>et al</i> ,)	Sixteenth Judicial Circuit, Kane County,
)	Illinois
Plaintiffs-Appellants,)	
)	
v.)	No. 2021 CH 55
)	Honorable Robert K. Villa
JAY ROBERT "J.B." PRITZKER,)	Judge Presiding
<i>et al</i> ,)	
)	
Defendants-Appellees.)	

**ASSOCIATED FIREFIGHTERS OF ILLINOIS' AMICUS CURIAE BRIEF IN
SUPPORT OF DEFENDANTS-APPELLEES**

INCLUDES APPENDIX

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INTEREST OF AMICUS CURIAE

Amicus curiae, the Associated Firefighters of Illinois (“AFFI”), serves as the Illinois state labor association of the International Association of Firefighters. The AFFI has approximately 224 associated member unions, representing firefighters all across the state of Illinois. All affiliated unions are engaged as the exclusive bargaining representatives of firefighters employed by municipalities or fire protection districts in the state of Illinois. The AFFI supports its affiliated unions and their members in matters that may impact their retirement pensions. Those pensions are governed by the provisions of the Illinois Pension Code (“Pension Code”), including but not limited to 40 ILCS 5/1-101 *et seq.*, 40 ILCS 5/4-101 *et seq.*, and 40 ILCS 5/22C-101 *et seq.* The firefighters represented by the AFFI associated member unions are, upon retirement, eligible for pension benefits under Article 4 of the Pension Code, 40 ILCS 5/4-101 *et seq.*, if they meet the criteria it sets forth.

Plaintiffs Arlington Heights Police Pension Fund, *et al*, bring this suit to challenge Illinois Public Act 101-610 (“the Act”).¹ The Act involves fundamental issues relating to the pension benefits guaranteed to firefighters and police officers who have chosen to pursue careers protecting the public. The resolution of this case is of utmost concern to the AFFI, its constituent unions, and their members, as public safety employees’ statutory interests and the financial health of the system that exists to pay their pension benefits are directly at issue in this litigation. Further, if the arguments advanced by Plaintiffs are accepted by this Court, it would lead to an unprecedented (and unnecessary) curtailment of

¹ Plaintiffs’ Brief includes a copy of *Federal* Public Act 101-610, which is not relevant to this case. A copy of *Illinois* Public Act 101-610 has been attached to this Brief as an Appendix, and is Bates-Stamped AA-0001 to AA-0216.

the General Assembly's ability to create procedures to generate significant savings and additional revenue for pension systems, and to otherwise ensure that pension funds in Illinois are adequately funded.

ARGUMENT

As an initial matter, this Brief does not analyze at length whether the Act violates the Pension Protection Clause of the Illinois Constitution, Ill. Const. 1970, art. XIII, sec. 5. This Brief also does not analyze whether the Act imposes an unconstitutional taking. The AFFI takes the position that the Act does not violate the Clause, and does not impose a taking.

I. The Act Protects AFFI's Members By Strengthening The Financial Condition Of Article 4 Pension Funds Without Reducing Benefits

The AFFI supports the Act because, by consolidating investment assets and authority, the Act strengthens the pension system's financial condition without reducing the benefits paid to any beneficiary, participant, or future participant. In Illinois, each non-volunteer firefighter, emergency medical technician, and paramedic is employed by a local municipality or fire protection district. Except for municipalities with fewer than 5,000 or more than 500,000 residents, the employing municipality or fire protection district must establish a Firefighters' Pension Fund pursuant to Article 4 of the Illinois Pension Code. *See* 40 ILCS 5/4-101; 40 ILCS 5/4-103. Article 4, which governs these downstate (non-Chicago) funds, prescribes that each fund will be governed and administered by a board of trustees. 40 ILCS 5/4-121. Until the Act, the downstate funds had the authority to invest assets not immediately needed to pay benefits ("investment assets"). However, their returns on investments were somewhat limited as the Funds did not enjoy economies of scale and were limited by Statute as to equity and fixed income positions. Additionally, each of the 295 funds individually paid separate administrative fees and costs related to investment.

Commission on Government Forecasting and Accountability, REPORT ON THE FINANCIAL CONDITION OF THE DOWNSTATE POLICE & DOWNSTATE FIRE PENSION FUNDS IN ILLINOIS [P.A. 95-0950], 2021 edition, at 13 (noting 295 downstate firefighters’ pension funds in 2019). By consolidating the investment assets into the Firefighters’ Pension Investment Fund (“FPIF”), and transferring investment authority to the FPIF, the Act will generate investment revenue and—as has already been shown in the short time since its inception—save money on administrative fees, increasing the combined assets available for all Illinois firefighters’ pensions without reducing benefits now or in the future.

It is not surprising, then, that the AFFI has supported the Act from the beginning. Recognizing the good that the Act could accomplish, the AFFI helped develop, draft, and pass it. AFFI representatives sat on the task force that initially studied the financial problems of Illinois’ pension systems. That task force issued a report that recommended the investment asset consolidation that the Act instituted. The AFFI participated because it correctly saw that the Act would protect AFFI members by adding income and saving costs for their retirement system without decreasing benefits. Based on the revenue increases, cost savings, and maintenance of benefits, the AFFI supported the Act. The AFFI urges this Court to affirm.

A. The Act Allows the Pension System to Generate and Retain Greater Financial Resources, Aiding Funds and Their Beneficiaries

The Act will improve the financial condition of the firefighters’ pension system because the FPIF is likely to receive greater returns on investment than the individual downstate funds did and will operate with greater investment authority than the local funds.

The Act also allows the FPIF to realize substantial savings on administrative costs, as compared to the total costs expended by each of the downstate funds. Each of these measures will generate revenue or savings that far eclipses the \$7.5 million loan to the FPIF as provided for by the Act. The revenue and savings will solidify the long-term financial health and viability of the Article 4 pension system.

1. The FPIF will obtain a higher rate of return on its investments than the downstate funds did

Many of the downstate funds were underfunded plans. Broadening investment opportunities for these plans, which weigh heavily on budgets of many communities statewide, is critical. It is anticipated that the FPIF will obtain a higher rate of return on its investments than the downstate funds obtained. This is because the restrictions imposed on the downstate funds, though appropriate, also severely limited the return on investment for those funds. The FPIF is not subject to those restrictions.

Illinois law restricted the investment options available to the downstate funds, based on each fund's total asset level. *See* 40 ILCS 5/1-113.1; 40 ILCS 5/1-113.2; 40 ILCS 5/1-113.3; 40 ILCS 5/1-114.4; 40 ILCS 5/1-114.4a. These restrictions sharply curtailed the downstate funds' ability to obtain a high rate of return on investment. The specific restrictions varied depending on the total value of the assets the fund held. A downstate fund with less than \$2.5 million in assets, for example, could only invest 10% of those assets in equities. 40 ILCS 5/1-113.2. That fund could only capture a sliver of the growth offered by a strong equity market. As a fund accumulated \$2.5 million, \$5 million, and \$10 million in assets, the restrictions loosened, but still remained significant. 40 ILCS 5/1-113.3; 40 ILCS 5/1-113.4; 40 ILCS 5/113.4a. All such funds were forced to invest their assets conservatively, within those restrictions. This limited their growth. The limited

growth, in turn, caused underfunding and necessitated higher tax levy contribution requests.

The Act eliminates these restrictions and allows for a greater investment opportunity. The FPIF now invests the combined assets it received from all downstate funds. As of July 31, 2022, the most recent date for which a report is available, the market value of the FPIF's assets was \$7,441,705,726. FPIF July 2022 Investment Performance Report, at 3, *accessed at* <https://ifpif.org/wp-content/uploads/2022/09/FPIF-July-2022-Investment-Performance-Report.pdf>, *last visited* October 3, 2022. By dint of its sheer volume, this body of assets will not face the possibility of being “wiped out” by several months of a poor equity market. The FPIF is protected by virtue of its size; it will not suffer losses that seriously impact its financial health, as a smaller fund might. In short, any potential losses would be spread proportionately between the 295 downstate funds.

Additionally, the Act will improve the rate of return on investments. The Act eliminates the restrictive provisions that previously applied to the downstate funds, cited above. The Act states plainly, “The Fund [FPIF] shall not be subject to any of the limitations applicable to investments of pension fund assets by the transferor [downstate] pension funds under Sections 1-113.1 through 1-113.12 or Article 4 of this Code.” 40 ILCS 5/22C-122. Instead, the Act provides that the FPIF “shall have the authority to invest funds, subject to the requirements and restrictions set forth in Sections 1-109, 1-109.1, 1-109.2, 1-110, 1-111, 1-114, and 1-115 of this Code.” *Id.* The requirements and restrictions applicable to the FPIF are far more lenient than those imposed on downstate funds. There are no numerical limits on the percentage of assets that the FPIF may invest in equities. The FPIF is only limited in that it may not invest more than 10% of its assets in an employer

whose employees are covered by the pension fund, 40 ILCS 5/1-111; and in that the trustees and investment manager(s) must faithfully discharge their fiduciary duties, 40 ILCS 5/1-109. Otherwise, the FPIF may invest as it sees fit.

This, naturally, will lead to higher returns on investment. It is widely recognized that equities offer a higher rate of return than other investments, such as fixed-income bonds. Freed from the downstate funds' restrictions, which were necessary previously but are not now, the FPIF will inevitably obtain better returns.

In addition, the buying power of the combined Funds' worth far outpaces the buying power of a single downstate Fund with smaller available assets to invest. Many of the individual downstate funds were underfunded due in part to these limitations on investment opportunities. This shift in investment strategy was exactly what the legislature intended in passing the Act. In the floor debate over the passage of what would become Act, the bill's sponsor Representative Hoffman stated in relevant part:

[W]e're going to use the buying power or the economy as a scale for investing all the money together. . . . I think it was determined that actuarially, as well as the fact that many of these funds can't make the same type of investments that provide higher yields with lesser risk, that it would be better to...for investment purposes to have all the funds together whether it be police or fire.

101st Ill. General Assembly, Regular Session November 13, 2019 (House of Representatives) at 82-83.

For these reasons, it is anticipated that the FPIF will obtain higher rates of return on investment than the downstate funds previously had. This increases the assets available to pay pensions to thousands of beneficiaries and participants.

2. The FPIF will realize substantial savings on administrative costs as compared to the downstate funds

In addition to the ability to generate greater investment returns, the FPIF will also realize substantial savings on administrative costs, compared to the cumulative costs paid by the downstate funds. The investment advisor fee paid by the FPIF, in particular, offers significant savings over the fees paid by the downstate funds.

Prior to consolidation, each downstate fund retained its own investment advisor to invest that fund's assets. Investment advisors generally charged fees as a percentage share of the overall fund assets managed, expressed in basis points.² The FPIF has compared the fees charged by investment advisors to downstate funds, and by investment advisors to the FPIF. That comparison is illuminating, and shows that the FPIF will realize substantial savings in the present and the future.

Consistent with the Act, downstate funds transferred their investment assets to the FPIF in multiple "tranches," including separate tranches in October and November 2021. In October, downstate funds transferred \$874 million in assets to the FPIF. *See* "Cost Savings" News item, posted December 14, 2021 to the FPIF's website, *accessed at* <https://ifpif.org/news/cost-savings/>, *last visited* October 3, 2022. The FPIF studied the fees that the downstate funds paid on those investments. *Id.* For the October tranche, investment advisor fees ranged from 2 to 160 basis points, with a weighted average of 37 basis points. *Id.* This amounted to a total of \$3.2 million annually in fees. *Id.* In contrast, the FPIF's investment advisor fee is just 3.3 basis points. *Id.* If that 3.3 basis points had applied to the \$874 million that was transferred, the fees paid would have been just under \$288,500. *Id.* This is a savings of approximately \$2.9 million, or 91%. *Id.*

² A basis point is one one-hundredth of a percent (0.01%). For example, 50 basis points means 0.50%. 100 basis points means 1%.

In the November tranche, the FPIF received \$304 million in assets. *Id.* The weighted average investment advisor fee for these assets was 52 basis points. *Id.* This resulted in a fee of \$1.6 million annually. *Id.* If the FPIF's fee of 3.3 basis points applied to these assets, only \$100,000 in fees would have been paid. *Id.* This would have saved \$1.5 million, or 94%. *Id.*

The weighted average of the downstate funds' investment advisor fees between October and November was 41 basis points. *Id.* If that figure applied to all the investment assets transferred to the FPIF pursuant to the Act, the downstate funds would have paid \$30.5 million annually in fees. *Id.* But applying the FPIF's fee of 3.3 basis points, the amount paid would have been less than \$2.5 million. *Id.* Thus, the FPIF projected the annual savings on investment advisor fees alone to be \$28 million. *Id.*; *see also* FPIF Investments and Operations Committee Meeting Minutes, June 2, 2022, at 3, *accessed at* <https://ifpif.org/wp-content/uploads/2022/08/2022-06-02-Investment-and-Operations-Minutes.pdf>, *last visited* October 5, 2022 (Portfolio Officer Mitchell Green reporting that fee savings alone was \$30 million per year and expected to increase). As a result, just one year of savings on investment advisor fees is projected to save the FPIF nearly four times the amount of the \$7.5 million loan that Plaintiffs object to. Plaintiffs' Brief at 17-18. Note also that—unlike the loan—the FPIF will save this amount every year. Further, the saved money will be invested and this one change made by the Act could easily lead to \$1 billion or more in savings over thirty years.

Even if the Act did nothing else, this significant savings in administrative costs would be a legislative victory. The AFFI supports the Act for this reason, as well.

B. Neither the Act Nor the Consolidation Process it Creates Will Diminish the Pension Benefits of any Beneficiary, Participant, or Future Participant

The Act protects beneficiaries and participants in part because it strengthens the financial health of the pension system without decreasing or diminishing pension benefits in any way. Rather, by establishing a centralized Fund for the investment of assets, the Act increases the systems' resources without reducing present or future benefits.

When passing a law to enhance the financial health of a pension system, a legislature has two options. It can increase the resources provided to the pension system (the difficult, but correct, option), or it can reduce benefits for future pension system entrants. In 2010, the General Assembly chose the latter option and passed Public Act 96-1495. P.A. 96-1495 altered pension benefits for firefighters who entered service on or after January 1, 2011. Specifically, it increased the age at which a firefighter could retire without an age-related reduction in his pension, 40 ILCS 5/4-109(c); decreased the amount of yearly increases to the pension, 40 ILCS 5/4-109.1(g), and decreased the pension some survivors could receive, 40 ILCS 5/4-114(j). These measures may have provided limited support to the pension system overall. However, every firefighter who entered service after January 1, 2011 will receive a lesser pension than he would have received in the absence of P.A. 96-1495. P.A. 96-1495 is the sort of pension system "solution" that puts a burden on workers due to the unwise funding decisions of a prior generation of lawmakers.

In Public Act 101-610—the Act at issue here—the General Assembly then chose the other path. The Act enhances the financial health of the pension system by creating more revenue for the system as a whole, through greater investment returns and savings on administrative costs. Crucially, the Act will not decrease benefits. Of the crucial pension-

setting provisions of Article 4—40 ILCS 5/4-109 (governing regular retirement pensions); 40 ILCS 5/4-109.1 (governing annual pension increases); 40 ILCS 5/4-110, 110.1, and 111 (governing disability pensions); and 40 ILCS 5/4-114 (governing pensions to survivors)—the Act does not decrease pensions provided in any of them. In fact, the Act amends two of the sections to provide increases. *See* Public Act 101-610, AA-0086 (amending 40 ILCS 5/4-109(c) to provide, in some cases, a greater average monthly salary to use to calculate pensions); *Id.* at AA-0093 to AA-0094 (amending 40 ILCS 5/4-114(j) to provide, in some cases, a greater pension to survivors). There is no provision in the Act that will reduce any benefit for any pensioner, participant, or future participant. No individual, under any circumstances, will see reduced benefits as a result of the Act. Increased viability of a pension that was achieved without the loss of or reduction of benefits is a remarkable legislative achievement. In the end, this achievement costs the Funds, its participants, and its beneficiaries little to nothing; there is everything to gain; and the Act should not be set aside or otherwise ignored due to the unfounded claims being made by the Plaintiffs.

Further, while very unlikely, it is theoretically possible that the Act (or the FPIF's actions) could reduce the pool of assets available to Article 4 pension funds. But even that would not lead to a reduction in benefits. All benefits remain guaranteed by the Pension Protection Clause, and every beneficiary will receive all the money he or she is entitled to. In other words, losses at the Statewide investment level (though extremely unlikely) will not lead to reduced benefits for any individual firefighter. The Act simply contains no threat of harm to any individual's benefit.

Plaintiffs' arguments are unpersuasive. They cannot argue that any benefits are being reduced in violation of the Pension Protection Clause. The Pension Protection Clause

protects benefits in the nature of monetary payments. The lower court correctly noted that the cases that interpreted “benefits” broadly all “involve[d] Plaintiffs who were denied a ‘benefit’ that could be directly tied to a change in the value of their future retirement payments.” (A-0010). Those benefits are not at issue here. This case is analogous to *People ex rel. Sklodowski v. State of Illinois*, 182 Ill.2d 220 (1998), and *McNamee v. State of Illinois*, 173 Ill.2d 433 (1996), in which the Illinois Supreme Court held that changes to the funding mechanisms employed by state pension systems do not implicate the Pension Protection Clause. This Court should note these cases and affirm.

The Act consolidates investment assets and creates a single statewide authority, the FPIF, to invest them. This will strengthen the financial health of the pension system. Further, it will do this without reducing benefits by a single cent for any current or future beneficiary. This is a laudable accomplishment that will protect all the Funds’ participants and beneficiaries now, and far into the future. While a few downstate funds object, their objections cannot serve as an impediment to significant reform and improvement in the system. The State’s power to create, change, alter, and reform pension funding mechanisms is broad, as shown in *Sklodowski* and *McNamee*. Here, the General Assembly was free to reform the pension system by consolidating assets for investment purposes. In doing so, it acted lawfully and wisely, and advanced the strong and legitimate interests of public safety employees in a financially health pension system.

II. The Consolidation Pursuant To The Act Is Limited In Extent, As Every Pension Board Duty And Authority, Other Than Investment Duty And Authority, Remains Vested In The Downstate Boards

The AFFI wishes to address a matter which the circuit court may have misunderstood. The consolidation pursuant to the Act is limited in scope, and goes no farther than necessary to achieve a better-funded pension system. The Act consolidates only the investment assets and investing authority of the downstate funds, and transfers or grants those assets and that authority to the FPIF. All other pension board duties and authorities remain vested in the downstate boards.

Certain language in the circuit court's order, *see* (A-0002 to A-0003), could be read to assert that the Act essentially eliminated the downstate funds and boards entirely, and transferred all of their duties and authorities to the FPIF. That is erroneous. The only duties and authorities that were transferred pursuant to the Act are the duty and authority to invest the investment assets. The assets themselves were to be transferred pursuant to the Act. However, no other duty or authority was transferred.

The Act did nothing to change the basic governing structure set out in Article 4, and in crucial ways, the Act reaffirmed the power of downstate funds. Article 4 still reflects that downstate funds will be created “[i]n each municipality” with 5,000 to 499,999 inhabitants. 40 ILCS 5/4-101; 40 ILCS 5/4-103. Each downstate fund will still be governed by a board. 40 ILCS 5/4-121. The Act makes no change to the downstate funds' authorities generally, including, *inter alia*, their authority to enforce contributions, 40 ILCS 5/4-124; to hear and determine applications for retirement pensions, 40 ILCS 5/4-125; and to order payments, 40 ILCS 5/4-125.

The powers and duties granted to the downstate board throughout Article 4 are broad in statutory language, and in practice. Aside those related to investing, the Act diminishes none of these powers and duties. Downstate boards retain the powers and duties

to make a broad range of determinations under Article 4. By way of example and not limitation, those include making determinations as to disability, determinations as to whether a firefighter has recovered from disability, determinations as to how much creditable service a firefighter has accumulated, determinations as to a survivor's entitlement to a pension, and determinations as to whether the board has jurisdiction to revisit a prior determination. The downstate boards also retain the powers and duties to determine the correct pension payment amount for all beneficiaries, and to determine the correct pensionable salaries for all beneficiaries. The lion's share of powers and duties that were vested in the downstate boards before the Act—and all of the powers and duties unrelated to investing—remain vested in the downstate boards.

Further, the Act itself explicitly disavows that it will intrude on these traditional functions of downstate funds. The Act clarifies that each downstate fund “shall retain the exclusive authority to adjudicate and award disability benefits, retirement benefits, and survivor benefits under this Article and to issue refunds under this Article.” 40 ILCS 5/4-117.2; *see* Public Act 101-610, AA-0095 to AA-0096 (provision of act adding 40 ILCS 5/4-117.2). The Act specifically states that the FPIF “shall not have the authority to control, alter, or modify, or the ability to review or intervene in, the proceedings or decisions of the fund as otherwise provided in this Section.” *Id.* The Act carefully restricted its effect to matters concerning investments, even disavowing a change to the status quo in some respects. Great care was taken to respect the downstate funds' authority, and the Act only intrudes on that authority to the extent necessary for the FPIF to invest assets lawfully.

Any attempt to cast the Act as a full takeover or power grab is misguided. The downstate funds still perform every board function aside from the investment of assets. Local control remains the general rule.

III. The AFFI's Members Elect The Employee-Side Trustees On The Firefighters' Pension Investment Fund's Board Of Trustees, Just As They Have Elected The Employee-Side Trustees In The Downstate Funds

The election process to elect trustees to the FPIF's Board of Trustees is open and democratic, just like the election process for the trustees who sit on the board of each downstate fund. Ultimately, the employee-side Trustees on the FPIF are elected by the AFFI's members, in a process nearly identical to the elections for downstate boards. The only difference—the number of voters for each candidate—is not sufficient to establish some infirmity in the Act.

The Pension Code provides that, on each downstate board, there will be two trustees who are active participants, and are elected by the participants; and one trustee who is a retiree, elected by the retirees. 40 ILCS 5/4-121. The employee trustees hold a majority on the board, and each AFFI member and retiree may vote for some representation on the downstate board. *Id.*

For the FPIF's Board, the mechanisms of representation are the same. Active participants may vote for the three FPIF Board trustees who, by statute, must be active participants. 40 ILCS 5/22C-115(b). Beneficiaries may vote for the trustee who is a beneficiary. *Id.* With the FPIF's Board, too, the employee trustees hold a majority on the board. *Id.* Each AFFI member and beneficiary thus votes for representation on the FPIF's Board.

The mechanisms for representation on the downstate board and on the FPIF's Board do not meaningfully differ. While each individual voter may be less able to swing an election for the FPIF's Board, that is not due to any legislative choice, nor is it due to the manner in which the boards or their statutes are constructed. It is simply due to mathematics. Representation remains proportional, as each individual gets one vote. This numerical change is simply not a basis for an Illinois court to find a statute unconstitutional. Each AFFI member is democratically represented on the FPIF's Board, just as they are on their own downstate board.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief of Defendants, the AFFI respectfully requests that this Court affirm the decision of the District Court.

Dated: October 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 17 pages.

By: /s/ Margaret Angelucci
Margaret Angelucci