No. 1-16-2471

IN THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

ILLINOIS COLLABORATION ON YOUTH, ACCESS LIVING, ADDUS HEALTHCARE INC., AIDS FOUNDATION OF CHICAGO ALTERNATIVES, INC., CARITAS FAMILY SOLUTIONS, CENTER FOR HOUSING AND HEALTH, CHADDOCK, CHICAGO COMMONS, CHILDREN'S HOME + AID, COMMUNITY YOUTH NETWORK, INC., CONNECTIONS FOR THE HOMELESS, COUNTY OF UNION, ILLINOIS DUPAGE YOUTH SERVICES COALITION FAMILY ALLIANCE, INC., FAMILY FOCUS, FOX VALLEY OLDER ADULT SERVICES, HAVEN YOUTH AND FAMILY SERVICES, HEARTLAND HUMAN CARE SERVICES, HOUSING OPPORTUNITIES FOR WOMEN, ILLINOIS COALITION AGAINST SEXUAL ASSAULT, INDIAN OAKS ACADEMY, INSPIRATION CORPORATION, INTERFAITH HOUSING DEVELOPMENT CORPORATION, JEWISH CHILD AND FAMILY SERVICES, JEWISH VOCATIONAL SERVICES, KEMMERER VILLAGE, LA CASA NORTE, LESSIE BATES DAVIS NEIGHBORHOOD HOUSE, LUTHERAN CHILD AND FAMILY SERVICES, MEDICAL GEAR LLC, METROPOLITAN FAMILY SERVICES, NEW AGE ELDER CARE, NEW MOMS, NEXUS, OMNI YOUTH SERVICES, ONE HOPE UNITED, OUNCE OF PREVENTION FUND, POLISH AMERICAN ASSOCIATION, PROJECT OZ, PUBLIC ACTION TO DELIVER SHELTER, INC., PUERTO RICAN CULTURAL CENTER, RAMP, INC., RIVER TO RIVER SENIOR SERVICES, SENIOR HELPERS, SENIOR SERVICES PLUS, SHELTER, INC., STEPHENSON COUNTY HEALTH DEPARTMENT, STEPPING STONES OF ROCKFORD TEEN LIVING PROGRAMS, THE BABY FOLD, THE CENTER FOR YOUTH AND FAMILY SOLUTIONS, THE FELLOWSHIP HOUSE THE HARBOUR, THE NIGHT MINISTRY, TREATMENT ALTERNATIVES FOR SAFE	On appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 16-CH-6172. The Honorable RODOLFO GARCIA, Judge Presiding.

COMMUNITIES, UNITY PARENTING AND COUNSELING, UNIVERSAL FAMILY CONNECTION, WESTERN ILLINOIS MANAGED HOME SERVICES, WHITESIDE COUNTY HEALTH DEPARTMENT, YOUTH OUTREACH SERVICES,	)
Plaintiffs-Appellants,	)
v.	)
JAMES DIMAS, SECRETARY OF THE ILLINOIS DEPARTMENT OF HUMAN SERVICES, in his official capacity, JEAN BOHNHOFF, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT ON AGING, in her official capacity, NIRAV SHAH, DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, in his official capacity, and FELICIA NORWOOD, DIRECTOR OF THE ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, in her official capacity, JOHN R. BALDWIN, DIRECTOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS, in his official capacity, MICHAEL HOFFMAN, ACTING DIRECTOR OF THE ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, in his official capacity, AUDRA HAMERNIK, EXECUTIVE DIRECTOR OF THE ILLINOIS HOUSING DEVELOPMENT AUTHORITY, in her official capacity, LESLIE GEISSLER MUNGER, COMPTROLLER FOR THE STATE OF ILLINOIS, in her official capacity, and BRUCE RAUNER, GOVERNOR OF ILLINOIS, in his official capacity,	)
Defendants-Appellees.	)

APPELLANTS' BRIEF

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Dated: December 20, 2016

Points and Authorities

Nature of the Action

On May 4, 2016 Plaintiffs filed a two-count complaint in the Chancery Division of the Circuit Court of Cook County against the defendant Governor and agency heads to require payment—including timely payment—of the contracts for the delivery of human services for fiscal year 2016. Plaintiffs sought preliminary and permanent injunctive relief, alleging irreparable injury. In Count I, under the "officer exception" to the State Lawsuits Immunity Act, plaintiffs contend that the defendant Governor and other state officers have exceeded the lawful powers of their office by entering these contracts and requiring plaintiffs to perform without pay while the defendant Governor has vetoed the General Assembly's actions on two occasions to provide full funding. In Count II, plaintiffs contend that by the Governor's successive vetoes of the full funding of these contracts, and by the so-called "Stop Gap Spending Bill" enacted on June 30, 2016, or P.A. 99-524, the defendants have unlawfully impaired the obligation of contracts in violation of Article I, section 16 of the Illinois Constitution. Plaintiffs appeal from the order and final judgment denying injunctive relief and dismissing both counts I and II as set forth in the Third Amended Complaint for failure to state a claim.

Statement of the Issues

1. Whether plaintiffs are entitled to prospective injunctive relief against the defendant Governor and other agency heads under the "officer exception" to sovereign immunity for conducting the public business in an unauthorized manner and beyond the lawful powers of their office in that the defendants continue to enter contracts which they fail to pay and which they also block attempts by the General Assembly to fund.

2. Whether the defendants have also engaged in a course of conduct that renders payment of State obligations less secure and unfairly limits the plaintiffs' legal remedy

for nonperformance in the Court of Claims so as to impair the obligation of contracts without reasonable cause, in violation of Article I, section 16 of the Illinois Constitution.

3. Whether this case continues to raise the same issues even after the defendants have reallocated funds from the Stop Gap Spending Bill intended for their services in fiscal year 2017 to cover the sums owed under the contracts for services in fiscal year 2016 and even if the specific allegations about non-funding of the contracts in fiscal year 2016 are moot, whether this case fits the exceptions to the doctrine set forth by the Supreme Court in *People v. Alfred H.H.*, 233 Ill. 2d 345 (2009).

Jurisdiction

This Court has jurisdiction over this appeal as it is an appeal of a final judgment of a circuit court in a civil case. Ill. Sup. Ct. R. 301. On August 31, 2016, the Circuit Court of Cook County entered a final judgment dismissing all of Plaintiffs' claims against all of the Defendants' with prejudice. R. C2834. Plaintiffs filed their final Notice of Appeal listing all parties on September 30, 2016. A. 212; *see also* R. C.2838 (First Amended Notice of Appeal).

Statutes and Constitutional Provisions Involved

Ill. Const., Art. I, § 2:

> DUE PROCESS AND EQUAL PROTECTION
>
> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Ill. Const., Art. I, § 16:

> EX POST FACTO LAWS AND IMPAIRING CONTRACTS

> No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed.

Ill. Const., Art. IV, § 9:

> VETO PROCEDURE
>
> (a) Every bill passed by the General Assembly shall be presented to the Governor within 30 calendar days after its passage. The foregoing requirement shall be judicially enforceable. If the Governor approves the bill, he shall sign it and it shall become law.
>
> (b) If the Governor does not approve the bill, he shall veto it by returning it with his objections to the house in which it originated. Any bill not so returned by the Governor within 60 calendar days after it is presented to him shall become law. If recess or adjournment of the General Assembly prevents the return of a bill, the bill and the Governor's objections shall be filed with the Secretary of State within such 60 calendar days. The Secretary of State shall return the bill and objections to the originating house promptly upon the next meeting of the same General Assembly at which the bill can be considered.
>
> (c) The house to which a bill is returned shall immediately enter the Governor's objections upon its journal. If within 15 calendar days after such entry that house by a record vote of three-fifths of the members elected passes the bill, it shall be delivered immediately to the second house. If within 15 calendar days after such delivery the second house by a record vote of three-fifths of the members elected passes the bill, it shall become law.
>
> (d) The Governor may reduce or veto any item of appropriations in a bill presented to him. Portions of a bill not reduced or vetoed shall become law. An item vetoed shall be returned to the house in which it originated and may become law in the same manner as a vetoed bill. An item reduced in amount shall be returned to the house in which it originated and may be restored to its original amount in the same manner as a vetoed bill except that the required record vote shall be a majority of the members elected to each house. If a reduced item is not so restored, it shall become law in the reduced amount.

> (e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of the members elected to each house. Such bill shall be presented again to the Governor and if he certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, he shall return it as a vetoed bill to the house in which it originated.

Ill. Const. Art. VIII, §2:

> STATE FINANCE
>
> (a) The Governor shall prepare and submit to the General Assembly, at a time prescribed by law, a State budget for the ensuing fiscal year. The budget shall set forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year of every department, authority, public corporation and quasi-public corporation of the State, every State college and university, and every other public agency created by the State, but not of units of local government or school districts. The budget shall also set forth the indebtedness and contingent liabilities of the State and such other information as may be required by law. Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget.
>
> (b) The General Assembly by law shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year.

State Lawsuit Immunity Act, 745 ILCS 5/1:

> Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court.

Introduction

The plaintiffs-appellants are 61 social service organizations that are currently performing contracts with the State of Illinois for which they are not being paid. During fiscal year 2016—for 12 months—plaintiffs served without *any* payment the most vulnerable citizens of the State. While there has just recently been payment on their contracts for fiscal year 2016—much of it since dismissal of this case—plaintiffs have now received no payment on contracts for fiscal year 2017. In effect plaintiffs are in the same position as before. The failure to pay has had a devastating effect on cash flow to the plaintiffs and ability to survive week to week—and made it impossible to resume to full strength many of the programs that plaintiffs had to reduce or shut down during fiscal year 2016. The reckless and arbitrary manner in which the State is conducting its business—or rather, not conducting it, and failing to pay bills—is especially targeted at plaintiffs. In a haphazard way, and by a patchwork of court orders, other State creditors are being paid, while plaintiffs are not. There is no coherent rationale to explain this disparate treatment, which is partly a result of judicial decisions. During the pendency of this appeal, which should be heard on an expedited basis, plaintiffs are nearly certain to have to lay off staff and cut programs and abandon in some cases the citizens they are supposed to serve. In other words, the manner of paying off bills will come down with brutal force especially on the homeless, runaway youth, women who have been sexually assaulted, and seniors who are trying to stay in their homes and out of institutions. The failure to pay these contracts—and the expedients that plaintiffs have desperately adopted to keep going—have also placed strains on the finances of counties and local governments. For example, without the jail diversion programs run by plaintiffs, more

troubled youth end up in jail. In many places of the State, especially downstate Illinois, there are no alternative private agencies that can provide these services.

This failure to pay bills, which imperils the very existence of the State infrastructure for providing human services, arises from the unorthodox and unconstitutional manner in which the defendant Governor and agency heads have been conducting public business. As chief executive, the defendant Governor cannot enter these contracts, require plaintiffs to perform, and then block the attempts by the General Assembly to pay them. The Governor cannot enforce contracts as an executive while using his legislative power of veto to block the funding of the same contracts. Under the well recognized "officer exception" to the State Lawsuit Immunity Act, 745 ILCS 5/0.01 *et seq.*, Illinois courts may grant prospective relief to bar the defendant officers from conducting the public business beyond their authority or engaging in an abuse of the powers of their constitutional offices. *See Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485 (2015); *Sass v. Kramer*, 72 Ill. 2d 485, 490-92 (1978). As set forth in the Statement of Facts, the defendant Governor has exceeded his lawful powers of office by using his *legislative* power of the veto to frustrate the General Assembly from funding the contracts that he has assumed as *executive.* Defendants are also operating the state without a budget—literally without producing a law or laws that balance "funds estimated to be available" with "appropriations" that are tied or matched with "expenditures," as required by Article VIII, section 2(b). As a result, having breached this constitutional duty, and without any coherent rationale, defendants are paying some creditors and not others in a haphazard or ad hoc manner—and not paying plaintiffs who serve the most marginal persons in the State. Accordingly, as set out in

Count I, defendants are acting *ultra vires* by continuing to enter hundreds of these contracts with plaintiffs, accept the services under these contracts, and then refuse to pay on a timely basis while blocking attempts of the General Assembly to pay them.

Even without a formal budget in place, and notwithstanding the violation of Article VIII, section 2(b) referred to above, plaintiffs are entitled to be paid *on the same regular and periodic basis* that the State of Illinois is obligated by court order to pay State employees. In *AFSCME v. State*, 2015 IL App (5th) 150277-U, the Fifth District of this Court upheld a temporary restraining order issued on July 10, 2015 by the Circuit Court of St. Clair County requiring that State employees be paid. *See also* R. C2779 (Circuit Court order). That order remains in place even now, without objection by the State, and no employee is missing a paycheck even without any consented-to appropriation from the General Assembly. Apart from the evident due process and equal protection concerns, there is no principled basis for the Illinois courts to order these regular and periodic payments to all state employees—including employees of the judicial branch—while denying them to plaintiffs.

Plaintiffs also contend, as set out in Count II, that by the Governor's successive vetoes of the funding of these contracts in June 2015 and June 2016 and by the forced resolution reached in the so called "Stop Gap Spending Bill," or P.A. 99-524 ("Stop Gap"), the defendants have unlawfully impaired the obligations of contracts in violation of Article I, section 16 of the Illinois Constitution. The repeated vetoes and the failure to have a budget—in violation of Article VIII, section 2(b), as referred to above—has led to ad hoc measures that have impaired the security of State payment of the contracts entered by the Governor and other defendants. Indeed, plaintiffs never were paid at any point

during the twelve months of fiscal year 2016, and are not being paid now. Furthermore, the Stop Gap adopted on June 30, 2016 places an arbitrary ceiling on what the State may pay plaintiffs on the fiscal year 2017 contracts. The Stop Gap generally limits the plaintiffs to the equivalent of twelve months of payments for eighteen months of services, including services on the fiscal year 2017 contracts now being performed; that is, for the whole eighteen month period running from July 1, 2015 through December 31, 2016. The Stop Gap *is* the law—at least for now—and as a law passed by the General Assembly it is a permanent impairment or "haircut" as to the amount due to plaintiffs over this eighteen month period. Aside from this facial impairment of the actual amount due, it is an impairment of the "obligation of contracts" in a second sense—an effective impairment of the legal remedy to recover nonpayment by the State. That remedy for nonpayment—a legal action in the Court of Claims for the face amount of the contracts—is available only if there is an appropriation or fund approved by the General Assembly from which the claim can be legitimately paid. Of course the Stop Gap ensures that there is no such available fund, and the Court of Claims has at least a policy of not awarding relief unless such a fund exists. In multiple ways, then, including the Governor's vetoes, the Stop Gap, and the operation of the State without the budget as required by Article VIII, section 2(b), defendants have repeatedly impaired both the *security* of payment and the *effective ability to use a legal remedy*, in violation of Article I, section 16. There is simply no fund out of which plaintiffs' obligations can be paid. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977) (finding unlawful impairment from the diversion of money from a fund to pay off bonds).

Plaintiffs respectfully request that because of the fast moving events in the State's current budget impasse, this Court take judicial notice of certain facts since the dismissal of this case on August 31, 2016. As set out in Part B of the Statement of Facts, these additional facts are of general knowledge and can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Ill. R. Evid. 201. Specifically, this Court should take note that the 61 plaintiff social service organizations have now received full or nearly full payment for the contracts in fiscal year 2016. These are the contracts for which they sought funding in the Third Amended Complaint, and which were attached as Exhibits A through G to the Third Amended Complaint. However, the Stop Gap as explained above has not rendered this case moot, and will not diminish the injury that plaintiffs will sustain. Indeed, with no money coming in, the injury may be far greater by the decision on this appeal, even if expedited. The full payment of contracts in fiscal year 2016 occurred only because defendants re-allocated the funds set aside in the Stop Gap for fiscal year 2017 to pay the contracts in fiscal year 2016. Accordingly, there is virtually no money left to pay for the services that plaintiffs have rendered for the past six months, which are the first six months of fiscal year 2017. Plaintiffs remain in the same acute financial distress—deep in the hole financially for the services they have rendered in the past six months and will render while this appeal is being decided. And as of January 1, 2017, there will not even money that is nominally available, since the Stop Gap only covers the period to December 31, 2016.

It is crucial that this appeal be promptly decided. It is likely, if not certain, that there will be no budget at all in fiscal year 2017, and perhaps in fiscal years 2018 and 2019 as well. Without payment for services to date in fiscal year 2017—and with no

likelihood of payment for the rest of the fiscal year—some of the plaintiff organizations are likely to collapse in the months ahead and few if any will be able to continue their programs at the proper level.

Plaintiffs are entitled to a prospective order of specific performance under Count I—and have a right to both legal and injunctive relief under Count II. Under both Counts, plaintiffs seek a declaratory judgment that the defendant Governor and agency may not repudiate these debts either by (1) use of a legislative veto to block funding of contracts that the defendants have voluntarily entered, or (2) reliance on Article VIII, section 2(b) of the Constitution to avoid payment on these contracts when the State itself has breached its constitutional duty under Article VIII, section 2(b) to have an overall budget.

I. Statement of Facts

As this case was decided on a motion to dismiss, the Court must accept the well-pleaded allegations of the Plaintiffs' Third Amended Complaint as true. Plaintiffs will set out these well pleaded facts in Part A and then set forth facts of which this Court can take judicial notice in Part B.

A. Facts Set Forth in Third Amended Complaint

The State of Illinois outsources delivery of most state-supported human services to plaintiffs and similar organizations. As set out in the Third Amended Complaint, the plaintiffs in the trial court were 98 of the organizations that deliver human services to Illinois citizens in need. R. C1656, ¶ 1. Of the 98 plaintiffs, 61 are party to this appeal. Plaintiffs deliver every kind of state-funded human service. They had and have contracts with the Department of Human Services, Department on Aging, Department of Public Health, Department of Healthcare and Family Services, Department of Corrections, and the Department of Central Management Services. R. C1658-60, ¶¶ 5-19; R. C1662, ¶ 41.

On February 18, 2015, the defendant Governor submitted to the General Assembly a proposed budget for fiscal year 2016, starting on July 1, 2015. R. C1661, ¶ 29. The defendant Governor's proposed budget provided for funding of most, if not all, of the services covered by the contracts that the defendant state officers later entered with the respective plaintiffs. R. C1661, ¶ 30.

In May 2015, the General Assembly passed a number of appropriations bills that authorized the expenditure of money to pay plaintiffs for the contracts with defendants in either the same, or differing but comparable, amounts to those proposed by the defendant Governor. R. C1661, ¶ 31. The General Assembly sent the appropriations bills to the Governor in late June 2015. R. C1662, ¶ 34. No further action by the Governor—or signature or consent—was necessary for the amounts appropriated by the General Assembly to become law. R. C1662, ¶ 36.

On June 25, 2015, the Governor vetoed all of the relevant appropriation bills. R. C1662, ¶ 37. The Governor's veto included funding that he himself had planned for these services. R. C1662, ¶ 38. At various times before and after the veto, the defendant directors induced plaintiffs to enter contracts to provide the services. R. C1662, ¶ 39. After the Governor's veto on June 25, 2015, the defendant directors at various times accepted and returned the plaintiffs' contracts and enforced them through the end of fiscal year 2016. R. C1662, ¶ 44.

The defendant directors never proposed or took any action to suspend or terminate the contracts signed by plaintiffs for lack of an appropriation by the General Assembly or for any other reason. R. C1663, ¶ 45. Many of the contracts, which are form contracts,

have a clause like Section 4.1 of Exhibit A to the Third Amended Complaint, which states:

> This contract is contingent upon and subject to the availability of funds. The State, at its sole option, may terminate or suspend this contract, in whole or in part, without penalty or further payment being required, if (1) the Illinois General Assembly or the federal funding source fails to make an appropriation sufficient to pay such obligation, or if funds needed are insufficient for any reason, (2) the Governor decreases the Department's funding by reserving some or all of the Department's appropriation(s) pursuant to power delegated to the Governor by the Illinois General Assembly: or (3) the Department determines, in its sole discretion or as directed by the Office of the Governor, that a reduction is necessary or advisable based upon actual or projected budgetary considerations. Contractor will be notified in writing of the failure of appropriation or of a reduction or decrease.

R. C1663, ¶ 46. Defendants never invoked these rights, but continued the contracts in effect. R. C1663, ¶ 47.

At the same time, the plaintiffs were not readily able to withdraw from these contracts. R. C1663, ¶ 48. First, contracts that allowed the plaintiffs to withdraw generally required the plaintiffs to give 30 days' notice, and in doing so, such plaintiffs would have been among those least likely ever to be paid. R. C1663, ¶ 49. Furthermore, the plaintiffs might face liability to their service populations if they abruptly withdrew even with 30 days' notice. R. C1663, ¶ 50. Plaintiffs also feared reprisal if they withdrew and the loss of funding not only from the defendants but from foundations and other funders for carrying out their missions. R. C1664, ¶ 51. Furthermore, the defendant directors do not dispute that the plaintiffs should receive payment for these services during fiscal year 2016. R. C1664, ¶ 52. Nonetheless, except in instances where payment was required by some other court order or federal funds were available, plaintiffs

received no funding for the services they rendered in fiscal year 2016 at any point during the fiscal year. R. C1664, ¶ 53.

None of this harm was necessary regardless of any political dispute between the Governor and the General Assembly, since the existences of these obligations to plaintiffs was never questioned or challenged or denied by the Governor or General Assembly. R. C1665, ¶ 59. The Governor had the option under the Illinois Constitution to exercise a line-item veto to block only expenditures unrelated to the obligations which the defendants have acknowledged with respect to plaintiffs. R. C1665, ¶ 60. Nonetheless, the Governor used his legislative power of veto to block the funding of the contracts that he and his subordinates had entered. R. C1665, ¶ 61.

On June 10, 2016, as the fiscal year 2016 drew to a close, the Governor again—for a second time—vetoed the full funding of the plaintiffs' contracts which had now been almost fully performed. R. C1665, ¶ 62. On April 13, 2016, the General Assembly had passed SB 2046 which approved appropriations for virtually all of Plaintiffs' contracts. R. C1665, ¶ 63. On April 14, 2016, the General Assembly sent SB 2046 to the Governor. R. C1665, ¶ 65. On June 10, 2016, the Governor vetoed SB 2046 in its entirety. R. C1665, ¶ 66. As in the previous veto of June 25, 2015, the Governor did not use the amendatory veto, or line item veto to allow the funding of the contracts that he and his designates have entered and enforced. R. C1665, ¶ 67. The Governor took this action to block the funding of the contracts although by June 10, 2016, the Governor and other defendants had already received the benefit of the performance of these contracts. R. C1666, ¶ 68.

On June 30, 2016, the General Assembly passed and the defendant Governor signed Public Act 99-524, popularly known as the "Stop Gap Spending Bill" or "Stop Gap Budget." R. C1666, ¶ 69. Public Act 99-524 does not purport to be a budget within the meaning of Article VIII of the Constitution—and is better described as providing interim funding in light of the impasse between the Governor and General Assembly as to an actual budget for fiscal year 2016. R. C1666, ¶ 70. In particular, Public Act 99-524 has very little money *explicitly* for the contracts at issue in this case. R. C1666, ¶ 71. For example, there are no funds explicitly appropriated by Public Act 99-524 for the contracts plaintiffs have with the Department on Aging for fiscal year 2016. R. C1666, ¶ 72.

Article 74 of Public Act 99-524 says that appropriations in Articles 75 through 225 are appropriated for use in the first six months of fiscal year 2017, but may be used to pay prior year costs. R. C1666, ¶ 73. Whether that money is so used is within the discretion of the defendant agencies. R. C1666, ¶ 74. Public Act 99-524 also has various lump sum amounts to be used by the Department of Aging, the Department of Corrections and other agencies, which is also to be spent according to Defendants' discretion. R. C1666, ¶ 75.

Furthermore, instead of requiring plaintiffs to be paid out of general revenue as typically occurred in the past, Public Act 99-524 limits payments out of specific funds. R. C1666, ¶ 76. There are dozens of such funds, and vouchers were held up for months by the defendant state agencies' need to code them to the specific funds. R. C1667, ¶ 77. While the news media give figures of the stop gap budget covering 50 percent or some other percent of the obligations for both fiscal year 2016 and 2017, the defendants could

choose without any standard or criteria to pay nothing, 10 percent, 20 percent, or other amount for services already rendered. R. C1667, ¶ 82.

Defendants took the position through fiscal year 2016 and in this litigation that the Governor's veto of the appropriations for these contracts barred them from paying plaintiffs for services rendered under these contracts. R. C1664, ¶ 56. As a result of this unorthodox manner of conducting public business, plaintiffs had to use up lines of credit, lay off professional and other staff, cut back programs and suffer a loss or degrading of their capabilities as service organizations. R. C1664, ¶ 57. Nonetheless, the defendants took the position that they could lawfully conduct the public business in this manner without appropriations to fund these contracts, and inflict such damage upon plaintiffs and leave plaintiffs to pursue such remedies as they might have in the Court of Claims. R. C1664, ¶ 58.

The impact on the plaintiffs of the defendants' non-payment in fiscal year 2016 was tremendous, and has not been entirely remedied by subsequent payments made since the passage of the Stop Gap bill. Indeed, in the briefing and at the hearing on the Plaintiffs' motion for preliminary injunction, the defendants conceded that Plaintiffs were suffering irreparable injury. R. C2815 & C2777. Most plaintiffs used up all available lines of credit and many destroyed their credit as a result. R. C1667, ¶¶ 83-84. Most plaintiffs had to use cash reserves and many have no cash reserves remaining. R. C1667, ¶ 85. Plaintiffs in some cases laid off up to 30 percent or more of their professional staff. R. C1668, ¶ 89. In some cases plaintiffs have closed critically needed programs, for which there are no alternatives in their areas. R. C1668, ¶ 90. Many plaintiffs had difficulty meeting payroll and a few came close to total closure. R. C1667, ¶¶ 86-87.

Furthermore, once services and programs are eliminated, many are incapable of restoration. R. 1668, ¶ 92. Even with payment from the Stop Gap, plaintiffs will not be able to find the find the same professional staff, or the equivalent and in many cases plaintiffs have already lost the personal networks and relationships in the communities they serve. R. C1668, ¶¶ 93-95. These personal networks and relationship are crucial in reaching the neediest clients. R. C1668, ¶ 96. Many of these clients are youth, homeless persons, persons with HIV/AIDS, or low income persons with persistent mental health and behavioral issues. R. C1668, ¶ 97. Already many of these former clients have ended up in the jails of the state because there is no other place for them to go. R. C1668, ¶ 98.

Because of defendants' course of conduct, the entire infrastructure of State-supported social services to the needy is threatened. R. C1669, ¶ 99. Because this problem is now rolling over into fiscal year 2017, the payments allowed for by the Stop Gap will not remedy this problem. The plaintiffs will only truly be able to recover and rebuild this infrastructure when they can once again feel confident that their contracts will be honored.

B. Facts Subject to Judicial Notice

Even prior to the dismissal of the Third Amended Complaint on August 31, 2016, plaintiffs brought to the attention of the Court that the defendants had begun reallocating money in the Stop Gap from fiscal year 2017 to meet the unpaid amounts of contracts for fiscal year 2016. At the time of the dismissal, the reallocations were still in process. Since the dismissal of the Third Amended Complaint, the defendants including the defendant Comptroller have exercised their discretion under the Stop Gap and reallocated nearly all of the funding for the plaintiffs' contracts in fiscal year 2017 to pay the outstanding amounts, except for interest, due under the contracts for fiscal year 2016.

While a few of the plaintiffs have received some limited or partial funding for their contracts for services in fiscal year 2017, other plaintiffs have received no payment. All the plaintiff organizations have suffered the loss of regular and timely payment of the vouchers submitted for payment under the contracts for fiscal year 2016. Plaintiffs ask this Court to take judicial notice of these facts.

II. Argument

A. Standard of Review

This is an appeal of a dismissal with prejudice based on a combined motion to dismiss pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619.1, and it is therefore subject to *de novo* review. *Gatreaux v. DKW Enters., LLC*, 2011 IL App (1st) 103482, ¶ 10.

B. As a matter of fundamental fairness and equal protection, the plaintiffs have the same right to be paid on a timely basis as state employees under the temporary restraining order upheld in *AFSCME v. State.*

The emergency basis for this direct appeal is the breakdown of constitutional government in the State of Illinois. This Court is well aware of the budget impasse between the General Assembly and Governor—now well over a year, and possibly to continue into 2017. A patchwork of court orders has kept up payment to some creditors of the State and not others. Some of the court orders require payment of pass-through federal funds, including Medicaid payments, which do not require consented-to appropriations. But there is one enormous exception. Without any consented-to appropriation, and by order of the Appellate Court, every single State employee, including many who work for the judicial branch, is receiving his or her salary as due on the same regular periodic basis. *See AFSCME v. State*, 2015 Il App (5th) 150277-U (upholding temporary restraining order ordering continued payment of state employees

despite lack of consented-to appropriation); *see also* R. C2780. To date, notwithstanding Article VIII, Section 2(b) of the Illinois Constitution and by a court order that has been left undisturbed for eighteen months, the Comptroller has paid out over $4 billion to state employees without any consented to appropriation by the General Assembly. *See* Comm'n on Govt. Forecasting & Accountability, Ill. Gen. Assembly, "State of Illinois Budget Summary Fiscal Year 2017, at 29 ($3.08B paid in FY16, $3.11B to be paid in FY17) (available online at http://cgfa.ilga.gov/Upload/FY2017BudgetSummary.pdf) (last accessed Dec. 20, 2016). Significantly, though the State initially sought and was denied direct appeal to the Illinois Supreme Court, R. C2782, the State has filed no further appeal or motion since the Appellate Court's decision to dissolve the order and has been content to leave this temporary restraining order in place by agreement and without pressing for a ruling on the merits.

Meanwhile, in the instant case, the defendants have vigorously opposed a similar action seeking a much smaller payment—precisely for lack of a consented-to appropriation. Furthermore, the Circuit Court inexplicably has failed to provide the same judicial treatment—and since there is no opinion, this Court can only guess the rationale for such a disparity. There is no "classification" that can justify this unequal treatment—and no reason why the Illinois courts should give priority to one kind of payment without a consented-to appropriation while denying another. It is especially unconscionable to inflict such an injury on those who serve the neediest citizens of the State. In *AFSCME*, the Appellate Court in the Fifth District justified upholding what has become a massive billion-dollar expenditure to State employees because of only a tentative and preliminary assessment that there was a valid legal claim of unlawful impairment of the obligation of

contracts. Accordingly, if this Court finds that there is no legal claim of impairment in this case—a ruling on the merits—then it follows that the order of the Court in St. Clair County now paying the state employees—which is based only on a tentative or preliminary assessment of the same legal claim—has to be dissolved immediately as well. Furthermore, under state law, there should be full restitution of $4 billion for wrongful issuance of a preliminary injunction.

Aside from this catastrophic outcome, which would follow if this Court upholds the dismissal of this case, affirming the dismissal will force plaintiffs to cut back services to the most vulnerable citizens of the state: the elderly infirm, runaway youth, persons with AIDS, and the homeless. Already there have been cutbacks: dropped programs, lay off of professional staff, and loss of contact with transient client populations. The harm is utterly irreparable. As these programs disappear in their current form—or disappear completely—they cannot be easily resumed.

It is not the case that Illinois courts can turn away from this situation: they have already intervened to determine a kind of priority of payment. There is no legally principled rationale for the current priority of payment—or disparate treatment of creditors, especially state employees. Whatever due process may require in a specific setting, it at least requires fundamental fairness. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). There is also an evident denial of equal protection, especially to creditors like plaintiffs who serve a politically powerless group like the homeless, the runaway youth and the elderly who are their clients. Courts should take special care when the denial in equal protection or equal treatment is at the expense of powerless groups. *City of Clerburne v. Clerburne Living Center*, 473 U.S. 432, 447 (1985); *United States Dept. of*

Agriculture v. Moreno, 413 U.S. 528, 535 (1973) ("a bare…desire to harm a politically unpopular group" is not a legitimate state purpose).

In the Third Amended Complaint, plaintiffs specifically cited and alleged both denial of due process and equal protection in violation of Article I, section 2 as a part of the defendants' unlawful conduct in Count I.

Plaintiffs now turn specifically to these legal claims in Counts I and II.

C. Under the "officer exception" to sovereign immunity, and where the defendant Governor is conducting the public business in a manner that exceeds or abuses the powers of his office, plaintiffs are entitled to the prospective injunctive relief of regular and timely payments.

In Count I of the third amended complaint, plaintiffs contend that by acting far beyond any power of office, the Governor and his agency heads have unlawfully entered hundreds of contracts—accepting the services of plaintiffs—while vetoing the two separate attempts of the General Assembly to fund them. In bringing this claim, plaintiffs invoke the "officer exception" to the *statutory* defense of sovereign immunity under the State Lawsuit Immunity Act, 745 ILCS 5/0.01 *et seq*. *See, e.g., Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485; *Sass v. Kramer*, 72 Ill. 2d 485, 490-92 (1978). In *Leetaru,* which collects similar cases, the Illinois Supreme Court recently has stated, "The exception is aimed…at situations *where the official is not doing the business which the sovereign has empowered him or her to do or is doing it in a way which the law forbids.*" *Id.* at ¶ 47 (emphasis added); *see also Sass v. Kramer*, 72 Ill. 2d 485, 490-92 (1978). Indeed, as established in prior cases, this is a constitutional tort, for which plaintiffs can seek monetary relief in this court, not just the Court of Claims, even in the absence of a consented-to appropriation. *See e.g. Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004); *Illinois County Treasurers' Ass'n v. Hamer*, 2014 IL App (4th) 130286.

At any rate, under the "officer exception" cases, plaintiffs seek only prospective injunctive relief: an order that through the duration of fiscal year 2017 the defendants will remain current in the regular periodic payments due on the vouchers submitted by plaintiffs. Those vouchers, which go to the respective defendant agency heads, should be forwarded for payment to the Comptroller for timely payment on the same basis that state employees and others now receive pay.

Nor can there be any defense to payment under Article VIII, section 2(b), which states that the General Assembly shall make appropriations for all expenditures of the State, when the General Assembly *has made appropriations for the expenditure of funds for plaintiffs' contracts,* at least in fiscal year 2016. Those appropriations for the expenditures would have become law, automatically, with or without the Governor's signature, but for the Governor's affirmative act of issuing a veto. In particular, it is not the intent of Article VIII, section 2(b) to justify the use by the *executive* to evade payment—to block the funding of obligations that the General Assembly has approved and the Governor as *executive* voluntarily assumed on behalf of the State. Had the Governor not blocked the funding *in full* of the fiscal year 2016 contracts, the Stop Gap, which is in reality an appropriation for twelve months of services, would now have been sufficient to fund the full twelve months of the fiscal year 2017 contracts. At any rate, Article VIII, section 2(b) specifically protects only the legislative branch—the legislative authority of the General Assembly and only the General Assembly. There would be no interference or conflict with the legislative branch if this Court ordered the officers of the executive branch to pay the bills prospectively on a timely basis.

Plaintiffs recognize that the Governor and General Assembly have legitimate differences about the budget—or the Governor's purported reform agenda as a condition for even having a budget. Plaintiffs have no position as to the merits of this political dispute. However, the Governor has in fact entered these contacts and continues to accept services without payment. He has chosen not to cancel or revoke the contracts, as he has power to do under provisions like Section 4.1 quoted in the Statement of Facts. The Governor could have used his line item veto authority to approve those parts of the budget bills—enacted in June 2015 and again in June 2016—that funded the contracts that he and the other defendants continue to enter and enforce. The defendants are always free to cancel the contracts prospectively: what they may not do, or what arises to an abuse of the powers of their offices, is to enter and continue the contracts without paying for them. Accordingly, under the well established "officer exception" to sovereign immunity, Illinois courts can issue prospective injunctive relief to specifically perform the contracts and become current in payments. Or put another way, the court has full equitable authority to bar defendants from both affirming and disaffirming the contracts all at once. Or to put it colloquially, defendants may not have their cake and eat it too.

For that is the gist of this *ultra vires* action: "not doing the business which the sovereign has empowered him to do." One standard is whether any Illinois court would tolerate a private business in acting the same way as the State of Illinois. Without question, if not outright fraud, the conduct of the defendants would constitute an "unfair trade practice" under the parameters of the Illinois Consumer Fraud and Deceptive Practices Act. 815 ILCS 505/1 *et seq.* As defined by the Illinois Supreme Court in *Robinson v. Toyota*, 201 Ill. 2d 403, 417-18 (2002), an unfair trade practice is any

business practice that *either*: (1) is contrary to the public policy of the State; (2) is unfair, oppressive, immoral, or unethical; *or* (3) inflicts substantial injury. The conduct of defendants alleged here could meet any one or all three. It is "contrary to public policy," as it ruins the credibility of State government as a business partner. It undermines the reputation of the State as a responsible party to a contract. *See State of Illinois (Central Management Services) v. AFSCME*, 2014 IL App (1st) 130262, *rev'd on other grounds* 2016 IL 118442. It is "unfair" and "oppressive" and represents a kind of forced "loan" with no interest from the plaintiffs to the State. And it "inflicts substantial injury," not only on plaintiff organizations which may have to close their doors, but also on the vulnerable client whom they serve. It is an entirely separate question whether the Governor should be conducting public business for an entire fiscal year without any budget in place at all. Plaintiffs address that issue in connection with Count II below to argue that it is at least an unlawful impairment of the obligation of contracts.

It is axiomatic that the sovereign has not "empowered" the defendants to "conduct the public's business" in this way, and plaintiffs are entitled to prospective injunctive relief.

D. In violation of Article I, section 16 of the Illinois Constitution, as well as Article I, section 2, defendants have unlawfully impaired the "obligation of contracts."

Article I, section 16 of the Illinois Constitution states in relevant part: "No…law impairing the obligation of contracts... shall be passed." This provision is parallel to Article I, section 10 of the United States Constitution (prohibiting *states* like Illinois from impairing the obligation of contracts). They should be interpreted in a similar manner. Such a clause prohibiting impairment does not exempt the public contracts to which the State or State officials are parties. To the contrary, it applies with even more force to such

contracts with the State, because the "State's self interest is at stake." *United States Trust Co. v. New Jersey*, 431 U.S 1, 26 (1977).

This case presents at least three unlawful impairments of the obligations of contracts. First, the Stop Gap bill enacted on June 30, 2016 provides that plaintiffs and other vendors will receive only partial funding of contracts that they had performed or entered as of that date. Indeed, the Stop Gap provided very little funding explicitly for contracts already performed for fiscal year 2016. Most of the money in the Stop Gap was for fiscal year 2017. Over the coming months, the defendants including the Comptroller reallocated the money from fiscal year 2017 to pay plaintiffs for services rendered in fiscal year 2017. However, that in turn leaves plaintiffs in fundamentally the same situation as when they filed suit: that is, six months have gone by without any payment for the fiscal year 2017 contracts which the Stop Gap Bill nominally covers. Without any question, by the time of oral argument in this case, that period without payment will be at least eight to nine months or even longer. In and of itself, the Stop Gap would render payment less secure: that is, the bill on its face, with the discretion to reallocate given to the defendants, virtually guaranteed that there would either by no payment on contracts performed in fiscal year 2016 or no payment in fiscal year 2017 for which most of the funding nominally applied. Regardless of any legal remedy for non-payment, this legislative act by itself rendered payment at least less secure.

As set out in *United States Trust*, an impairment need not be a complete cancellation of a debt. In *United States Trust*, the unlawful impairment was no more than the partial diversion of money for mass transit out of a revenue stream intended for the bondholders. 431 U.S. at 25-26. There was not even an outright loss to the bondholders:

just a mere impairment in the security provided by the bond covenant. In the same way, Article VIII, section 2(b) of the Illinois Constitution obligates that the State have an actual budget, and the breach of this constitutional duty is in itself an impairment of the obligation of contracts. That section states as follows:

> The General Assembly *by law* shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed the funds estimated to be available during the fiscal year.

Ill. Const., Art. VIII, § 2(b) (emphasis added).

It may be pointed out that Section 2(b) of Article VIII does not literally use the word "budget." Indeed, there is good reason for such omission, for in a dictionary sense, a "budget" is an inchoate term with multiple possible meanings. However, Section 2(b) instead requires in practical effect a specific budget-making process. It requires a balancing of "funds estimated to be available" with "appropriations" that are in turn to be funds or accounts that matched or tied to "expenditures." It is impossible to do what Section 2(b) requires without calling it a budget. And the failure to perform this balancing—this breach of Article VIII, section 2(b), leaving the State without a budget for fiscal year 2016 and almost certainly 2017—has led to ad hoc and arbitrary payment of some creditors and not others.

This breach of constitutional duty is the cause of the financial chaos which has led to plaintiffs going without pay and cutting back services to the neediest but least political powerful citizens of the State. Likewise, the compliance with the budget-making process required by the Illinois Constitution would be the single greatest security of payment that creditors like plaintiffs could have—that is, a budget like in other years that identifies the specific funds out of which they will be paid, instead of ad hoc payments made by

political whim. It is the failure of the General Assembly and the Governor to perform this constitutional duty—a failure without precedent in the history of the State, and an astonishing breach of Article VIII, section 2(b)—which has unlawfully impaired the security of every State contract, but of plaintiffs most of all. While plaintiffs do not expect this Court to order the enactment of a budget, there is a remedy for this constitutional wrong: to allow plaintiffs to sue for the timely and immediate payment of these contracts. The defendants cannot cite the lack of an appropriation when the defendants have violated their own constitutional obligation to have a budget in place. Nor can they deny that the failure to perform this Constitutional duty is an impairment of the security of payment for every contract in the State.

The second unlawful impairment is in the Stop Gap itself, for the Stop Gap is a law which *does* purport to cut the obligation to pay the agreed upon contractual amount to plaintiffs—and even worse, it does so retroactively, after the contracts for fiscal year 2016 were performed. The funding is back-loaded to fiscal year 2017, and there is relatively little money appropriated for fiscal year 2016. Furthermore, however the money is reallocated, the Stop Gap is still a law that impairs the obligation of payment. It is a law that pays for the equivalent of *twelve months* to cover services to be performed over *eighteen months*, with a large percentage allocated for services rendered in fiscal year 2017. As noted in the Statement of Facts, the defendants, including the Comptroller have reallocated the funding designated for the first half of fiscal year 2017 to pay in full or nearly in full the contracts performed in fiscal year 2016. In other words, the Stop Gap is at least a facial impairment of the obligation of contracts for fiscal year 2016. Now, after the reallocation, it is still an impairment because plaintiffs will receive no payment

for services that they have already rendered to defendants in this fiscal year: from July 1, 2016 through December 31, 2016. The reallocation replaces one unlawful impairment with another.

To be sure, it is possible that in the next six months, the General Assembly and Governor may agree on a budget that pays for services rendered to date. But there may well be no such budget. And in many cases, there is always the theoretical possibility that the General Assembly might change the law or pass a new law: but at present the parties have only the existing law. The point here is that the *existing* law—the Stop Gap—impairs the obligation of contracts. It does not say that "more is coming," but that this is what the plaintiffs will receive, period. It is an impairment *now,* with all the finality of any law.

Furthermore, this law is an unlawful impairment in yet another sense: it is an *impairment of the legal remedy for nonpayment.* Plaintiffs have discussed how the there is a loss in security of payment—but there is also a loss of a legal remedy. It is important to distinguish this kind of impairment from an ordinary breach of contract. In *Horwitz-Matthews Inc. v. City of Chicago,* 78 F.3d 1248 (7th Cir. 1996), the Seventh Circuit has helpfully distinguished between the two: between a breach of contract claim, which plaintiffs might have brought in the Court of Claims, and an impairment of their legal remedy, so as to make it impossible or at least difficult to sue. As the Seventh Circuit states:

> [The cases relating to impairment] differentiate…between a measure that leaves the promisee with a remedy in damages and one that extinguishes the remedy.…In Holmes's vivid formulation, the obligation created by a contract is an obligation to perform *or* pay damages for nonperformance,

> and if the second alternative remains…the obligation created by the contract is not impaired.

Id. at 1250-51 (emphasis in original, citations omitted).

In this case, the Stop Gap not only says that plaintiffs will not get the full amount but effectively ensures that they will have no legal remedy for nonpayment. Under the State Lawsuit Immunity Act, 745 ILCS 5/1, the plaintiffs have a remedy for nonpayment *only* in the Court of Claims. In several cases, the Court of Claims has stated that it has a "policy" of paying claims only out of appropriated funds. For example, in *LaSalle National Bank v. State*, 43 Ill. Ct. Cl. 266, 270 (1991): "[I]t is this Court's policy to limit awards so as not to exceed the amount of funds, appropriated and lapsed, with which payment could have been made."

Given this impairment, there can be no limit on the power of this Court to order monetary relief, notwithstanding the State Lawsuit Immunity Act. First of all, sovereign immunity is only a statutory defense to payment, and plaintiffs are asserting a constitutional right under Article I, section 16. A *state law* cannot insulate the State from a constitutional obligation. *See Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004) (lack of appropriation by General Assembly cannot interfere with payment of judicial salaries required by the Illinois Constitution). Where the gist of the constitutional wrong is to take away the legal remedy for nonpayment, it is no answer to say plaintiffs have no legal remedy for nonpayment. Under these circumstances, to avoid the State Lawsuit Immunity Act from being an impairment of contract, this Court itself must have the power to give a legal remedy for non-payment.

Of course, as the U.S. Supreme Court has stated, "an impairment may be constitutional if it is *reasonable and necessary* to serve an important public purpose."

U.S. Trust, 431 U.S. at 25 (emphasis added). The defendants have not even attempted to make the argument that the nonpayment of plaintiffs serves "an important public purpose." Nor have defendants attempted to argue that the current budget impasse, which has led to the failure to pay, serves "an important public purpose." To the contrary, for the State to go an entire year without a budget violates Article VIII, section 2(b) of the Illinois Constitution.

Furthermore, prior to enactment of the Stop Gap, there was yet another kind of legislative impairment that led to the Stop Gap: the *legislative* act of the Governor in blocking the full funding of contracts. To be sure, the "legislative veto" is not a legislative *act* in the same way as a law passed by the General Assembly, as referred to in Article I, section 16. But the veto in this case did impair and even nullify an obligation of the State—and the policy behind a law impairing the obligation should apply to any formal legislative "act" that impairs the obligation. Indeed, it may be regarded as a denial of substantive due process, a "taking" by the Executive of a contractual right that the Legislature had approved. At the very least, once the General Assembly has approved a contractual right to payment, the Governor no longer has a defense to nonpayment of a claim that he himself has caused the State to incur. The Governor has raised the defense that Article VIII, section 2(b) requires an appropriation which he has used his power of veto under Article IV to block. But Article VIII, section 2(b) refers expressly only to the General Assembly—and requires only the General Assembly to appropriate the funds. In this case, the General Assembly did pass various bills—twice, in June 2015 and again in June 2016—that would have provided such full funding. There has been compliance or substantial compliance with Article VIII, section 2(b). Indeed, those budget bills would

have become law automatically had the Governor not imposed a veto, for the Illinois Constitution does not require any positive act by the Governor for such a bill to become law. Ill. Const. Art. IV, § 9(b). Plaintiffs do not question the right of the Governor to exercise such a veto any more than the General Assembly's right to pass a law—but a veto may strip the Governor from any defense under Article VIII, section 2(b), which is to protect the power of the General Assembly and not to allow the Governor himself to cause the State to renege on a valid debt. Like a private party under the law of contracts, the Governor may not use his own separate approval—that is, condition in his exclusive control—to bar a liability that he has caused the State to incur. *Farnsworth on Contracts*, section 8.6 at 431 (private party may not use condition under his exclusive control to bar liability).

E. The Supreme Court's decision in *State (Central Management Services) v. AFSCME*, 2016 IL 118422, is consistent with a finding of unlawful impairment, especially one arising from a breakdown of government.

The Supreme Court's decision in *State (Central Management Services)*, 2016 IL 118422, is not in conflict with a finding of impairment: to the contrary, it holds open the argument that a large scale repudiation of State debt may violate Article I, section 16. *Id.* at ¶ 54. As a preliminary distinction, there was no claim in *State (Central Management Services)* that the defendant officers had acted in excess of the powers of their office. Even more important, the impairment claim here is of a different kind. In that case, where a specific appropriation was absent, the plaintiff union, AFSCME, had sued to collect a pay raise under a multiyear collective bargaining agreement. In addition to Article VIII, section 2(b), the Court relied on a specific statute, Section 21 of the Illinois Public Labor Relations Act, which specifically required that the General Assembly approve in each year a specific raise under a multiyear collective bargaining agreement. The Court found

that Section 21, a specific *statutory* condition of liability applicable only to a particular type of contract, had been an implied term of the contract from the start, so that there could be no retroactive impairment. Here of course there was no such pre-existing statutory condition of liability for any of these contracts. Furthermore, there was no retroactive impairment in *State (Central Management Services)* like the Stop Gap. Accordingly, the Court was considering only an omission, not a law, and considering a contract that had a prior statutory requirement of approval that was an implied term.

Of course there are many other differences, including the fact that in this case, the General Assembly did pass bills to fund these contracts. Significantly, in *State (Central Management Services)* the Court made clear that its overriding concern was to protect the power of the General Assembly, not the Governor who had entered the collective bargaining agreement. As the Court said:

> The power to appropriate for the expenditure of public funds is vested exclusively in the General Assembly; *no other branch of government holds such power*.

Id. at ¶ 42 (emphasis added). In this case, to uphold the dismissal would be to frustrate the repeated attempts by the General Assembly to fund the valid debts that the Governor has caused the State to incur.

However, even in the case of a *pure* omission, even absent a positive law like the Stop Gap, which literally impairs the obligation of contracts, the Supreme Court found there could be an impairment. With the current budget impasse no doubt in mind, the Court went out of its way to state how limited its holding was in *State (Central Management Services).* After emphasizing the particular requirements of Section 21 for annual approval, the Court states:

> We *reiterate* that this case involves a *particular* contract: a multiyear collective bargaining agreement. Whether other state contracts with different provisions and different controlling law could also be subjective to legislative appropriation without offending the contracts clause is not before us.

Id. at ¶ 54 (emphasis added).

Here there is more than an omission to fund a particular contract. There is an "omission" or failure to have any budget at all, in violation of Article VIII, section 2(b). The violation of this constitutional duty by defendants is the reason that the "security" of payment for any of the valid debts of the State has been impaired. The failure to have a budget—or to conduct the business of the State in an orderly manner—has led to ad hoc payments of some vendors, and not others, with full payment or half payment, or no payment, in the most arbitrary and capricious way. That is, the breach of Article VIII, section 2(b) *is* the kind of "omission" that results in an impairment of the obligation of contracts under Article I, section 16.

Indeed, the order and priority of payment, with or without appropriation, has been occurring in a haphazard manner in the judicial branch—or in the federal courts. The priority that now exists is not the product of any systematic legal principle, but just the randomness of who filed first and in what forum.

There is no legal principle, or principle of equal protection or due process, that leaves plaintiffs or other vendors without a remedy for payment in this Court where the defendants have breached their legal duty to have in place a budget and let the courts decide whom the State should pay.

F. This case is not moot—and even if it were the issues raised would fall under all three of the recognized exceptions to the doctrine.

For all the reasons described above, this case is anything but moot even if subsequent events have affected the allegations of the Third Amended Complaint: allegations that were accurate at the time of the dismissal on August 31, 2016. While plaintiffs may have recently received full funding of the contracts performed in fiscal year 2016, they are back to the same place that they were when they filed the case on May 4, 2016: *they are not being paid.* And now, unlike the time of the original filing, there is an actual law that has the effect of cutting off their right to be paid or to sue for not being paid for the work done in the past six months. While the payments on the contracts in fiscal year 2016 were necessary, the plaintiffs in many cases still lack the funds to rehire staff or restore the programs that were lost. The belated payment does not compensate them adequately for the loss of the capabilities of their respective organizations to perform these contracts. For that reason, plaintiffs are seeking injunctive relief, and specific performance, since the injury being done to their programs is irreparable even if full payment comes in another year or two. Nor should this Court ignore the harm to the people whom plaintiffs serve. Without immediate injunctive relief for timely payment, there will not and cannot be full restoration of these programs: more homeless youth will end up in jail, more seniors will go into institutions, more victims of sexual assault will find there is no counseling available.

Even if moot—and it is not moot—this case meets all three of the well-established exceptions to the doctrine. *See, e.g., People v. Alfred H. H.*, 233 Ill. 2d 345 (2009). The first exception is for cases "capable of repetition but evading review." *Id.* at 354. There can be no doubt of repetition. Defendants are repeating the same conduct with

the fiscal year 2017 contracts. And if there is yet another Stop Gap—albeit unlikely—the contracts may be paid off again, but so late as to leave the plaintiff organizations irreparably damaged. At least on Count I, plaintiffs are entitled only to prospective injunctive relief—not damages. Indeed, in the trial court below, defendants did not dispute that plaintiffs did suffer irreparable injury even though the contracts for fiscal year 2016 have now been paid. R. C2815 & C2777.

The second exception that plaintiffs meet is for cases having a special "public interest." As stated in *Alfred H.H.*, "The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." 233 Ill. 2d at 355 (internal quotations omitted). Surely the legal issues raised by the current budget impasse should receive an "authoritative determination," and may help end a public emergency causing great harm to the people of this State.

The third and final exception, where there are "collateral consequences," also applies with force in this case. Though technically paid, the long period without payment has degraded the capabilities of the plaintiff organization; they have laid off professional staff who have taken other jobs, they have lost touch with transient clients whom they were serving, and there has been a disruption of relationships with other organizations and some of the private funders that help the plaintiff organizations survive. R. C1664, ¶ 57. That is exactly the reason that this case cries out for injunctive relief to ensure the continued existence of programs that if dropped or cut back are not easily resumed at the same level.

Where the "collateral consequences" imperil the very existence of these programs so crucial to so many people of this State, plaintiffs respectfully come before this Court to seek relief.

Conclusion

For these reasons, Plaintiffs respectfully request that this Court reverse the judgment of the Circuit Court and deny Defendants' motion to dismiss.

Dated: December 20, 2016

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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 35 pages.

Dated: December 20, 2016

Respectfully submitted,

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Certificate of Filing and Service

The undersigned attorney certifies that on December 20, 2016 he caused the foregoing Appellants' Brief and the accompanying appendix to be filed with the Clerk of the Illinois Appellate Court and a copy to be served by email to:

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