No. 1-16-2471

IN THE ILLINOIS APPELLATE COURT
FIRST JUDICIAL DISTRICT

ILLINOIS COLLABORATION ON YOUTH, *et al.*	)	
	)	On appeal from the Circuit Court
Plaintiffs-Appellants,	)	of Cook County, Illinois, County
	)	Department, Chancery Division,
v.	)	No. 16-CH-6172.
	)	
JAMES DIMAS, SECRETARY OF THE ILLINOIS DEPARTMENT OF HUMAN SERVICES, in his official capacity, *et al.*,	)	The Honorable RODOLFO GARCIA, Judge Presiding.
	)	
Defendants-Appellees.	)	

APPELLANTS' REPLY BRIEF

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Points and Authorities

Introduction

The issue before this Court in Count I is whether the defendant officers can enter thousands of contracts—and continue them—without a budget, in breach of Article VIII of the Illinois Constitution, and through the unheard of use of a veto to block the funding of the very contracts that as executive officers they chose to enter. Plaintiffs have stated a claim under the "officer exception" to sovereign immunity because the defendant executives have no authority to conduct the public business in this unconscionable manner—in effect, to have their cake and eat it too, by getting the services necessary to keep the state afloat so as to continue a budget impasse they might otherwise be forced to end. It is disingenuous to say that in not paying and inflicting irreparable injury on plaintiffs, the defendants are merely protecting the "power" of the General Assembly when in June 2015 and June 2016, the General Assembly twice enacted full appropriations for the contracts.

Plaintiffs are not asking that this Court to invalidate the Governor's legislative power to veto—rather they seek to hold the defendants accountable for violating their constitutional responsibility as executives—by inducing and continuing these contracts in their executive capacity while using their separate legislative veto to block funding and imperil the very existence of the plaintiff organizations. As pleaded in Count I, this case comes within the "officer suit" exception to sovereign immunity recognized so often by the Illinois Supreme Court. These defendants could easily use their line item veto to allow funding of plaintiffs' contracts and block other items of the budget. It only adds to the hypocrisy that the executive branch defendants even acknowledge that they are inflicting all of this irreparable injury—but claim that they have to do so to protect the privileges of the General Assembly. It is hard to imagine a greater legal or even moral

inequity: to exploit fragile organizations like so many of the plaintiffs to “loan” money and services to keep the State afloat while defendants continue a feud with the General Assembly that has nothing to do with the merits of funding these contracts.

In addition, in Count II, plaintiffs have adequately pleaded a claim for “impairment of contract” under Article I, Section 16 of the Constitution. The opening brief set out the three ways in which the impairment has occurred. First, blocked by the vetoes of defendants, the General Assembly did pass a ""Stop Gap" Bill" that the defendant Governor approved—and that provides partial funding. In other words, it is a legislative compromise that keeps some of the plaintiff organizations “alive” but allows the defendants to inflict more pain and use the plaintiffs as political hostages. That ""Stop Gap" " is on its face an impairment of contract—because while accepting and acknowledging the contracts are already fully performed, the "Stop Gap" purports to “re-write” the contracts to lower the contract price.

Even defendants find it hard to deny that the "Stop Gap" changes or impairs contracts already in effect. Instead, the defendants reply that if the "Stop Gap" is an impairment, the only remedy is to invalidate the "Stop Gap" and return the money received under it. However, it is not possible to put the "Stop Gap" back into the bottle, or pretend it is not there. The "Stop Gap" is a formal legislative act—this time, signed by the Governor—that recognizes the validity of *all* these contracts, not just the ones performed in fiscal 2016 but the ones in fiscal 2017 already in existence on June 30, 2016, when Public Act 99-524 was signed. *That* part of the "Stop Gap" means that defendants can no longer point, however disingenuously, to a “lack” of appropriation—or to a lack of consent to the contracts. Once the General Assembly *and* the Governor have

enacted a "law" like Public Act 99-524 that ratifies or adopts or recognizes the existence of these contracts, Article VIII no longer can be a defense to payment—much less the claim made by defendants that under Section 4.1 the whole contract is illusory. The contracts attached to the complaint have been recognized by the General Assembly as obligations of the State, and neither the General Assembly nor the Governor can lawfully change the agreed upon contract price after the fact without violating Article I, Section 16.

In a second way there is impairment because the defendants cannot use the State Lawsuit Immunity Act—and the disclaimer of the Court of Claims—to deny *any* legal remedy for non-performance. That is, where the contract is adopted, ratified, or recognized as valid by the General Assembly through the "Stop Gap", and there is no valid Article VIII concern here, then Article I, Section 16 requires a legal remedy for non-payment—in this Court, if not in a legislative court like the Court of Claims. As Illinois courts have repeatedly pointed out, the State has no *constitutional* immunity from suit—only statutory—and no legislative act can insulate the State from *any* legal remedy, without violating Article I, Section 16. The Lawsuit Immunity Act does provide legal remedies in the Court of Claims—but that results in an impairment where this legislative court denies that it can give relief in the absence of an appropriation. *See, e.g., LaSalle National Bank v. State*, 43 Ill. Ct. Cl. 266, 270 (1991) ("it 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"). If they are valid contracts and if they have been ratified by the General Assembly, then Article I, Section 16 requires that plaintiffs have a

legal remedy for nonperformance, even if it is not the "policy" of the Court of Claims to give relief.

I. Plaintiffs have a claim under the "officer exception" to sovereign immunity.

In denying that the "officer exception" to sovereign immunity applies here, the defendants rely on cases denying the "exception" applies to routine, business-as-usual acts. The cases cited by defendants belong to another world from the world in which this case arises, where there has been a near total breakdown of the processes of government. The issue is not whether plaintiffs allege a constitutional violation—although they do—but whether the defendants have engaged in some extraordinary act outside of the powers of their office. Here plaintiffs allege that the defendants have entered thousands of contracts without any budget or security of payment in place, in breach of their obligation under Article VIII to have a budget. And plaintiffs allege that the way in which the public business is conducted—where defendants continue contracts but block the funding of them—is unconscionable. In *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, which is the leading case, the Supreme Court found that that the "officer suit" exception to sovereign immunity can exist even when the defendant officers violate administrative regulations or conduct business under a personnel handbook. In that case, the Court held:

> The doctrine of sovereign immunity "affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority, and in those instances an action may be brought in circuit court."
>
> * * *
>
> Of course, not every legal wrong committed by an officer of the State will trigger this exception. For example, where the challenged conduct amounts to simple breach of

> contract and nothing more, the exception is inapplicable. Similarly, a state official's actions will not be considered *ultra vires* for purposes of the doctrine merely because the official has exercised the authority delegated to him or her erroneously. The exception is aimed, instead, 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. The purpose of the doctrine of sovereign immunity, after all is to protect the State from interference in its performance of the functions of government and preserve its control over State coffers. The State cannot justifiably claim interference with its functions when the act complained of is unauthorized or illegal.

Id. at ¶¶ 45-47 (internal marks and citations omitted).

Not even the Attorney General is willing to say specifically that the defendant Governor has been "doing the business which the sovereign has empowered him to do" by entering thousands of contracts without a budget and using a veto to block the very contracts that he and the other defendants voluntarily entered in their executive capacity. Nor do the defendants deny that this is unconscionable conduct and causing irreparable injury to plaintiffs. Indeed, the Attorney General's position in the case concerning the payment of State employees is that the government *cannot* function this way—that without appropriations for pay, the State should shut down and stop functioning. Logically, then, when the defendant executive officers go on entering contracts and obligating the State to pay for services without a budget in effect, they are acting *ultra vires*.

The defendants rely on cases where the Court found that the "officer exception" does not apply—even when a constitutional violation was alleged—because the officers were engaged in routine, business-as-usual decisions, like the firing of an employee, well within their official capacity, even if the decision was wrong. In citing these cases the defendants beg the question as to whether these defendants—in this case, in this set of

facts—were just acting in a routine manner and well within their official capacity. No executive in the history of this State has ever "routinely" entered thousands of contracts without any funding or any appropriation or any valid budget in place—not just for a few weeks or even months but for close to two entire fiscal years. There is no authority under the Illinois Constitution for the executive to conduct business in this way. That limit would exist even if the budget impasse—or the failure to fund these contracts—was entirely the fault of the General Assembly. But, what is so extraordinary here is that the General Assembly has twice enacted full funding, and the Governor could have used his line item veto to allow the funding to the contracts that he and defendants have entered.

In cases like *Ellis v. Board of Governors of State Colleges & Univs.*, 102 Ill. 2d 387 (1984), and *Brucato v. Edgar*, 128 Ill. App. 3d 260 (1st Dist. 1984), the court found no "officer suit" exception because the officer was not doing anything exceptional. In *Ellis*, for example, a routine employment case, Secretary of State Edgar was not entering thousands of contracts for which he was blocking funding. Nor was he acting to imperil the entire infrastructure of providing human services to hundreds of thousands of desperate citizens. In *Joseph Construction Co. v. Board of Trustees of Governors State Univ.*, 2012 IL App (3d) 110379, the court held that the use of "ultra vires" was just "artful pleading" to get out of an ordinary garden-variety dispute over a single construction contract.

On the one hand, defendants brush off this case as a simple breach of contract. On the other, defendants accuse plaintiffs of seeking to get the Court to end the budget impasse or enact a budget—hardly consistent with a "routine" breach of contract. There is indeed nothing "routine" about this case. But the plaintiffs are not requiring the

General Assembly to enact a budget, or to invalidate the defendant Governor's use of the veto. The *ultra vires* act complained of here is not the veto, and plaintiffs do not challenge the authority of the Governor to veto the budget bills. Rather the *ultra vires* act is the Governor's conduct *as an executive*, entering and continuing contracts voluntarily where he has also blocked the funding. Plaintiffs challenge the conduct of public business that in the business world no court would tolerate—and would amount to an unfair trade practice if not fraud. *See Robinson v. Toyota*, 201 Ill. 2d 403, 417-18 (2002). Plaintiffs are not asking this Court to referee a dispute between the branches but rather to require the Governor and other defendants to make good on their promise of payment when they have taken acts in their exclusive power to block the payment.

Furthermore, cases like *Lewis E. v. Spagnolo*, 186 Ill. 2d 198 (1999), and *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1 (1996), where the Court did not require the General Assembly to fund a particular level of aid, are not apposite. They even implicitly favor plaintiffs. In those cases, the Court found that the meaning of a "minimally adequate" or "high quality" education was too inchoate to enforce. But *Committee for Educational Rights v. Edgar* does not deny the power of the Court to issue a monetary remedy when there is a discernible constitutional violation. Indeed, as defendants concede, the court can use its power to require a payment for a constitutional violation—without an appropriation. *See Jorgensen v. Blagojevich*, 211 Ill. 2d 286 (2004); *Illinois County Treasurers' Ass'n v. Hamer*, 2014 IL App (4th) 130286. In other words, the "officer suit" exception may bar retroactive payment when it is a violation of statute, or a violation of an administrative regulation. But it is logically impossible for a

state statute—a law passed by the General Assembly—to bar any remedy for a constitutional violation.

Given this case law, if there is a constitutional violation, there is no necessary reason why the "officer suit" exception cases would always limit relief to a prospective injunction. That is true, to be sure, where the exception is based on a statutory violation and where there is a legal remedy for non-payment in the Court of Claims. But here plaintiffs allege a constitutional equal to or of even greater enormity and consequence than that in *Jorgensen* or *Hamer*. It is hard to see how a statutory defense like the State Lawsuit Immunity Act can bar plaintiffs from a constitutional violation of any kind—much less a violation that brings the case within the "officer suit" exception because it is so out of the scope of the authority of these defendants. In short, a state law—one enacted by the General Assembly, just like any other law—cannot bar this Court from redressing constitutional violations, and if it purported to do so, such a law would violate the principle of the separation of powers. Ever since *Marbury v. Madison*, 5 U.S. 137 (1803), it has been recognized that courts can bar invasions by the government of constitutional rights.

Even so plaintiffs are primarily seeking prospective injunctive relief. Here it is true that the claims are nearly all paid. But plaintiffs seek review under the "mootness" exception to establish their right to prospective injunctive relief for the fiscal year 2017 contracts which are not yet fully performed. Defendants made no objection to the argument that this case is not moot for these reasons as well, and any such argument is now waived. Even if all plaintiffs had been paid in full for the contract performance in fiscal year 2016—and that is not the case—plaintiffs still have a need for prospective

relief for the contracts they are obligated to perform now, because they face literally the same irreparable injury acknowledged by the Attorney General previously. Plaintiffs on remand would continue to seek prospective relief only—namely, an order to make payments under these contracts. And specific performance is an equitable and not a legal remedy, and plaintiffs seek performance of their right to timely payment, to prevent the irreparable injury alleged in the opening brief—the loss of staff, the loss of contact with client populations, and the degrading of their capabilities to perform the work that the taxpayers expect them to do.

Defendants also claim that in the proceedings below, the trial court found no harm because the plaintiffs are able to withdraw from the contracts. It should be clear, however, that the trial court made no such finding. While the court may have raised the point in a colloquy in oral argument—that statement may be no more than a way of testing an argument, and not the judge's own view. As it is, all facts have to be construed in favor of plaintiffs on a motion under 2-615 or 2-619. As to the ability to withdraw, the contracts in this case specifically deny a right to withdraw—at least immediately. After giving notice, plaintiffs have to continue the contracts for 30 days. There is no such limitation on the right of the defendants to withdraw. Plaintiffs also expose themselves to audits and inquiry—and plaintiffs specifically allege fear of reprisal and loss of future state business if they seek to withdraw. In addition, as alleged in the complaint, in many cases plaintiffs cannot withdraw because of funding arrangements with third parties. Furthermore, plaintiffs justly fear that if they give notice and withdraw, they will lose any opportunity to payment if and when another "Stop Gap" is enacted and limited funds are parceled. So long as no budget is in place, and plaintiffs have no way of knowing what

will happen, a termination may lead to their exclusion from some future temporary expedience. Last and not least, these contracts—which provide no profit to plaintiffs and which they carry out for charitable purposes—require them to inflict terrible harm on recipients. No one wants to close an assisted living facility. Nor do defendants want the plaintiffs to discontinue these contracts—indeed, it may result in greater expense to the state. Instead of diversion programs like Redeploy Illinois, the State would incur the much greater cost of putting the juveniles in detention centers. Or if assisted living programs are dropped, the State would have to pay much greater cost in transferring the seniors now being served by plaintiffs into state-run nursing homes.

Plaintiffs are entitled to relief against a destructive manner of conducting the state business—and the crippling of their ability to provide these desperately needed services.

II. As set out in Count II plaintiffs have suffered an impairment of their contractual right to payment.

Defendants claim that in the absence of an agreed to appropriation, there is no right to payment under provisions like Section 4.1, whether or not the defendants continue the contracts—and there is no "contract" that was ever "impaired." First, the General Assembly *did* appropriate the funds, in June 2015 and June 2016—and if this were a condition, defendants would have still breached Section 4.1 by frustrating a condition in their exclusive control. As argued above, plaintiffs are entitled to read the contract as requiring the defendants not to block the General Assembly from funding of contracts that the defendants want the plaintiffs to perform. *Farnsworth on Contracts*, Section 8.6 at 431 (private party may not use conditions under his exclusive control to bar liability).

Second, Section 4.1 does not support a claim that there was no contract at all—and no obligation to pay—from the mere absence of a prior appropriation. In this case, where Article VIII should not be deemed to bar payment, and where the General Assembly did approve these contracts in various budget bills and in the "Stop Gap" , Section 4.1 does not preclude liability if there has been no termination. In this respect, the holding in *State (CMS) v. AFSCME* is instructive. In that case, the Court found that under a statute—not a mutually agreed upon contract like here—the very *formation* of the contract in the first instance, at least as it concerned raises over a multiyear term—required a specific legislative approval. Section 21 of the Public Employee Labor Relations Act states as follows:

> § 21 *Subject to the appropriation power of the employer*, employers and exclusive representatives may negotiate multi-year collective bargaining agreements pursuant to the provisions of this Act.

5 ILCS 315/21 (emphasis added).

But Section 4.1, which defendants seem reluctant to quote, is far more specific about the contingent nature of the contracts:

> 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.

The first sentence—which does not use the word "appropriation" or "appropriation power" but "availability of funds"—does not say how the "contract" is "contingent." But the lengthy second sentence spells out in detail in what three ways the contract may be terminated. The specificity about a prospective termination—the crafted way in which the "contingency" is spelled out for the security of the parties—would exclude others not mentioned. At no point does Section 4.1 ever imply that a valid contract is not entered in the first place with or without a prior appropriation, and it would violate the mutuality of obligation to say that plaintiffs are bound to meet all the requirements but defendant is not. If all these contracts were illusory from inception, the State could not operate as reliable business partner. Just as a matter of public policy—not to mention the judicial policy of avoiding forfeitures—the defendants' interpretation has to be rejected.

But the plain language is enough as well. The key words here are the following: "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 defendants are excused from further payment only after the notice is given, they are not excused from payment before notice is given. Furthermore, by definition, or simple logic, the defendants have a power to terminate only an *existing* contract, not an illusory one—quite unlike the situation in *State (CMS) v. AFSCME* (*State of Illinois (Central Management Services) v. AFSCME*, 2014 IL App (1st) 130262, rev'd on other grounds 2016 IL 118442), where the Court found that the terms of a CBA never took effect at all.

As defendants interpret it—that there was no contract at all, and no liability prior to giving notice—this Court would have to read in language that is not there, and regard the rest of Section 4.1 as surplus. The interpretation offered by plaintiffs gives meaning

and effect to all parts of Section 4.1, and of course, such an interpretation is to be preferred. However, even if the defendants were correct in their interpretation—and they are not—they would still be liable because the defendant officers by their own voluntary act blocked the General Assembly funding. *See Farnsworth on Contracts*, Section 8.6 at 431 (private party may not use condition under his exclusive control to bar liability). Defendants could have used a line item veto to permit the funding of the contracts.

Even to this very day, defendants have not given notice under Section 4.1. There is no attempt in defendants' brief to explain why they have not done so. The fact is, the defendants do regard these contracts as binding, and expect plaintiffs to meet a myriad of conditions in performing them. *All of the contracts—certainly in fiscal year 2016 and currently in fiscal year 2017—are being fully performed by plaintiffs, and the benefit of performance is being accepted without question by defendants*. Furthermore, this claim that the contract is illusory is even more out of line because it fails to explain why defendants—including the Comptroller—have paid either the entire amount or nearly all of the amount of the contracts for fiscal year 2016. In doing so, the defendants and Comptroller had to reallocate funds designated for fiscal year 2017. The defendants and Comptroller would not—and should not—have taken these extraordinary steps to fund the contracts if they thought that they were illusory.

Defendants also rely on Article VIII and the State Comptroller Act to claim that, despite the language of Section 4.1, plaintiffs' contracts are invalid without appropriations. These citations are similarly unavailing. First, *State (CMS) v. AFSCME*, 2016 IL 118422, at least implies as much. The Court required a legislative appropriation for that particular CBA based on the language of Section 21 of the Public Labor

Relations Act. But the majority was emphatic that other challenges under the Contracts Clause might be decided in a different manner. Finding it was an open question, the Court stated:

> 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). As Article VIII and the State Comptroller Act apply to *any* payment by the State, the Court's statement that it was not deciding claims of impairment of other contracts implies that Article VII and the State Comptroller Act alone do not control. The Court made this much clear about any future decision: the issue of impairment depends on the *wording of the contract*. And Section 4.1 makes clear that there is a binding contract unless the defendants give notice of termination.

Second, the defendants' point about Article VIII is that the Constitution vests the power to make appropriations *entirely* in the legislative branch, and that any decision by this Court or the Executive to make a payment would improperly invade the General Assembly's authority. But the General Assembly did make appropriations for plaintiffs' contracts—twice.

Finally, the State Comptroller Act does not say as much as defendants suggest. It is decidedly different than Section 21 of the PLRA. It does not limit the Executive's authority to enter into contracts and obligate the State to pay, while the PLRA expressly does that. Instead, the State Comptroller Act limits the Comptroller to paying when there is an appropriation or "other obligational or expenditure authority." 15 ILCS 405/9(c). Not only did the General Assembly twice make appropriations, but the Executive has

indisputedly obligated the State to pay on these contracts. And perhaps more importantly, there is no question that the Comptroller can rely on expenditure authority provided by a court order, as she is currently doing in a number of other cases. The Act exists to make sure the Comptroller does not pay money the State does not have, but the defendants are not making arguments about a lack of revenue. That is a question to answer once a remedy has been provided by the Court, not a limitation on the remedy the Court can provide.

In short, unlike in *State (CMS)*, as the defendants and the General Assembly have both recognized, and as the plain language of the contracts confirms, these are valid contractual obligations. However, that does not mean that this action is "founded" upon contract, or at least within the meaning of the cases cited by defendants. This not a case about breach of contract in the ordinary sense. Rather, this is a case where the defendants have—contrary to Article I, Section 16—eliminated all remedies that would exist *if* the plaintiffs brought an ordinary breach of contract case. The defendants have argued that since they vetoed the appropriations for these contracts, they have no *constitutional* authority to pay. Furthermore, this principle—that plaintiffs cannot bring a claim "founded on contract"—can hardly bar a constitutional claim. The rule is set forth in a statute, and therefore cannot logically or properly bar a whole class of serious constitutional breaches.

The Illinois Supreme Court has "long recognized the presumption that the State, or a department thereof, cannot violate the Constitution and the laws of the State." *Herget Nat'l Bank v. Kenney*, 105 Ill. 2d 405, 411 (1985). It would be bizarre to hold otherwise, for it would mean that when the 1970 Constitution abolished sovereign immunity, it gave

the General Assembly the power to reinstate it *through statute* in a form that allows the State to ignore the Constitution itself. *See id*. (allowing a claim for damages against a State defendant in a takings case because to hold otherwise would allow the immunity statute to supplant the constitutional requirement that just compensation be determined by a jury). While statutory sovereign immunity may bar a *statutory* claim "founded upon contract," it cannot properly apply to a constitutional claim. The mere fact that a claim concerns a contractual relationship does not mean that it is "founded upon contract" for purposes of determining the application of the Court of Claims Act. *See Senn Park Nursing Ctr*. *v*. *Miller*, 118 Ill. App. 3d 733, 745-46 (1983), *aff'd*, 104 Ill. 2d 169 (1984). In any event, if such an argument were valid for a constitutional claim, it would lead to the absurd result that no one could ever challenge "an impairment of contract" under the so-called "Contracts Clause," i.e. Article I, Section 16. By definition a claim for impairment of contract is founded upon contract but that does not remove Article I, Section 16 from the Illinois Constitution.

To sum up: the plaintiffs have alleged three types of impairment in Count II:

First, the failure to put a budget in place as required by Article VIII unlawfully jeopardizes the security of every contract in this state. As set out in *State (CMS)*, every contract with the State incorporates existing law, and plaintiffs were entitled to the security of a budget providing a fixed sum of money which would allow them to determine whether they can be paid. Without such a budget in place, plaintiffs have no security of payment—or of knowing whether they will be paid. The impairment of a fund to ensure security of payment is an impairment of contract, as the U.S. Supreme Court held in *United States Trust Co*. *v*. *New Jersey*, 431 U.S 1 (1977). Plaintiffs and all who do

business with the State are entitled to have a responsible spending plan in place that at least arguably comports with Article VIII, and defendants have impaired every contract by not having such a budget in place.

Second, the "Stop Gap" specifically was a legislative impairment—a law affirmatively impairing a contract. In Public Act 99-524 the General Assembly and the Governor recognized the validity of all these contracts, and indeed, the Comptroller has since paid them. The "Stop Gap" removes any doubt that the General Assembly authorizes, ratifies, or acknowledges the contracts. This is so not just in fiscal year 2016 but now in fiscal year 2017 because the "Stop Gap" covers contracts in both fiscal years. But in both cases the "Stop Gap" changes the contract prices of both: (1) the fiscal 2016 contracts already performed, and (2) the fiscal 2017 contracts which had been entered and existed in writing or orally by the time the "Stop Gap" was enacted on June 30, 2016. In effect, the "Stop Gap" blesses all the contracts but leaves the Governor free to pick which ones to fund, and which ones to partly fund, without any standard for the Governor to use.

Aside from being an impairment, the "Stop Gap" is also, as plaintiffs allege in Count III, a denial of due process, in violation of Article I, Section 2 of the Illinois Constitution. No one has an opportunity to be heard, and there is no fundamental fairness—or meaningful standards from the General Assembly—as to which contracts will be paid.

Third, the mere lack of appropriation—and it should be emphasized that the General Assembly itself did try to appropriate the money—is an impairment by itself here because the plaintiffs have no legal remedy for nonpayment of the contracts that

were sanctioned by the "Stop Gap" . That is the consequence of the State Lawsuit Immunity Act, in tandem with the policy of the Court of Claims as a legislative court. The Lawsuit Immunity Act on its face does not impair any legal remedy for non-payment, and is facially constitutional. But the Court of Claims, which is a creature of the General Assembly and not part of the judicial branch, does not provide a legal remedy, contrary to the implication in the Court of Claims Act. Because the Court of Claims has a policy of not paying claims without a full appropriation—and the General Assembly is responsible for this policy, as it controls this particular administrative court—then the General Assembly has maintained a scheme that impairs the legal remedy for nonpayment. The effect is to deny a legal remedy for nonpayment—in violation of Article I, Section 16, which applies especially to self interested impairments of contracts with the State. *United States Trust Co*., 431 U.S. at 26. In this case, even though these contracts are fully performed and recognized as valid, plaintiffs still have no remedy for no payment. This is the classic impairment described by Justice Holmes, as summarized by the Seventh Circuit in *Horwitz-Matthews Inc*. *v*. *City of Chicago*, 78 F.3d 1248, 1250-51 (7th Cir. 1996).

III. Plaintiffs have properly alleged a denial of equal protection and due process, in violation of Article I, Section 2.

Defendants argue in a footnote that Plaintiffs have waived or failed to appeal their claims that defendants violated equal protection and due process. But, plaintiffs did no such thing. They made arguments about both in their opening brief. Moreover, Defendants have responded to those arguments in their own response brief.

A. Equal protection

Defendants claim that since plaintiffs are not a "suspect class," and have no "fundamental right," they are subject only to a "rational basis" for the denial of the millions of dollars due to them. But defendants do not offer a "rational basis"—a considered judgment of the General Assembly—for paying billions of dollars to State employees without an appropriation under Article VIII while refusing to pay plaintiffs. Indeed, defendants apologize for the disparate treatment of plaintiffs as not "intentional." If not intentional, it can hardly be rational. And indeed, the General Assembly has made no judgment, much less a considered one, as to why some are being paid and others are not. It is true enough that the Attorney General recently sought to dissolve the order of the St. Clair County Court in *State v. AFSCME* and is now seeking to overturn the Fifth District's decision in the same case. *AFSCME v. State,* 2015 IL App (5th) 150277-U. But the Attorney General is acting in that case in an independent capacity, on behalf of "the People of the State of Illinois" and not the defendants. The *defendant Governor and other defendants* are not appealing—in fact, the Governor's own counsel opposed the Attorney General's motion. Refusing to join with the Attorney General in overturning the order, the defendants in this case—including the Comptroller—continue to pay the State employees every cent due to them without a murmur every pay day. The defendant Governor has made at least one statement that he wishes to continuing paying the State employees, without an appropriation, even if Attorney General were to succeed in overturning the St. Clair court's order on appeal. The court in St. Clair County denied the Attorney General's motion on behalf of the People—a motion that the *defendants* did not join—and issued a rebuke, noting the chaos it would cause in the state.

When the Attorney General or defendants or both tell this Court that the discrimination is not intentional, it is conceding plaintiffs' point—there is no rational basis for it. Nor is the disparate treatment limited to the outcome of one case—or just the way in which State employees are being paid while plaintiffs are not. This Court can take judicial notice that other vendors—indeed, most vendors—are being paid under court order and in the absence of a legislative appropriation, while plaintiffs are not. To be sure, the courts find that in particular cases the payments are mandatory under state or federal law, whether there is an appropriation under Article VIII or not. But no one would seriously suggest that the General Assembly had previously made a rational basis decision as to which payments require approval under Article VIII and which do not. In the end, Article VIII is being applied in a haphazard and inconsistent way, so that only plaintiffs who serve unpopular or powerless groups end up not being paid. It is not enough for the Attorney General to say that every court can make its own judgment when the outcomes are so disparate and arbitrary. And while plaintiffs are not a traditional suspect class, they do serve the indigent, the poor, the homeless, and other powerless and often unpopular or stigmatized groups that do receive special protection from the Courts. "[A] bare…desire to harm a politically unpopular group" is not a legitimate state purpose for disparate treatment. *Department of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). A motion to dismiss is inappropriate when there is an issue of intent or motive—for the defendants—albeit not the Attorney General independently—had no principled reason for their willingness to treat plaintiffs in such a different manner than other vendors. Furthermore, the lower court gave no rationale for its decision and made no findings of

fact as to whether there was an improper motive that required at least an intermediate standard of review.

If this Court rules in favor of plaintiffs, the defendants are free under Section 4.1 to revoke the contracts—an option that defendants refuse to use, because they know plaintiffs cannot or dare not withdraw. And if defendants continue to accrue debts, then it is their own voluntary decision, not the decision of this Court. What this Court should not permit is to allow defendants to continue with this abusive way of running the government.

B. Due Process

Plaintiffs in this reply brief have only mentioned the due process claim in the argument set out above and rely here on the argument already made in the opening brief. As set forth in that brief, there is no legally principled rationale—no fundamental fairness—in the priority of payment. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). Plaintiffs are at a loss to determine how the Comptroller is making payments and why funds in various accounts are restricted and unavailable for payment of legitimate claims against the State. Such a serious denial of "process" should not have been dismissed, especially without any indication of the lower court's rationale.

Conclusion

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

Dated: March 10, 2017

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, and the certificate of service, is 6,554 words.

Dated: March 10, 2017

Respectfully submitted,

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Certificate of Filing and Service

The undersigned attorney certifies that on March 10, 2017 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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