IN THE CIRCUIT COURT OF THE 20TH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

Caritas Family Solutions, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. 17-CH-112
v.	)	
	)	The Honorable Robert P. LeChien
James Dimas, Secretary of the Illinois Department of Human Services, in his official capacity, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION AND RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Introduction

The defendant officers offer no argument or evidence to oppose plaintiffs' evidence that they are suffering irreparable injury as a result of the defendants' failure to lawfully and reasonably conduct the business of the State. Yet they seek a stay or a dismissal of plaintiffs' complaint on the ground that similar claims concerning different contracts for different services are currently on appeal elsewhere. That result would neither comport with Section 2-619(a)(3) of the Illinois Code of Civil Procedure, nor would it be just.

The defendant officers argue that plaintiffs' claims are barred by statutory sovereign immunity because they are "founded on contracts." Yet that argument has already been rejected by this Court in AFSCME, et al. v. Rauner, et al., No. 15 CH 475. Moreover, it is effectively an argument that no plaintiff could ever sue the State for violation of Article I, Section 16 of the Constitution, the Contracts Clause. The defendants argue that plaintiffs must seek their remedy in the Court of Claims, yet they have expressly conceded that plaintiffs have no remedy there. Dismissal on this ground would not comport with the Illinois Constitution, it would allow the defendants to evade liability for conducting the business of the State in an unlawful and unconscionable manner, and it would not be just.

The defendants argue that plaintiffs' claims lack merit because their contracts were "subject to appropriations." They essentially ignore that it was incumbent on the defendants to invoke this contingency and suspend or terminate the contracts. Instead, they held plaintiffs to them; they held plaintiffs hostage to the political battle the Governor was waging with the General Assembly. The defendants seek an interpretation of the contracts that allows the State to enter into contracts that bind the plaintiffs, but not the defendants. And they seek refuge in the Article VIII of the Constitution, which requires the State to have a budget and the General Assembly to make appropriations, even as the Defendant Governor is blocking the General Assembly's efforts to appropriate funds and carrying on the business of the State without a budget. They make this argument just two short months after the Governor's counsel told this Court that the State should be required to continue paying State employees without appropriations. To dismiss on this ground, the Court would have to ignore the plain contract language and ignore the complete breakdown of the other two branches of the State's government. That result would not be just.

Plaintiffs have effectively been "floating" the State—loaning it money to allow it to continue to function while the government is in a state of dysfunction. Plaintiffs are providing services to the most vulnerable populations in this State, preventing the State from having to bear that burden while political fights drag on. The defendants do not dispute that plaintiffs should be paid. The defendants concede that plaintiffs have no other remedy available to them. Yet while virtually everyone else owed money by the State is being paid, defendants ask this Court to turn away from this problem and allow plaintiffs to remain hostages, barely kept alive by a Stop Gap so that they remain useful as hostages. Plaintiffs seek only what is just, and ask that the Court deny the defendants' motion for summary judgment and grant the plaintiffs' motion for a preliminary injunction.

Argument

I. The Court should keep jurisdiction and decide the motion for preliminary injunction.

Because the case of Illinois Collaboration on Youth, et al. v. Dimas et al., No. 16-CH-6172 (Cir. Ct. Cook Cty.) (hereinafter "ICOY"), and the instant case arise from separate transactions—contracts separated by a year, for different services—there is no basis to dismiss this case under 735 ILCS 5/2-619(a)(3) and certainly not to stay it with so many organizations on the verge of collapse. Under the Supreme Court's test for dismissal under § 619(a)(3) as set out in *A.E. Staley Mfg. Co. v. Swift & Co.*, 845 Ill. 2d 245 (1980) and cited extensively in *Combined Ins. Co. v. Certain Underwriters*, 356 Ill. App. 3d 749 (1st Dist. 2005), the question is not whether the cases involve the same legal theories or issues, but whether they arise from the same transaction or occurrence. *Id.* at 753-54. The test as to what is or is not the "same transaction" is ultimately one of common sense. *Id.* And common sense is enough to find that a case involving fiscal year 2017 contracts—which have largely been paid—cannot arise from the same transaction as fiscal year 2016 contracts—which have now largely been paid. An entire year has elapsed between the entry of one set of contracts and the entry of the other. Nor do they involve the same subject matter, i.e., the same services rendered in the same period.

Moreover, as *Combined Insurance* makes clear, even if this case did arise out of the same transaction as the ICOY case, Section 2-619(a)(3) does not mandate dismissal or a stay—it gives the Court discretion to allow the case to proceed. *Id.* At 754. Indeed, *Combined Insurance* is a curious case for defendants to cite, since the appellate court found an abuse of discretion in the stay. There is an appeal pending in the ICOY case, on which the Appellate Court recently heard arguments. But, though the plaintiffs-appellants in that case believe it would be improper, that appeal may at some point be dismissed as moot as payments continued to be made on the FY2016 contracts as a result of the Stop Gap. More importantly, even if the appeal is successful, it would not resolve plaintiffs' claims in this case, which concern different contracts for a different fiscal year. Some of the plaintiffs here are not even party to that case, and those that are did not seek relief on FY2017 contracts—most of which had not yet been entered when they filed their complaint.

Even assuming the decision in the ICOY case would resolve this case, that decision may not come for months, and plaintiffs are suffering irreparable injury *now*. They not only allege irreparable injury from violation of their constitutional rights, but plaintiff organizations may have to cut programs that cannot easily be restored—or indeed, their own organizations may collapse. They have laid off staff that they may never rehire. They may lose contacts with vulnerable clients. Plaintiffs submit that the irreparable injury they are suffering now from the non-payment of the fiscal year 2017 contracts is greater than that suffered at the time they filed or at the time the ICOY case on the fiscal year 2016 contracts was dismissed. They are deeper in the hole after not one but nearly two fiscal years without a budget. Furthermore, the breakdown of government which was the basis of their claim in ICOY is now much further advanced and the network for providing human services is in a much worse condition. Nor has there been any true resolution of the issues they raise.

Finally, it is also impossible to know on what grounds the Circuit Court in Cook County dismissed ICOY v. Dimas as there was no written opinion, or even a statement of reasons from the bench. One simply does not know if the Circuit Court would have reached the same decision or conclusion if it had the case now—when there is no Stop Gap at hand. Furthermore, it is very likely there will not be a Stop Gap, and the Governor has said he will not agree to another Stop Gap so that the destruction of contract rights averted in ICOY will now take place if relief is denied here.

Because of the importance of the issues and the lack of any judicial clarification of these issues and the continuing irreparable injury, the court should not exercise this discretion to stay this case. The plaintiffs, and the vulnerable people they serve, deserve a resolution.

II. Sovereign immunity does not apply because plaintiffs have stated claims that defendants acted unconstitutionally and *ultra vires*.

With no better arguments defendants again claim the defense of sovereign immunity on both the "officer exception" claim and the impairment claim. With respect to Count I, raising the defense of sovereign immunity at the outset just begs the question of whether the defendant officers have acted illegally. The Illinois Supreme Court and Illinois Appellate Court have made clear that the defense of sovereign immunity—a statutory defense—will not apply if the defendant officers in this case have breached the constitution or acted *ultra vires* or in excess of their authority. Of course in Count II the plaintiffs do allege a breach of the contracts clause, Article I, section 16, which prohibits the legislative impairment of the obligation of contracts. It is self-evident that the State Lawsuit Immunities Act cannot—by mere legislative fiat—insulate the State actors from legislative impairment of contract. If it did—and it does not—the State Lawsuit Immunities Act by itself would be just one more unconstitutional legislative impairment of contract, or a statute that facilitates one.

The defendants, by their counsel, expressly stated this logical implication of their theory in the argument in the AFSCME v. Rauner case. In the transcript attached to the defendants' brief as Exhibit F, counsel for the defendants stated as follows:

> [P]laintiffs raise one legal theory in this case, one legal theory, an impairment of obligation of contract claim. [Counsel for AFSCME] is absolutely correct that the first element of the impairment of contract analysis is is there a contract, is there a contract? But once you've answer[ed] that element and once you realize that there is a contract and you're suing the State based upon the contract this case is outside of this court's jurisdiction.

Def. Br. Ex. F at 38:15-23. Defendants argued that any such claims must be brought in the Court of Claims, as they do here. But the defendants have also recently conceded, in the oral argument in the ICOY appeal, that plaintiffs have no remedy in the Court of Claims. In response to the Appellate Court questioning whether the defendants agreed with the plaintiffs that the Court of Claims could not or would not provide the plaintiffs any relief, counsel for the defendants stated:

> I will agree with them and I think it's correct that the Court of Claims has a policy of not issuing awards, which are recommendations to the legislature to appropriate funds for those awards, where there has not been an appropriation. I think that's correct. That said, that doesn't mean that the unavailability of relief in the Court of Claims either means that this case falls outside of sovereign immunity, or that it constitutes an unconstitutional impairment of contract.

See Audio Recording of Oral Arguments in ICOY, et al. v. Dimas, et al., No. 1-16-2471, (Ill. App. Ct. May 4, 2017), at 28:08.[1] In other words, defendant's argument comes down to this: by passing the State Lawsuit Immunity Act and the Court of Claims Act, the General Assembly rendered it impossible for any plaintiff to ever sue the defendants for violation Article I, Section 16 of the Constitution.

Plaintiffs have also pleaded a claim that the defendant officers are liable because they have acted *ultra vires* and abused their authority. The *ultra vires* act alleged here is *not* a "simple breach of contract" as in cases like *Smith v. Jones* or *Ellis* or *Brucato v. Edgar*. What plaintiffs challenge in Count I is that the defendants did not have the power even to enter and continue

[1] Available at http://multimedia.illinois.gov/court/AppellateCourt/Audio/2017/1st/050417_1-16-2471.mp3.

these contracts so long as the Governor was using his legislative veto to stop the funding of these contracts. Or put another way: the Governor exceeded the powers of his office by acting in his executive capacity to enter and continue contracts at the same time that he was disaffirming or blocking funding for those contracts in his "legislative" capacity—frustrating the very action by the General Assembly that he now claims is a prerequisite or condition precedent to plaintiffs' pursuit of their claims.

There is also an element of unconscionability in this practice, since the defendants were holding the plaintiffs to carry out contracts from which the plaintiffs could not easily or practically withdraw—and had even partially performed. The plaintiffs cannot readily withdraw from these contracts for at least four reasons. First, the contracts themselves forbid such withdrawal unless plaintiffs perform—however destitute or short of funds—for another 30 days without pay. Second, as the Attorney General has conceded in the ICOY case, the plaintiffs that do try to withdraw are likely to lose any partial payment that may come about later through a second "Stop Gap" or other expedient. *See* Appellee's Brief, ICOY, et al. v. Dimas, et al., No. 1-16-2471 (1st Dist.), attached hereto as Exhibit 1, at 24 ("Plaintiffs' continued performance made it possible for them to be paid for the services they rendered if appropriations were eventually forthcoming…"). In other words, by withdrawing, plaintiffs risk losing everything. Third, some of the plaintiffs have to perform because of commitments made to foundations or other organizations that have matched the state share or provided partial funding. Finally, the plaintiff organizations justly fear being blacklisted from future contracts with the state.

The defendants have unconscionably exploited plaintiffs then by entering and continuing these contracts and holding plaintiffs to them, because plaintiffs cannot easily withdraw. The defendants are making the plaintiff organizations "float" the state by effectively lending the State money to continue to provide human services during the budget impasse. This is more than a simple breach of contract—it has all the elements of an unfair trade practice as set forth by the Illinois Supreme Court in *Robinson v. Toyota Motor Credit Corp.*, 201 Ill 2d 403, 417-18 (2002).

By comparison, in cases like *Leetaru* and *Senn Park*, where the courts have applied the "officer suit exception," the illegal or *ultra vires* acts seem almost trivial by comparison. In *Leetaru* the University of Illinois just failed to follow its own internal procedures relating to a research grant. In *Senn Park* the Director of the Department of Public Aid had used the wrong formula to calculate a COLA increase.

This Court disposed of virtually the same sovereign immunity argument in the AFSCME v. Rauner case, noting that "there is a difference between an officeholder's exercise of duties, constitutional duties, and the contractual obligations of the State of Illinois." Def. Br. Ex. F at 28-29. Defendants attempt to cite this portion of the transcript in that case for the proposition that this case is different because it is "strictly a contract issue between the State and a vendor." Def. Br. at 16. This is a disingenuous reference to the Court's comments. The Court was plainly not distinguishing between "a contract issue between the State and a vendor" and a "contract issue between the State and a public employees' union." It was distinguishing between a case concerning "strictly a contract issue" and one concerning a state officer's breach of his or her constitutional duties. For all the reasons set forth above, this case, like AFSCME v. Rauner, concerns the latter.

Thus, just as the Court rejected the defense of sovereign immunity in that case, the Court should do the same in this case.

III. Plaintiffs have stated a claim for impairment of contract in Count II.

Defendants next argue that plaintiffs have not stated a claim for impairment of contract. Their primary argument is that because plaintiffs' contracts state that they are "contingent upon and subject to the availability of funds." But, as set forth in the complaint and in plaintiffs' opening brief, this argument ignores that the contingency provision defendants quote continues to state that it is incumbent on defendants, in the event of the unavailability of funds, to terminate or suspend the contracts. The defendants have not done so. Instead, the defendants have continued the contracts from which the plaintiffs are effectively unable to withdraw, as set forth in plaintiffs' opening brief and above.

The defendants' only response to this argument is to urge the Court to interpret this termination clause to permit the defendants to escape liability without terminating the contracts. In essence, defendants argue that they can have plaintiffs perform, while defendants are able to walk away from all of their contractual obligations. This is precisely what the Contracts Clause prohibits. This is also what makes this case dramatically different than *State (CMS) v. AFSCME*, 2016 IL 118422. In that case, the Court held that raises in multiyear collective bargaining agreements were explicitly subject to appropriations under Section 21 of the Public Labor Relations Act (PLRA). On this basis, it struck down the award of an arbitrator that gave AFSCME's members raises without any approval by the legislature. The result was that AFSCME's members would not get raises so long as the General Assembly failed to approve them. But the Court was careful to limit its holding as follows:

> Finally, we disagree with the dissent that our decision creates uncertainty as to the State's obligations, generally, under its contracts. 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 subject to legislative appropriation without offending the contracts clause is not before us.

Id. at ¶ 54. Here, the State defendants offer an interpretation of contracts not covered by Section 21 of the PLRA that would allow the State to completely avoid any obligation whatsoever on its contracts, even after requiring the plaintiffs to perform their obligations under the contracts in their entirety. They ask the Court to render the State's obligations under its contracts entirely illusory. This is not an overstatement of defendants' case. In the oral arguments in the ICOY appeal, counsel for the defendants argued:

> The plaintiffs have said that these contracts have been validated and accepted by the General Assembly when they enacted the Stop Gap budget. Well, they were always valid. There's no doubt that these were legally valid contracts, just like any contract with the State that's even subject to sovereign immunity. It's a valid contract, but it doesn't mean that it's enforceable in court.

Audio Recording of Oral Arguments in ICOY, at 29:22. In other words, defendants argue that plaintiffs can be held to their obligations under these valid contracts, even as they are being deprived of any remedy for enforcing the defendant's obligations. But, as plaintiffs set forth in their opening brief, this deprivation of any remedy—any opportunity to enforce a contract when breached—is precisely what makes the defendants' actions in this case an impairment of the obligation of contracts, rather than a simple breach of contract. Pl. Br. at 20-21 (quoting *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1251 (7th Cir. 1996)).

The Court should not take the defendants' invitation to extend the holding of *State (CMS) v. AFSCME.* First, this Court already refused to apply *State (CMS) v. AFSCME* in the AFSCME v. Rauner case on the grounds that the tolling agreements extending the multiyear collective bargaining agreements were not explicitly governed by Section 21 of the PLRA and did not require the problematic raises over the course of multiple years. That same logic applies with even more force here. Plaintiffs' contracts are not even arguably governed by Section 21.

It was no accident that the Court in that case sought to avoid "creating uncertainty as to the State's obligations, generally." Under the lead case applying the federal Contracts Clause, *U.S. Trust v. New Jersey*, 431 U.S. 1 (1977), the Court rejected the notion that an unconstitutional impairment took place only when the State effected a "total destruction" of the contract remedy, and held that merely reducing the security of payment by the State amounted to an unconstitutional impairment. Here, the State defendants are arguing that they should be allowed to eliminate all security of payment under their contracts.

The defendants argue that they have not destroyed the remedy, or at least any certainty that there will be a remedy, because plaintiffs can seek a remedy in the Court of Claims. But, as set forth above, the defendants know this not to be true. As plaintiffs set forth in their opening brief, and as defendants recently acknowledged at long last in the ICOY case, they have no remedy in the Court of Claims without an appropriation. In other words, plaintiffs' only hope that they will ever be able to even sue the State for breach of their contracts is dependent on the State someday—perhaps long after the conclusion of the fiscal year, and likely after many more of the plaintiffs have shut their doors permanently—passing appropriations that the defendant Governor does not immediately veto as he has done in the past.

Defendants also claim that the Appropriations Clause bars plaintiffs' claim that their contracts have been unconstitutionally impaired. They rely, in part, on *AFSCME v. Netsch*, 216 Ill. App. 3d 566 (4th Dist. 1991). Again, the Court rejected that same argument in AFSCME v. Rauner. In doing so, the Court pointed out that "*Netsch* did not preclude the courts from…intervening…where the legislative and executive branches failed to perform their obligations." Def. Br. Ex. F at 22. Specifically, the *Netsch* court stated:

> While we now hold that the issue of general breakdown of government is not before us, we are not saying that the courts are barred from intervening in the event that the legislative or executive branches fail to perform their constitutional functions.

216 Ill. App. 3d at 569.

Defendants acknowledge this in their brief, but claim that this distinction of *Netsch* in AFSCME v. Rauner cuts in *defendants'* favor. Defendants argue that while there was a complete breakdown in government in that case, there is none here because the Stop Gap provided the plaintiffs some funding. In other words, defendants take the untenable position that: (1) in July 2015, at the very beginning of the budget impasse, there was a complete breakdown in government because there was the potential in the future for state employees to go without full pay for work they had not yet performed; but (2) in May 2017, when the other two branches of State government have utterly failed in their obligation under Article VIII to have a budget in place for almost two entire fiscal years, resulting in months of work already performed by plaintiffs going uncompensated, there has not been a breakdown.

And defendants stake this position on the passage of a Stop Gap bill that was itself an impairment of the obligation of contracts that affirmed plaintiffs' fiscal year 2017 contracts but ensured that they would not be paid for at least half of the services provided under those contracts. The Stop Gap bill acknowledged the existence of the obligations to human services providers in fiscal year 2017, but provided far less money than was needed to pay those obligations. For one thing, it provided funding only for half of the fiscal year, through December 31st, 2016. Secondly, it gave the defendants authority to use this fiscal year 2017 money to pay the outstanding obligations on fiscal year 2016 contracts, thereby ensuring there would not even be sufficient funds to cover plaintiffs through December 31. Third, for some of plaintiffs' contracts, specifically those that provide services to victims of domestic violence, it provides no state funding at all for the entirety of fiscal year 2017. Contrary to defendants' position, if the AFSCME v. Rauner case fell within *Netsch*'s caveat regarding a "general breakdown" of State government, this case most definitely does. After all, in the words of defendants' counsel in the ICOY appeal, "The current budget impasse in this State I believe is unprecedented." Audio Recording of Oral Arguments in ICOY, at 37:43.

And again, if the Appropriations Clause alone barred plaintiffs' claims, the Court in *State (CMS)* would not have so explicitly stated that its decision rested on Section 21 of the PLRA and the type of contract involved. The same goes for the Comptroller Act. If the Appropriations Clause or the Comptroller Act barred any claim that required payment without an appropriation, even a claim founded on another constitutional provision like the Contracts Clause, there would be no reason for the Court to look to Section 21 and no basis for the Court's limitation on its holding. Moreover, the *Jorgensen* and *Hamer* decisions cited by plaintiffs would be bad law, as would this Court's decision in AFSCME v. Rauner. The fact is that the *State (CMS)* case was leaving open the possibility for a suit like this one in the unfortunate instance where the State truly attempted to walk away from all of its obligations—or, in the words of the *Netsch* opinion, when there was a general breakdown of government.

For this reason, the defendant Governor's reliance on the Appropriations Clause in Article VIII is actually quite hypocritical. The Governor twice blocked the General Assembly from passing appropriations to pay the plaintiffs in fiscal year 2016, even as he continued their contracts. He thereby forced the passage of the Stop Gap budget, which explicitly wrote down the State's obligation to pay on plaintiffs' fiscal year 2017 contracts, thereby impairing them. He also opposed the Attorney General's effort to lift the preliminary injunction requiring continued payment of state employees in AFSCME v. Rauner. And he, along with the General Assembly, has entirely failed to meet the requirements of Article VIII that the State have a budget in place before it begins obligating the State to pay for services. He should not be heard to then use Article VIII as a defense allowing him to avoid the obligations that he has incurred and that he has stopped the General Assembly from funding.

The plaintiffs have thus stated a claim that defendants have unlawfully impaired the obligation of contracts and the Court should deny defendants' motion to dismiss the claim.

IV. Plaintiffs have stated claims for violations of equal protection and due process.

Defendants next argue for dismissal of plaintiffs' due process and equal protection claims. Defendants move for dismissal of the due process claim on three grounds. The first is simply a reiteration of their arguments regarding the interpretation of Section 4.1 of the contracts. Defendants argue that plaintiffs were not deprived of property because they had no right to payment without appropriations in the first place. Plaintiffs stand on their arguments on this point above. Second, defendants argue that plaintiffs are provided due process for any deprivation of property because they may pursue a claim in the Court of Claims. Of course, as noted above, defendants have conceded that the Court of Claims process is not really available to plaintiffs—or at least that it would be a futile and meaningless process to pursue. Finally, defendants claim that the proper remedy for such a violation would be not to provide plaintiffs with payment, but with a fair hearing that allows them to contest the legitimacy of defendants failing to pay them. Of course, that is precisely the process that plaintiffs are seeking here, which they claim a right to pursue under the officer suit exception to sovereign immunity. If plaintiffs are right that there is no legitimacy to defendants deprivation of their property rights, there can be no question that they are entitled to a restoration of those rights.

Defendants argue that plaintiffs' equal protection claims must fail because there is a "rational basis" for treating plaintiffs differently than the countless others that the State is currently paying without appropriations. Defendants suggest that other constitutional provisions and federal legal requirements distinguish between plaintiffs and many of the Stat's other creditors. But defendants acknowledge that the ongoing payment of State employees is a "meaningful departure" from this purportedly rational basis for paying others while denying payment to plaintiffs. Defendants argue that that departure finds its own rational basis in this Court's ruling, which was based on the notion that the tolling agreements in that case were not governed by Section 21 of the PLRA. Defs Br. 28. Of course, this distinction does not get defendants anywhere, as plaintiffs contracts are not governed by the PLRA at all. For all of the reasons set forth above, when it comes to the logic underlying the Court's ruling in *AFSCME v. Rauner*, plaintiffs' contracts are indistinguishable from those at issue in that case. That leave the defendants without any rational basis for distinguishing between the treatment of plaintiffs and the treatment of the State's employees, compelling a ruling in plaintiff's favor on their equal protection claims.

V. Plaintiffs meet all of the requirements for obtaining a preliminary injunction.

The parties agree that in order to obtain a preliminary injunction, plaintiffs must show: (1) a clearly ascertained right in need of protection; (2) irreparable harm in the absence of injunctive relief; (3) no adequate remedy at law; and (4) likelihood of success on the merits.

As in the ICOY case, the defendants offer no argument or evidence to refute plaintiffs' showing of irreparable harm. They waive any such argument, stating "Defendants do not dispute or underestimate the serious hardships that Plaintiffs and their clients have suffered as a result of the State's budgetary crisis." Def. Br. at 31. And as set forth in plaintiffs' opening brief, the Attorney General has publicly affirmed that organizations like the plaintiffs are suffering irreparable harm.

Defendants simply incorporate their arguments in support of their motion to dismiss in order to refute plaintiffs' motion on the first and fourth factors. Plaintiffs therefore incorporate their arguments above in response to that motion into their reply on those factors. Finally, defendants argue that plaintiffs have an adequate remedy at law because they may seek damages in the Court of Claims. But, as set forth above, the defendants have recently acknowledged in the Appellate Court that no such remedy is actually available to plaintiffs.

The only additional argument offered by defendants is on the balance of the harms. Defendants argue that the State will suffer irreparable injury if a preliminary injunction is entered. The defendants claim that paying the plaintiffs will require them to stop paying others because there are not sufficient funds in the States' General Revenue Fund "to pay the amounts Plaintiffs ask to be paid in the time that Plaintiffs seek to be paid." Essentially, the defendants are suggesting that an order from this Court granting the plaintiffs' motion would bankrupt the State. The defendants offer only a general reference to the Comptroller's website in support of this contention. They do not offer figures to back it up, or any explanation as to why they could not pay plaintiffs out of other funds. It is entirely unclear whether the problem defendants are alluding to could be resolved by requiring payment on a slightly delayed schedule or by some other fine-tuning of the Court's order. Moreover, given that the State is spending billions of dollars every year on all kinds of other obligations, it seems unlikely that the funds required to pay plaintiffs, which amount to only tens or perhaps hundreds of millions of dollars, will force the State into bankruptcy. In any event, the defendants have completely failed to offer facts in support of this argument, and the Court should reject it.

In fact, denying plaintiffs' the preliminary relief they request is more likely to plunge the State into chaos and bankruptcy. As set forth in plaintiffs' opening brief, their provision of free services is what is keeping the State afloat. If they stop providing services to vulnerable populations, the burden for providing for these people will fall directly on State institutions, and it will be far more expensive. To give but one example, it will cost the State far more to house children in detention centers than it will to pay the plaintiff providers that offer diversion services to keep those kids out of custody.

Because plaintiffs are undisputedly suffering irreparable harm, the balance of the harms is therefore in their favor.

Conclusion

For all of the reasons set forth above and in plaintiffs' opening brief, plaintiffs respectfully request that the Court deny defendants' motion to dismiss, as well as their alternative request for a stay, and grant plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

Dated: May 10, 2017

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EXHIBIT 1

No. 1-16-2471

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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

(Full caption on following pages)

BRIEF OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT REQUESTED

No. 1-16-2471

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS COLLABORATION ON YOUTH, ACCESS LIVING OF METROPOLITAN CHICAGO, ADDUS HEALTHCARE INC., AIDS FOUNDATION OF CHICAGO, CARITAS FAMILY SOLUTIONS, CENTER FOR HOUSING AND HEALTH, CENTER FOR YOUTH AND FAMILY SOLUTIONS, CHICAGO COMMONS, CHILDREN'S HOME + AID, CONNECTIONS FOR THE HOMELESS, 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, INTERFAITH HOUSING DEVELOPMENT CORPORATION, INSPIRATION CORP. JEWISH CHILD AND FAMILY SERVICES, JEWISH VOCATIONAL SERVICE AND EMPLOYMENT CENTER, KEMMERER VILLAGE, LESSIE BATES DAVIS NEIGHBORHOOD HOUSE, LUTHERAN CHILD AND FAMILY SERVICES, MEDICAL GEAR, LLC, NEW AGE ELDER CARE, NEW MOMS, METROPOLITAN FAMILY SERVICES, OMNI YOUTH SERVICES, ONE HOPE UNITED, POLISH AMERICAN ASSOCIATION, PROJECT OZ, PUERTO RICANS CULTURAL CENTER, SHELTER, INC., STEPHENSON COUNTY HEALTH DEPARTMENT, STEPPING STONES OF ROCKFORD, INC., THE BABY FOLD, THE FELLOWSHIP HOUSE, THE NIGHT MINISTRY, OUNCE OF PREVENTION, TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES., UNIVERSAL FAMILY CONNECTION, UNION COUNTY, UNITY PARENTING, WESTERN ILLINOIS MANAGED HOME SERVICES, YOUTH OUTREACH SERVICES, Plaintiffs-Appellants,	)	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division. No. 16 CH 6172 The Honorable RODOLFO GARCIA, Judge Presiding.

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 HAMERNICK, EXECUTIVE DIRECTOR OF THE ILLINOIS HOUSING DEVELOPMENT AUTHORITY, in her official capacity, LESLIE GEISSER MUNGER, COMPTROLLER FOR THE STATE OF ILLINOIS, in her official capacity, and BRUCE RAUNER, GOVERNOR OF ILLINOIS, in his official capacity,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiffs are various social service agencies that entered into contracts with different state agencies to provide services for fiscal year 2016 and have been affected by the State's ongoing budget impasse. Plaintiffs' contracts provide that they are subject to legislative appropriations. Although such appropriations were not enacted by the beginning of fiscal year 2016, Plaintiffs continued to provide the services specified in their contracts as the budget impasse persisted. Ten months after the fiscal year began, Plaintiffs, claiming a contractual right to be paid for their services despite the lack of appropriations, brought this suit seeking a court order that they be immediately paid out of unappropriated state funds.

Plaintiffs' complaint did not directly assert a breach of contract but instead relied on other legal theories, including that the Governor and defendant agency heads were acting beyond their legal authority and were violating the Illinois Constitution's prohibitions against laws impairing contractual obligations, the denial of equal protection, and the deprivation of property without due process. On all of these claims, Plaintiffs sought immediate payment of what they said was owed under their contracts. On the last day of the fiscal year, a partial appropriation bill became law and provided for payment of most of the amounts Plaintiffs claimed. Plaintiffs then amended their complaint to refer to this enactment. Defendants moved to dismiss the action, asserting that it is barred by the State's sovereign immunity and that none of Plaintiffs' legal theories states a valid claim for relief. The circuit court granted this motion. All questions are raised on the pleadings.

Issues Presented for Review

1. Whether Plaintiffs' claims are barred by sovereign immunity.

2. Whether Plaintiffs' request for a court order requiring that they be paid out of unappropriated state funds is legally justified by their claims that:

a. The Governor and state agency heads acted in excess of their legal authority by (i) conducting state business without an enacted state budget, (ii) vetoing appropriation bills to pay for Plaintiffs' contractual services, or (iii) entering into contracts with Plaintiffs and accepting their services without enacted appropriations;

b. The absence of enacted legislation appropriating state funds to pay Plaintiffs for the services specified in their contracts constitutes (i) an unconstitutional impairment of contractual obligations; (ii) a denial of Plaintiffs' right to equal protection, or (iii) a violation of Plaintiffs' right to due process.

STATEMENT OF FACTS

Plaintiffs' Complaint

Plaintiffs are social service organizations that entered into written contracts to provide various human services for the State in fiscal year 2016 ("FY 16"). (A 5-7, 9.) Plaintiffs' contracts expressly provide that they are "contingent upon and subject to the availability of funds." (A 10; C 102.) Each contract further provides that 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 . . . fails to make an appropriation sufficient to pay" the amounts provided. (*Id.*) Each contract also contains an "Applicable Law" provision specifying that any claim against the State arising out of the contract must be filed exclusively with the Illinois Court of Claims. (C 103.)

On February 18, 2015, the Governor submitted a proposed budget for FY 16 that would have provided funding for most, if not all, of the services provided under Plaintiffs' contracts. (A 8.) The General Assembly subsequently passed several appropriations bills that authorized the expenditure of funds to pay for most of these services. (A 8-9.) Shortly before the beginning of FY 16, on June 25, 2015, the Governor vetoed these bills. (A 8.) The General Assembly did not thereafter take action overriding that veto.

Despite the lack of appropriations, Plaintiffs provided the services identified in their contracts. (A 9-10.) The defendant agencies did not make any payment for those services. (A 11.) Nor did they formally terminate Plaintiffs' contracts based on the absence of appropriations. (A 10-11.) Plaintiffs acknowl-dged that they could have withdrawn from their contracts, but they chose not to do so for several reasons, including that they would have had to give 30 days' notice; withdrawing would have made them the least likely ever to be paid and reduced the amount of any payments; and they might face liability from their service populations and loss of funding from private foundations and other funding sources. (*Id.*)

On April 13, 2016, more than nine months after FY 16 began, the General Assembly passed Senate Bill 2046, which included appropriations for nearly all of the services specified in Plaintiffs' contracts. (A 12.) On June 10, 2016, Governor Rauner vetoed this bill in its entirety. (*Id.*) Again, the General Assembly did not take action to override the Governor's veto.

On May 4, 2016, more than 10 months after the start of FY 16, Plaintiffs filed a Complaint that named as defendants Governor Rauner and the heads of the agencies that entered into the contracts with Plaintiffs (sometimes collectively "Defendants") and sought a court order requiring Defendants immediately to pay Plaintiffs in full the amounts they claimed to be owed for the services they provided under their contracts. (C 3-19.) The complaint also named the Comptroller as a defendant for purposes of implementing any judgment in their favor. (C 432-33.)

On June 30, 2016, the General Assembly passed, and the Governor signed into law, Senate Bill 2047, which took effect immediately as Public Act 99–0524. (A 3-5, 11, 13.) Public Act 99–0524 included appropriations for certain purposes for FY 16 and for the first half of fiscal year 2017 ("FY 17"). (*Id.*) It included appropriations to pay for various social services, including services specified in Plaintiffs' contracts, and it contained limited discretion to use some funds earmarked for FY 17 to pay services rendered in FY 16. (*Id.*) (In their appellate brief (at 9), Plaintiffs advise that, under the appropriations provided by Public Act 99–0524, they have now received "full or nearly full payment for [their] contracts in fiscal year 2016.")

On July 20, 2016, Plaintiffs filed a Third Amended Complaint, which again sought a court order requiring Defendants to pay them immediately, in full, the amounts they claimed to be owed under their contracts, despite the absence of appropriations sufficient to pay those amounts. (A 1-25.) Count I sought this relief based on allegations that Defendants had committed *ultra vires* acts (A 16-17), and Count II sought that relief based on allegations that Defendants had violated Plaintiffs' rights under various provisions of the Illinois Constitution, including the prohibition against laws impairing the obligation of contracts (art. I, § 16) and the guarantees of equal protection and due process (art. I, § 2) (A 17-20).

In Count I, Plaintiffs specifically alleged that (a) Defendants violated Article VIII, section 2 of the Illinois Constitution by conducting the State's business without a budget in place; and (b) the Governor exceeded his constitutional authority by vetoing appropriations bills for Plaintiffs' contracts while simultaneously entering into and enforcing contracts with Plaintiffs. (A 16.) Count I further alleged that these actions, by denying payment to Plaintiffs while other persons were being paid, violated Plaintiffs' right to equal protection under the law. (*Id.*) Count I requested a judgment requiring Defendants (1) to immediately pay the vouchers submitted by Plaintiffs for services rendered in FY 16, regardless of whether there were sufficient appropriated funds; and (2) to immediately pay Plaintiffs for any bills overdue by 90 days or more. (A 17.)

In Count II, Plaintiffs alleged that (a) by continuing Plaintiffs' contracts through FY 16 without payment and then enacting Public Act 99–0524, Defendants violated the constitutional prohibition against the impairment of contractual obligations; and (b) Defendants violated Plaintiffs' rights to due process of law. (A 17-18.) Count II requested an injunction (1) barring Defendants from continuing in this "unconstitutional scheme," and requiring payment for vouchers submitted by Plaintiffs that they alleged were overdue by 90 days or more; and (2) ensuring that Plaintiffs receive full payment of the contracts performed in FY 16. (A 19.)[1]

Defendants' Motion to Dismiss

Defendants moved to dismiss. In support of their motion, Defendants raised four main arguments. *First*, Defendants argued that Plaintiffs' claims were barred by sovereign immunity, and that Plaintiffs' attempts to sidestep that defense by contending that Defendants' actions exceeded their authority were

[1] In Count III, Plaintiffs alleged that Public Act 99–0524 permitted unfair and unequal payments to different persons, in violation of Plaintiffs' rights to due process and equal protection, and that it also conferred adjudicative functions on executive officials, in violation of the separation of powers required by Article II, section 1 of the Constitution. (A 20-21.) Plaintiffs do not challenge the dismissal of those claims on appeal, and they are not discussed further in this brief.

unfounded. (C 2796-2803.) *Second*, Defendants argued that Plaintiffs failed to state a claim on which relief can be granted because their contracts were expressly "contingent upon and subject to the availability of funds." (C 2803–04.) *Third*, Defendants argued that Plaintiffs' claims should be dismissed because the Appropriations Clause of the Illinois Constitution, Ill. Const., art. VIII, §2(b), and § 9(c) of the State Comptroller Act, 15 ILCS 405/1, *et seq*., prohibit expenditures of public funds without a corresponding appropriation. (C 2804-06.) *Fourth*, Defendants argued that Plaintiffs failed to state a claim under the provisions of the state constitution prohibiting impairment of contracts and denial of due process and equal protection. (C 2806-13.)

The Circuit Court's Judgment

During the hearing on Defendants' motion to dismiss, in response to an assertion by Plaintiffs' counsel that the governor and other defendants had "continued to enforce contracts," A. 179, the circuit court stated:

> You indicated enforcing contracts and forcing organizations to comply with the contracts that were already in place. And, yet, I'm not sure what you're alluding to when you say that. Certainly, there's been no court action by the State against any of the plaintiffs regarding the, to compel that they comply with the contracts that were entered into for 2016-2017. And it is unlikely that's going to happen.

(A 179-80.)

The circuit court granted Defendants' motion to dismiss. (A 206-08, 211.) Ruling from the bench, the court stated:

> [T]he only way to really get law that is going to guide further future cases is by getting appellate court review

> and the quickest way to do that is by denying the plaintiffs all relief being sought and granting the State's motion to dismiss based on sovereign immunity and the absence of circumstances to trigger the exception that would otherwise preclude the absolute bar of sovereign immunity.

(A 207.) Addressing Plaintiffs' motion for a preliminary injunction, which became moot with the dismissal of Plaintiffs' action, the court also held that, "ultimately . . . plaintiffs would not be able to succeed on this case for the reasons . . . articulated by the State." (*Id.*) Plaintiffs then took this appeal.[2]

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[2] Although Plaintiffs' third amended complaint included almost 100 plaintiffs (A 1-2), many of them did not join this appeal, and Plaintiffs filed several notices of appeal to reflect this change in the identity of the appellants (A 212-15).

ARGUMENT

I. Summary of Argument

The central question in this case is whether the courts are authorized to take over from the political branches the fundamental power to authorize state spending. All of the relevant legal authorities — the contracts entered into by the parties, the Illinois Constitution's Appropriations Clause, the State Comptroller Act, and the doctrine of sovereign immunity — uniformly answer that question in the negative. Without detracting in any way from the manifest hardship to Plaintiffs caused by the State's prolonged budget impasse and the related absence of payment for all of Plaintiffs' services, the circuit court's dismissal of this action was proper. The relief Plaintiffs seek — monetary recovery for contractual services — is barred by sovereign immunity. There is, in any event, no merit to their constitutional and other claims. And, most fundamentally, they are seeking judicial recourse in connection with a budget-related issue for which the Constitution vests exclusive responsibility in the other branches of government.[3]

Plaintiffs evidently crafted their claims to avoid two major obstacles: the State's sovereign immunity and the constitutional prohibition against the expenditure of unappropriated funds contained in the Appropriations Clause of the Illinois Constitution (art. VIII, § 2(b)). Specifically, Plaintiffs have attempted to invoke the "officer suit" exception to sovereign immunity, contending that Defen-

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[3] Plaintiffs assert on appeal that, pursuant to the appropriations in Public Act 99–0524, they "have now received full or nearly full payment" for the contracts at issue in this case. (Pl. Br. at 9.) On the assumption that not all Plaintiffs have been fully paid the amounts they claim, Defendants agree that this appeal is not moot.

dants have acted outside their legal authority in various ways. Plaintiffs have also attempted to allege various constitutional claims on the premise that they take precedence over the Appropriations Clause and thus provide exceptions to the general prohibition against spending state funds without an appropriation.

Plaintiffs' claims fall squarely within the State's sovereign immunity because they seek the payment of state funds for contractual services. Plaintiffs' invocation of the "officer suit" exception to sovereign immunity is unavailing because they have not alleged actions by Defendants beyond the scope of their legal authority, and even if they had, the available relief would be a prospective injunction against such conduct, not payments to Plaintiffs under prior contracts.

Defendants' actions also are not an unconstitutional "impairment" of the State's contractual obligations. Because the State's obligations under Plaintiffs' contracts were expressly contingent on appropriations, the absence of such appropriations cannot impair those obligations. See *State (CMS) v. AFSCME*, 2016 IL 118422, ¶ 52. Plaintiffs' argument disputing the existence of this contractual contingency is unsound, but even if they were right, the absence of legislative appropriations would at most be a breach of contract, not an unconstitutional impairment, because Plaintiffs' claimed injuries did not result from the passage of a law extinguishing or substantially diminishing Plaintiffs' contractual rights or remedies available when their contracts were formed. And the remedy for a law impairing the obligation of contracts is to declare the law invalid and enjoin its enforcement, not to award breach-of-contract damages.

Plaintiffs' equal protection and due process claims also lack merit, for Plaintiffs have failed to allege the elements of a constitutional violation and again seek relief — monetary compensation equal to breach-of-contract damages — that is unavailable for such claims.

Plaintiffs' claims, and the relief they seek, also violate the constitutional separation of powers among the different branches of government. Plaintiffs rightly do not contend that they may obtain a court order requiring the General Assembly to enact appropriations or controlling the Governor's exercise of his constitutional veto power over proposed legislation, including appropriation bills. See *Daly v. Madison County*, 378 Ill. 357, 362 (1941); see also *Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 925-26 & n.14 (D.C. Cir. 1980) (denying mandamus relief regarding budget dispute between President and Congress and stating that matters involving "wrangling over the federal budget and budget procedures . . . are the archetype of those best resolved through bargaining and accommodation between the legislative and executive branches"). But the relief they do seek is the functional equivalent of such a forbidden order, because their complaint would require the court to act as if appropriations providing for payments to Plaintiffs have been enacted, or as if the Governor's vetoes of appropriation bills never happened, apparently on the theory that those state actors should not have done what they did. (See Pl. Br. at 26: "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.") In short, Plaintiffs ask this Court to replace the exercise of functions entrusted to the political branches of government with its own judicial decision about how those functions should be exercised. That is not the courts' proper role in state government.

II. Standard of Review, and Standards Governing Motions to Dismiss

The Circuit Court's judgment dismissing this action may be affirmed on any ground supported by the record. *Eychaner v. Gross*, 202 Ill. 2d 228, 262 (2002). Those grounds include a lack of jurisdiction due to the State's sovereign immunity, asserted pursuant to Section 2–619(a)(1), and Plaintiffs' failure to state legally valid claims, asserted under Section 2–615. Each is reviewed *de novo*. See *Blount v. Stroud*, 232 Ill. 2d 302, 308-09 (2009) (reviewing whether circuit court had subject matter jurisdiction); *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 94 (2001) (dismissal under Section 2–619(a)(1)); *Carr v. Koch*, 2012 IL 113414, ¶ 27 (dismissal under Section 2–615); *Beacham v. Walker*, 231 Ill. 2d 51, 57-58 (2008) (same)

A Section 2–615 motion accepts as true a complaint's well-pleaded allegations of fact, but not legal or factual conclusions. *Beacham*, 231 Ill. 2d at 57-58; *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995); *Talbert v. Home Sav. of Am.*, 265 Ill. App. 3d 376, 379 (1st Dist. 1994). Such a motion should be granted if, under applicable law, the complaint's well-pleaded factual allegations fail to establish a legally sufficient cause of action justifying the relief requested. *Beacham*, 231 Ill. 2d at 58; *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003). Plaintiffs' contracts attached to their Complaint are considered part of their pleading and control over any inconsistent factual allegations. *Kehoe v.*

Saltarelli, 337 Ill. App. 3d 669, 676 (1st Dist. 2003).

Section 2–619(a)(1) of the Code of Civil Procedure authorizes the dismissal of a suit on the ground that "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2–619(a)(1) (2014). Whether a court lacks jurisdiction of an action does not depend on the merits of the plaintiff's claim. *In re Luis R.*, 239 Ill. 2d 295, 301-02 (2010); *Blount*, 232 Ill. 2d at 316.

III. Plaintiffs' Claims Are Barred by Sovereign Immunity and Were Properly Dismissed for Lack of Jurisdiction.

Because this action is barred by sovereign immunity, the circuit court lacked subject matter jurisdiction, and its judgment dismissing the action should be affirmed. Plaintiffs' claims are all founded on their contracts with the State and seek relief in the form of breach-of-contract damages against the State. Those claims and relief are outside the courts' jurisdiction and may be brought only in the Court of Claims. Plaintiffs' attempt avoid this result by recasting their breach-of-contract claim as allegations of *ultra vires* acts and unconstitutional conduct by Defendants does not alter this conclusion.

A. General Principles Governing State Sovereign Immunity

The 1970 Constitution eliminated sovereign immunity as a constitutional principle but authorized the General Assembly to reestablish that immunity by legislative enactment. See Ill. Const. art. XIII, § 4; *Senn Park Nursing Ctr. v. Miller*, 104 Ill. 2d 169, 186-87 (1984). It did so by passing the State Lawsuit Immunity Act (the "Immunity Act"), which states that, subject to limited exceptions (none of which is relevant here), "the State of Illinois shall not be made a defendant or party in any court." 745 ILCS 5/1 (2014). When sovereign immunity applies, the circuit court lacks subject matter jurisdiction to consider the claim. *Smith v. Jones*, 113 Ill. 2d 126, 130-31 (1986).

The Immunity Act applies to actions that seek to require the payment of money or otherwise to control the exercise of governmental powers. *Currie v. Lao*, 148 Ill. 2d 151, 158 (1992); *Senn Park Nursing Ctr.*, 104 Ill. 2d at 187-88. Whether the Immunity Act precludes circuit court jurisdiction of a claim depends on whether the relief sought is effectively against the State, not on the formal name of the parties or the description of the claim. *Smith*, 113 Ill. 2d at 131; *Senn Park Nursing Ctr.*, 104 Ill. 2d at 187.

The State's sovereign immunity may not be avoided simply by naming a state officer as a defendant instead of the State. *Leetaru v. Bd. of Trs. of the Univ. of Ill.*, 2015 IL 117485, ¶ 45. Thus, the Immunity Act generally applies to actions against state agencies and officials, other than suits for judicial review of administrative decisions. *Applegate v. Illinois Dep't of Transp.*, 335 Ill. App. 3d 1056, 1061 (4th Dist. 2002); *Foley v. AFSCME, Council 31*, 199 Ill. App. 3d 6, 14 (1st Dist. 1990). Under the "officer suit" exception to sovereign immunity, however, courts have jurisdiction over claims seeking prospective injunctive relief against ongoing conduct by state officials that is "illegal," in the sense that it is wholly beyond their constitutional or statutory authority. *Senn Park Nursing Ctr.*, 104 Ill. 2d at 188-89; see also *Leetaru*, 2015 IL 117485, ¶¶ 45-47; see also *PHL, Inc. v. Pullman Bank & Trust Co.*, 216 Ill. 2d 250, 260-67 (2005); *Schwing v. Miles*, 367 Ill. 436, 441 (1937). But this exception to sovereign immunity does not permit a suit against the State to go forward merely because it alleges an "erroneous exercise" of the state official's authority. *PHL, Inc.*, 216 Ill. 2d at 266-67 ("It is well settled that a state officer's erroneous exercise of a broad grant of delegated authority does not constitute an *ultra vires* act."). And claims that seek to control government functions or require the payment of state funds do not avoid sovereign immunity merely because they ask for declaratory or injunctive relief. *State Bldg. Venture v. O'Donnell*, 239 Ill. 2d 151, 164 (2010); *Ellis v. Board of Governors of State Colleges & Univs.*, 102 Ill. 2d 387, 395 (1984); see also *Leetaru*, 2015 IL 117485, ¶ 47 ("where the challenged conduct amounts to simple breach of contract and nothing more, the exception is inapplicable").

The Court of Claims Act (705 ILCS 505/1 *et seq.* (2014)) supplements the State Lawsuit Immunity Act by giving the Court of Claims exclusive jurisdiction over certain matters. In particular, Section 8 of the Court of Claims Act provides that the Court of Claims has "exclusive jurisdiction" over all claims against the State "founded upon any contract entered into with the State of Illinois" or "founded upon any law of the State of Illinois or upon any regulation adopted thereunder . . . ." 705 ILCS 505/8(a),(b) (2014).

B. Under the State Lawsuit Immunity Act and the Court of Claims Act, the Circuit Court Lacked Jurisdiction over Plaintiffs' Claims Founded on Their Contracts.

The relief requested by Plaintiffs in this case seeks to control the actions of the State and subject it to liability, and thus is barred by sovereign immunity. Specifically, Plaintiffs' complaint demanded immediate payment for services provided under their contracts in FY 16, regardless of whether there were sufficient appropriations for those payments; payment for vouchers Plaintiffs submitted that they claimed were overdue by 90 days or more; and permanent injunctive relief to ensure that Plaintiffs receive full payment of their contracts for FY 16. (A 16-17, 19-20.) Plaintiffs are clearly seeking payment for the contractual services they rendered in FY 16, and such claims therefore are barred by sovereign immunity. See *Smith*, 113 Ill. 2d at 132-33; *President Lincoln Hotel Venture v. Bank One*, 271 Ill. App. 3d 1048, 1056-57 (1st Dist. 1994).

In addition, because Plaintiffs' claims are founded on contracts with the State, those claims are within the exclusive jurisdiction of the Court of Claims and could not be pursued in circuit court. Plaintiffs specifically allege that they contractually agreed to provide various services for the State and have not been paid for those services, and the relief they seek is payment for those services in the amounts provided by their contracts. (A 11.) Having made their contracts an essential element of their claims, Plaintiffs cannot avoid the conclusion that their action is "founded upon [a] contract entered into with the State of Illinois" and, therefore, within the "exclusive jurisdiction" of the Court of Claims. 705 ILCS 505/8(b). "[T]here is no dispute that claims against the state founded on a contract must be filed in the Court of Claims." *State Bldg. Venture*, 239 Ill. 2d at 161. Consistent with these principles, Plaintiffs' contracts provide that any claim against the State arising out of their contracts must be filed exclusively with the Court of Claims. (See, e.g., C 103.) Plaintiffs further allege that their contracts are attached "in compliance with 735 ILCS § 5/[2–]606" (A 9), which requires them to do so for "a claim . . . founded upon a written instrument." 735 ILCS 5/2–606 (2014). This allegation further demonstrates that Plaintiffs themselves believe their claims are founded upon their contracts, for which sovereign immunity bars any relief in circuit court, with the only recourse being in the Court of Claims.

The Supreme Court's ruling in *State Bldg. Venture* is instructive. In that case, the plaintiff filed a declaratory judgment action alleging that it was damaged by the State's interpretation of its rights under a commercial lease, and seeking a determination that the State's construction of the lease was invalid. *Id.* at 154-56. The Court explained that the determination of whether an action is founded on a contract and brought against the State depends upon the issues involved and the relief sought. *Id.* at 161. The Court then held that sovereign immunity barred the plaintiff's claim because it was founded upon a contract with the State and the plaintiff alleged a present claim for relief, rather than a prospective claim, by seeking a determination of its rights under that contract. *Id.* Likewise here, Plaintiffs sought a determination of their rights under their contracts with the State — namely, that the State is obligated to pay Plaintiffs for their contractual services rendered in FY 16. Under the holding of *State Bldg. Venture*, sovereign immunity bars Plaintiffs' entire action.

C. The "Officer Suit" Exception to Sovereign Immunity Does Not Apply.

Plaintiffs try to avoid the State's sovereign immunity by invoking the "officer suit" exception to sovereign immunity, pursuant to which a court may enter injunctive relief prohibiting future action by a state official "in violation of statutory or constitutional law or in excess of his authority." *Leetaru*, 2015 IL 117485, ¶ 45 (internal citations omitted); see also *Ellis*, 102 Ill. 2d at 395 (holding that sovereign immunity is inapplicable where "a plaintiff is not attempting to enforce a present claim against the State, but rather seeks to enjoin a State officer from taking *future actions* in excess of his delegated authority") (emphasis added). This effort fails because Plaintiffs' complaint sought to enforce a present claim for monetary relief against the State based on existing contracts, not to enjoin future action in excess of Defendants' legal authority, and because in any event there is no merit to Plaintiffs' allegations that Defendants took action in excess of their legal authority.

1. The relief Plaintiffs seek is not available under the officer suit exception.

Critically, Plaintiffs' complaint does not seek prospective injunctive relief in the sense allowed by the officer suit exception. Instead, it demands immediate payment in full for the services they provided, regardless of appropriations, and an injunction directing Defendants to ensure that Plaintiffs receive full payment of their contracts for FY 16. (A 16-17, 19-20; see also Pl. Br. at 10: "Plaintiffs are entitled to a prospective order of specific performance under Count I".) Simply stated, Plaintiffs are not seeking prospective injunctive relief to prevent ongoing actions in excess of Defendants' authority, but are seeking retroactive, monetary relief for present claims based on services rendered under earlier contracts. See *Ellis*, 102 Ill. 2d at 394-95 (holding that sovereign immunity barred suit alleging constructive discharge because, despite request for injunctive relief in addition to damages, it was "clearly based upon a present claim which has the potential to subject the State to liability"); *Illinois Health Care Ass'n v. Walters*, 303 Ill. App. 3d 435, 440 (1st Dist. 1999) (Theis, J.) ("A distinction has been made between cases based on a present claim for damages and those seeking to enjoin a state official from taking future action in excess of her delegated authority."); *Brucato v. Edgar*, 128 Ill. App. 3d 260, 267 (1st Dist. 1984) (holding that sovereign immunity barred plaintiff's claim based on a contract with the State, even though her prayer for relief, which sought monetary recovery from the State, was "framed in equitable terms").

Nor does Plaintiffs' reliance on the Contracts Clause of the Illinois Constitution prevent their action from being a present claim or bring it within the officer suit exception. Not every legal wrong allegedly committed by a State officer, including a departure from constitutional requirements, triggers the officer suit exception. *Leetaru*, 2015 IL 117485, ¶47; see also *Brucato*, 128 Ill. App. 3d at 262-67 (dismissing claim on sovereign immunity grounds where plaintiff alleged that defendants' actions "constituted a denial of her constitutional right to due process and equal protection."). For example, where the challenged conduct amounts to simple breach of contract, the exception is inapplicable. *Id.*, citing *Smith*, 113 Ill. 2d at 132–33. In *Smith*, the Supreme Court held that sovereign immunity could not be avoided where "plaintiffs' complaint . . . alleges only that the Director exceeded his authority by breaching a contract." 113 Ill. 2d at 132–33.

The appellate court's opinion in *Joseph Construction Co. v. Board of Trustees of Governors State University*, 2012 IL App (3d) 110379, is instructive. There the court held that sovereign immunity required dismissal of a suit seeking payment under a contract with a state university, even though the complaint asked for injunctive relief "prohibiting defendants from 'withholding funds'" and declaring that the plaintiff "'is entitled to the balance due under the terms of the parties' agreement'" based on allegations that the state officer "acted 'outside the scope of her authority' by failing 'to honor the terms of the parties' agreement'" and by withholding funds allegedly due. *Id.*, ¶ 47. In support of this ruling, the court emphasized that "[t]his entire action is premised and founded upon the construction contract between plaintiff" and the state university, *id.*, ¶ 50, and that "artful pleadings can allow any plaintiff to suggest that a state employee acts outside the scope of his or her employment when disbursing funds to which the plaintiff feels entitled," *id.*, ¶ 52.

These principles apply here. Regardless of how Plaintiffs label their claims, they essentially seek monetary recovery from the State for a present claim based on their contracts, and the officer suit exception does not apply. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 147 (1984) (holding that while injunctive relief against *ultra vires* acts is permissible without violating State's sovereign immunity, that principle did not apply to a damages remedy that would require payment by the State).

2. Plaintiffs' claims of *ultra vires* action are meritless.

In any event, Plaintiffs have not validly alleged that any of the acts or omissions set forth in Plaintiffs' complaint exceeds Defendants' legal authority. A state official's actions will not be considered *ultra vires* even if the official has erroneously exercised his or her delegated authority. *Leetaru*, 2015 IL 117485 at ¶ 47. Rather, the officer suit exception applies where the official "performs illegally or purports to act under an unconstitutional act or under authority which he does not have," *id.* at ¶ 46; see also *PHL, Inc.*, 216 Ill. 2d at 266.

Here, the actions Plaintiffs complain about — conducting state operations without an enacted budget, entering into contracts and accepting services under them without corresponding appropriations, and vetoing appropriation bills that would have provided funds to pay for those services — regardless of how controversial they may be on public policy grounds, are actions that Defendants had the lawful authority to take. Plaintiffs thus cannot point to those actions as a basis for avoiding sovereign immunity.

Nor do Plaintiffs' contentions based on the alleged duty to adopt a comprehensive annual budget support their claim of *ultra vires* conduct or related request for relief. Article VIII, Section 2 of the Illinois Constitution requires the Governor to submit a proposed budget (art. VIII, § 2(a)) and then gives the General Assembly the power to enact appropriations legislation (*id.*, § 2(b).) It is long established that the manner in which the General Assembly exercises this legislative authority is a political question, not subject to judicial control. See *Daly*, 378 Ill. at 362; see also *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 205-09 (1999); *Committee for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 28-29 (1996); see generally *Nat'l Wildlife Fed'n*, 626 F.2d at 925-26.

The same reasoning necessarily applies to Plaintiffs' suggestion that the General Assembly had a legally enforceable duty to enact specific appropriations to pay for Plaintiffs' contractual services, or that courts can control the Governor's exercise of his express constitutional power to veto bills passed by the

General Assembly (Ill. Const. art. IV, § 9), which is legislative in nature, see *Williams v. Kerner*, 30 Ill. 2d 11, 14 (1964), and specifically covers appropriation bills (Ill. Const. art. IV, § 9(d). See *Johnson v. Carlson*, 507 N.W.2d 232, 235 (Minn.1993) ("It is not for this court to judge the wisdom of a veto, or the motives behind it, so long as the veto meets the constitutional test."); *Barnes v. Sec'y of Admin.*, 586 N.E.2d 958, 960-62 (Mass. 1992) (rejecting claim that court could invalidate Governor's veto reducing item of appropriation for reasons other than compliance with State constitution's provisions governing exercise of veto power); *O'Hara v. Kovens*, 606 A.2d 286, 289-95 (Md. App. 1992) (affirming dismissal of claim requiring proof of fraudulent motives for Governor's veto of proposed legislation, and stating that "no precedent suggests that the motives of a governor for vetoing legislation require more scrutiny or are less entitled to separation of powers protection than the motives of legislators in enacting legislation").

Of course, courts may determine whether a veto complied with the constitutional procedures specified for its exercise. See *Fordice v. Bryan*, 651 So. 2d 998, 1002 (Miss. 1995); *Barnes*, 586 N.E.2d at 960-62; *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 978 (N.M. 1974). And if the effect of veto is to violate a constitutional or other right, the courts may enforce that right without inquiring into the Governor's reasons for deciding to use his veto power. See *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 305-11 (2004). But that is not the nature of Plaintiffs' challenge to the validity of Governor's vetoes, which they contest on the basis that he exceeded his authority when he and his agency heads "entered hundreds of contracts — accepting the services of plaintiffs — while vetoing the two separate attempts of the General Assembly to fund them." (Pl. Br. at 20.) And Plaintiffs' challenge to the validity of the Governor's vetoes also runs afoul of the principles that discretionary actions are not subject to judicial control, *People ex rel. Madigan v. Kinzer*, 232 Ill. 2d 179, 183-84 (2009); see also *Kirkpatrick*, 524 P.2d at 978 (courts cannot control discretionary exercise of Governor's veto power), and that claims of improper motives generally cannot nullify legislative action. See *Empress Casino Joliet Corp. v. Johnston*, 763 F.3d 723, 730-31 (7th Cir. 2014); *Barnes*, 586 N.E.2d at 961; *O'Hara*, 606 A.2d at 289-95. Thus, there is no basis to conclude that the Governor exceeded his authority by vetoing appropriation bills on June 25, 2015, and on June 10, 2016, or that the courts may nullify those vetoes or treat those bills as if they had been signed.

Plaintiffs' claims of *ultra vires* action by the other Defendants are also unfounded. The defendant agency heads did not act in excess of their authority by entering into and continuing contracts with Plaintiffs for which there was no prior appropriation. The contracts contain an express provision — consistent with what the law already provides — making them contingent on and subject to the availability of sufficient funds. The Appropriations Clause of the Illinois Constitution (Ill. Const. art. VIII, §2(b)) and the State Comptroller Act (15 ILCS 405/9(c)) bar the expenditure of State funds absent an appropriation. And as a precaution against claims that contractual obligations have been created without supporting appropriations, it is a common feature of public contracts to contain a provision like the one in Plaintiffs' contracts stating that any financial obligations by the government are "subject to appropriations." See, e.g., *Avery v. City* *of Chicago*, 345 Ill. 640, 645 (1931); 1979 Ill. Att'y Gen'l Op. 24, 24-25 (S-1412) (explaining that standard non-appropriation clause confirms that, in "recognition . . . of the legislature's exclusive authority to appropriate State funds," a contract does not "create State debt or bind the State in excess of the State agency's appropriation"); 1977 Ill. Att'y Gen'l Op. 99, 102 (S-1265). This allows government to avoid the impractical choice between denying *any* authority to negotiate a contract without a full prior appropriation, and giving executive officials unqualified authority to bind the government to financial obligations regardless of actual appropriations. See *People ex rel. Board of Trustees of Univ. of Ill. v. Barrett*, 382 Ill. 321, 341-44, 348-51 (1943); see also 1978 Ill. Att'y Gen'l Op. 169 (S-1391) (describing effect of Section 30 of the State Finance Act, 30 ILCS 105/30 (2014), which generally prohibits incurring any indebtedness or financial obligation for the State "in excess of the money appropriated"). The defendant agency heads therefore did not exceed their lawful authority by entering into contracts in the absence of a sufficient appropriation. On the contrary, they would have exceeded their authority if they purported to bind the State to financial commitments or authorized payments to Plaintiffs without an enacted, sufficient appropriation.

Nor did Defendants exceed the bounds of their legal authority by not terminating Plaintiffs' contracts after the fiscal year began, but before any appropriations were enacted. Plaintiffs' continued performance made it possible for them to be paid for the services they rendered if appropriations were eventually forthcoming, which is what they wanted. (A 10-11, 44, 147.) Thus, although Defendants could not, without appropriations by the General Assembly, subject the State to any financial obligation to pay Plaintiffs, Defendants were not prohibited from letting Plaintiffs perform under their contract in the hope that this contingency might be satisfied, thereby meeting one of the conditions for Plaintiffs to be paid if such appropriations were enacted, as they ultimately were. See 1975 Ill. Att'y Gen. Op. 246, 249-51 (S-977) (explaining that executive officers could not subject the State to liability in excess of appropriations, but that General Assembly could later validly appropriate funds for goods or services provided in excess of available appropriations).[4]

IV. Plaintiffs' Claims Are Barred By the Lack of Enacted Legislative Appropriations.

The circuit court's dismissal of this action was also proper because the absence of enacted appropriations for Plaintiffs' contractual services precluded payment for those services.

A. The Appropriations Clause of the Illinois Constitution Precludes Plaintiffs' Claim to Payment for Services Under Their Contracts.

Even if this Court had jurisdiction over Plaintiffs' claims, the Appropriations Clause of the Illinois Constitution precludes payment to them for their contractual services in the absence of enacted, sufficient appropriations. The

[4] In their circuit court filings, Plaintiffs stated that Defendants "monitor[ed] plaintiffs for compliance with state regulations in delivery of services." (A 33.) Plaintiffs' complaint also conclusorily alleged that Defendants "enforced" these contracts before appropriations were enacted. (A 10, 16.) But when the circuit court judge said he was "not sure what you're alluding to when you say that," Plaintiffs' counsel admitted that "there's been no court action by the State against any of the plaintiffs . . . to compel that they comply with the contracts that were entered into for 2016-2017 [and] it is unlikely that's going to happen." (A 179-80.)

Appropriations Clause provides, in pertinent part, that "[t]he General Assembly by law shall make appropriations for all expenditures of public funds by the State." Ill. Const., art. VIII, §2(b). An appropriation consists of "setting apart from public revenue a certain sum of money for a specific object." *Board of Trustees of Cmty. College Dist. No. 508 v. Burris*, 118 Ill. 2d 465, 477 (1987) (internal quotation omitted). The legislature's responsibility under the Appropriations Clause to determine the purposes and amounts of appropriations is reinforced by the Separation of Powers Clause, which states: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." (Ill. Const. art. II, § 1.) The Appropriations Clause thus allocates constitutional authority among the different branches of government by giving the legislature the responsibility to exercise the "power of the purse" over state budget matters. As the Supreme Court explained in *State (CMS) v. AFSCME*, "[t]he power to appropriate for the expenditure of public funds is vested exclusively in the General Assembly; no other branch of government holds such power." 2016 IL 118422, ¶ 42; see also *Cook County v. Ogilvie*, 50 Ill. 2d 379, 384 (1972) ("The power to make appropriations is constitutionally vested in the General Assembly[.]"). These principles control here.[5]

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[5] Most jurisdictions have constitutional provisions similar to the Appropriations Clause, which was patterned after the similar provision in the federal Constitution. *Humbert v. Dunn*, 24 P. 111, 111-12 (Cal. 1890). Implementing these provisions, courts routinely refuse to enforce claimed contract obligations in excess of the appropriations for them. See *Leiter v. United States*, 271 U.S. 204, 206-07 (1926); *Marine Revitalization Corp. v. Dep't of Land & Natural Res.*, 2010 WL 5150166, ¶ 31 (D. N. Mariana Isl. 2010); *Manhattan*

In *State (CMS) v. AFSCME*, the Court vacated an arbitrator's award in a contract dispute ordering the State to pay salary increases specified in a collective bargaining agreement where the General Assembly had not appropriated funds for those increases, holding that the order violated public policy, as established by the Appropriations Clause. 2016 IL 118422, ¶¶ 2, 40-42, 56. In *Barrett*, the Court applied the same principle, holding that even though the University of Illinois had the statutory authority to enter into contracts, it could not pay compensation to its in-house counsel without an appropriation by the General Assembly for that purpose. 382 Ill. at 338-52. The Court explained that the University, in exercising its authority to enter into contracts, "must keep within the authorization *and appropriations available*," *id.* at 341 (emphasis added), and that "[t]his power is . . . *always subject to the restriction* that [payments made] must be within the classifications *for which funds have been appropriated and are available*"), *id.* at 344 (emphasis added). Reinforcing the point, the Court held that "before the Auditor of Public Accounts may be directed by mandamus to issue and deliver warrants to anyone claiming payments from the State, it must be clearly shown that a proper appropriation has been made and that there are available funds in the appropriation, against which such warrants may be drawn." *Id.* at 348. And in *AFSCME v. Netsch*, 216 Ill. App. 3d 566 (4th Dist. 1991), the appellate court rejected the plaintiffs' effort to require the Comptroller to pay State employees absent enacted appropriations. *Id.* at 568.

Bldgs., Inc. v. Hurley, 643 P.2d 87, 94-96 (Kan. 1982); *Butler v. Hatfield*, 152 N.W.2d 484, 492-94 (Minn. 1967); *State ex rel. Armontrout v. Smith*, 182 S.W.2d 571, 573 (Mo. 1944).

Plaintiffs here seek relief similar to what was rejected in *State (CMS) v. AFSCME*, *Barrett*, and *Netsch* — i.e., payment for their contractual services in the absence of a sufficient appropriation. Plaintiffs' request should likewise be rejected.

1. Defendants' actions did not suspend the operation of the Appropriations Clause.

Plaintiffs nonetheless suggest that, based entirely on the actions of executive-branch officials in entering into and accepting services under Plaintiffs' contracts, Defendants may be ordered to pay Plaintiffs everything they claim to be owed under those contracts. But such relief is contrary to the Appropriations Clause, which gives the General Assembly the exclusive power to authorize the expenditure of state funds. Indeed, if Plaintiffs' claim were correct, the Appropriations Clause would mean little, for it could easily be circumvented by executive actions.

Plaintiffs' argument disregards the constitutional allocation of authority to appropriate state funds. The Supreme Court has spoken clearly on the point: "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*." *State (CMS) v. AFSCME*, 2016 IL 118422, ¶ 42 (emphasis added); see also *Netsch*, 216 Ill. App. 3d at 568 ("any attempt by the comptroller to issue the funds in the absence of an appropriation bill signed into law by the governor would create obvious problems under the separation-of-powers doctrine"). Reinforcing this constitutional allocation of responsibility, the Supreme Court in *Ogilvie* held that the General Assembly may not delegate to executive-branch officials its constitutional authority over the appropriation of public funds. 50 Ill. 2d at 384-85; see also *Burris*, 118 Ill. 2d at 479. Yet in this case, Plaintiffs contend that executive-branch officials could, and did, create a legally enforceable obligation to spend State funds without a corresponding appropriation by the legislature. The separation of powers among the respective branches of state government precludes that relief.

2. The Limited Exceptions to the Appropriations Clause Do Not Assist Plaintiffs Here.

It is true that the Appropriations Clause of the Illinois Constitution is subject to limited exceptions — such as financial obligations directly mandated by the Illinois Constitution, such as judicial salaries, see Ill. Const., art VI, § 14 ("Judges shall receive salaries provided by law . . . ."); *Jorgensen*, 211 Ill. 2d at 311, or mandated by federal law, which takes precedence over the Illinois Constitution under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2).[6] But those exceptions do not benefit Plaintiffs, whose claims for payment rest on services performed under contracts entered into with executive-branch officials.

In support of their position, Plaintiffs have attempted to style their claims as ones to vindicate constitutional rights, apparently on the assumption that this avoids the limitation imposed by the Appropriations Clause. But that approach is unsound because, as explained below, the circumstances Plaintiffs allege do not

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[6] An example of such spending mandated by federal law is reflected in the August 31, 2015 federal court order in *Memisovski v. Maram*, N.D. Ill. No. 92-cv-01982, and *Beeks v. Bradley*, N.D. Ill. No. 92-cv-4204, requiring the State to make all Medicaid payments necessary to comply with federal law.

give rise to valid constitutional claims against Defendants, and even if they did, the remedy would not be to pay Plaintiffs the amounts they claim for their contractual services. In particular, the Supreme Court's decision in *State (CMS) v. AFSCME*, described in more detail below (at 34-35), rejected the very impairment-of-contract theory advanced by Plaintiffs here.

B. The State Comptroller Act Prohibits Payments to Plaintiffs for Services Under Their Contracts.

Section 9(c) of the State Comptroller Act, 15 ILCS 405/9 (2014), which bars the expenditure of public funds without a corresponding appropriation, also prohibits the relief Plaintiffs claim in this case. That provision states:

> The Comptroller shall examine each voucher required by law to be filed with him and determine whether unencumbered appropriations or unencumbered obligational or expenditure authority other than by appropriation are legally available to incur the obligation or to make the expenditure of public funds. If he determines that unencumbered appropriations or other obligational or expenditure authority are not available from which to incur the obligation or make the expenditure, the Comptroller shall refuse to draw a warrant.

15 ILCS 405/9(c). The evident purpose of this provision is to ensure that the Comptroller does not authorize an expenditure of available state funds without an appropriation or equivalent legal authorization to do so. But Plaintiffs specifically allege the *absence* of such an appropriation for the payments they seek. (A 9-11.) For this reason as well, their action was properly dismissed.

C. The Subject-to-Appropriations Contingency in Plaintiffs' Contracts Forecloses Their Claimed Right to Payment for Services Under Their Contracts.

A further bar to Plaintiffs' requested recovery of payments for services specified in their contracts is the provision in those contracts expressly making them contingent on appropriations. Given the nature of the appropriations process, state agencies commonly include an appropriation contingency in their contracts. See 1979 Ill. Att'y Gen'l Op. 24 (S-1412); 1977 Ill. Att'y Gen'l Op. 99, 102 (S-1265); cf. *Avery*, 345 Ill. at 645 (addressing appropriation contingency in municipal contract).[7]

Consistent with this policy and practice, Plaintiffs' contracts specifically provide that they are "contingent upon and subject to the availability of funds." (A 10.) Thus, even as a matter of basic contract law, that language limits Plaintiffs' contract rights to the amount of any enacted appropriations and provides an additional reason why their claims are foreclosed by the lack of appropriations for the amounts they seek. See *State (CMS) v. AFSCME*, 2016 IL 118422, ¶¶ 44-53; see also *Butler*, 152 N.W.2d at 491-94; *Killebrew v. United States*, 52 Ct. Cl. 440 (1917); see generally *Brawley v. United States*, 96 U.S. 168 (1877); *R. A. Weaver & Assoc., Inc. v. Asphalt Const., Inc.*, 587 F.2d 1315, 1319-22 (D.C. Cir. 1978).

Plaintiffs suggest that the clause in their contracts making them "contingent upon and subject to the availability of funds" does not actually make them subject to appropriations and, in effect, is mere surplusage that adds nothing to

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[7] Even if there were no such express contingency, under general contract law principles "statutes and laws in existence at the time a contract is executed are considered part of the contract," and "[i]t is presumed that parties contract with knowledge of the existing law." *State (CMS) v. AFSCME*, 2016 IL 118422, ¶ 53 (citations and internal quotation marks omitted). At a minimum, therefore, Plaintiffs' contracts were subject to the limitations provided by the Appropriations Clause and the State Comptroller Act, which bar the expenditure of state funds without an appropriation.

the immediately following clause stating that Defendants may terminate the contracts if the necessary appropriations are not enacted. (Pl. Br. at 11-12.) But these provisions are not inconsistent, and Plaintiffs' proposed reading of their contracts must be rejected because it would violate the principle that all provisions of a contract should be given meaning if that is reasonably possible, *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011), and would also offend the rule that contracts should not be interpreted in a manner that would violate the law (here, the Constitution and relevant statutes), see *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 217 (1997); see also *Local 165, Int'l Bhd. of Elec. Workers, AFL-CIO v. Bradley*, 149 Ill. App. 3d 193, 211 (1st Dist. 1986). Defendants' decision not to exercise their contractual discretion to terminate or suspend Plaintiffs' services (which Plaintiffs apparently did not want exercised because it would have prejudiced their ability to be paid and the amount of any payments to them, which Public Act 99–0524 ultimately authorized) did not nullify the separate appropriation contingency in these contracts.

V. Plaintiffs' Impairment-of-Contract Claim Does Not Support Their Request for Court-Ordered Payments for Contractual Services.

There is also no merit to Plaintiffs' claim of an unconstitutional impairment of their contracts. The Contracts Clause in the Illinois Constitution states that "[n]o . . . law impairing the obligation of contracts . . . shall be passed." (Ill. Const. art. I, § 16.) It provides the same protection as its federal counterpart, on which it was based. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 482 (1998); *George D. Hardin, Inc. v. Village of Mt. Prospect*, 99 Ill. 2d 96, 103 (1983). The purpose of the Contracts Clause "is to protect the expectations of persons who enter into contracts from the danger of subsequent legislation." *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 398 Ill. App. 3d 510, 530 (2d Dist. 2009) (citation and internal quotation marks omitted). Thus, it provides a shield against legislation that takes away existing contractual rights or remedies. It does not impose on government an affirmative duty to fulfill all of its contractual obligations, as Plaintiffs effectively claim.

The Contracts Clause's protection does not apply here for several reasons. Because Plaintiffs' contracts contained explicit appropriation contingencies, the absence of such appropriations cannot violate Plaintiffs' contract rights. In addition, Plaintiffs have alleged at most a breach of contract, not the unconstitutional enactment of a law impairing contract obligations. And even if Plaintiffs had validly alleged such an impairment, the remedy would be to declare that enactment invalid, not to grant Plaintiffs a breach-of-contract remedy in the form of a damages award against the State.

A. Plaintiffs Have Not Alleged An Unconstitutional Impairment of Contract Obligations.

1. The failure of a contractual condition did not "impair" Plaintiffs' contracts.

As an initial matter, Plaintiffs' Contracts Clause claim fails because, as discussed above, the need for legislative appropriations was a contingency explicitly built into their contracts, and the failure of that contingency could not have violated their contract rights or impaired the State's contractual obligations to them. This was the basis for the Illinois Supreme Court's rejection of a similar claim in *State (CMS) v. AFSCME*. In that case, the Court held that the wage increase claimed by the plaintiff was "always contingent on legislative funding, and the failure of that contingency to occur cannot 'impair' AFSCME's agreement with the State." 2016 IL 118422, ¶ 52. That holding controls here. All of Plaintiffs' contracts are subject to appropriations. The failure of that contingency therefore cannot be an unconstitutional impairment of their contracts.

In support of the opposite position, Plaintiffs rely on the preliminary injunction granted by the Circuit Court of St. Clair County, which the Fifth District affirmed in an unpublished appellate decision, *AFSCME v. State*, 2015 IL App (5th) 150277-U. In light of the Supreme Court's later holding in *State (CMS) v. AFSCME*, however, that reliance is entirely unjustified. In that litigation, several labor unions claimed that, despite the absence of enacted appropriations, the failure to pay state employees the wages and salaries provided in collective bargaining agreements would impair the State's contractual obligations, in violation of the Contracts Clause. See *AFSCME v. State*, 2015 IL App (5th) 150277-U, ¶ 4. Relying specifically on the First District's opinion that the Supreme Court later reversed in *State (CMS) v. AFSCME*, the circuit court adopted this theory and entered a temporary restraining order ("TRO") requiring the Comptroller to pay the employees' normal salaries. *Id.* at ¶ 12. The Fifth District affirmed the TRO, also expressly relying on that subsequently reversed First District opinion. *Id.* at ¶¶ 38-39. But neither the order by the St. Clair County circuit court, nor the Fifth District's unpublished order in that case, has any precedential effect, and the latter may not even be cited as precedent. See S. Ct. R. 23; *Price ex rel. Massey v. Hickory Point Bank & Trust*, 362 Ill. App. 3d

1211, 1220-21 (4th Dist. 2006); *In re Donald R.*, 343 Ill. App. 3d 237, 244 (3d Dist. 2003). And both are undermined by the Supreme Court's reversal and explicit repudiation of the First District's Contracts Clause analysis, which made clear that where a contract is contingent on appropriations, the lack of such appropriations cannot impair the obligations of that contract. 2016 IL 118422, ¶ 52.

Plaintiffs assert that the Supreme Court' decision in *State (CMS) v. AFSCME* is distinguishable on the basis that it involved a statutory limitation on public labor contracts (Pl. Br. at 30-31), and that the Court even endorsed the legal theory they advocate here (*id.* at 31: "even in the case of a pure omission" to enact appropriations, "the Supreme Court found there could be an impairment.") Neither assertion is faithful to the Supreme Court's opinion. Although Plaintiffs' contracts do not involve collective bargaining agreements subject to Section 21 of the Public Labor Relations Act, 5 ILCS 315/21 (2012), they are subject to the Appropriations Clause and other statutory provisions discussed above (e.g., 15 ILCS 405/9(c) (2014)) that expressly make them subject to sufficient appropriated State funds. And the appropriation contingency in Plaintiffs' contracts is indistinguishable from the ones the Supreme Court relied on in *State (CMS) v. AFSCME*. Moreover, nothing in the Court's opinion can fairly be read to endorse Plaintiffs' legal theory that the Contracts Clause effectively defeats the Appropriations Clause and these statutes, as well as the State's sovereign immunity, by man-dating judicial enforcement of state contracts entered into by executive-branch officials when the General Assembly exercises its constitutional authority not to appropriate funds for those contracts.

Plaintiffs' Contracts Clause claim fails for the further reason that even if their contracts were not contingent on appropriations, they have alleged only a *breach*, not an unconstitutional impairment, of the State's obligations. Although the Contracts Clause protects contracts with the government as well as contracts between private parties, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977), the government violates the Contracts Clause when it enacts legislation after formation of a contract that materially diminishes one party's contractual obligations or the remedies for nonperformance that existed when the contract was formed. See *Mercantile Trust & Deposit Co. v. City of Columbus*, 203 U.S. 311, 320 (1906) (inquiry under Contracts Clause is whether "there is any subsequent legislation, by municipality or by the state legislature, which impairs [the] obligation" of a contract); *Green v. Biddle*, 21 U.S. 1, 17 (1823) (holding that Contracts Clause extends to legislation materially impairing "existing remedies"); *Richardson v. U.S. Mortg. & Trust Co.*, 194 Ill. 259, 266 (1901) ("remedies existing at the time the contract is made cannot be impaired, so as to materially lessen the value of the contract by subsequent law"); see also *Horwitz-Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250-51 (7th Cir. 1996); *AFSCME, Council 31 v. State of Ill., Dep't of Cent. Mgmt. Servs.*, 2015 IL App (1st) 133454, ¶ 44 (listing elements of Contracts Clause claim). And it is well established that a breach of contract by the government does not establish a constitutional violation. *Hays v. Port of Seattle*, 251 U.S. 233, 237-38 (1920); *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148-50 (1901); *Horwitz-Matthews, Inc.*, 78 F.3d at 1250 (stating that it "would be absurd to turn every breach of contract by a state or municipality into a violation" of the constitution); see also *Council 31, AFSCME v. Quinn*, 680 F.3d 875, 885-86 (7th Cir. 2012) (rejecting argument that legislature unconstitutionally impairs contractual obligations when it fails to appropriate funds sufficient to meet State's alleged contractual obligations to employees). Here, however, Plaintiffs' complaint about non-payment of the sums they say are owed does not result from the enactment of legislation after they entered into their contracts, nor do they complain of an impairment of any contractual rights or remedies that existed when these contracts were formed.

2. The absence of legislation cannot impair a contract.

The central flaw in Plaintiffs' impairment-of-contract claim is that they allege, not that the *passage* of a law has impaired their contract rights, but that the *absence* of legislation appropriating funds for those contracts has done so. But in view of the text of the federal and state Contracts Clauses,[8] courts have held that those Clauses are limited to prohibiting the *enactment* of laws impairing contract obligations. Thus, in *Cleveland & P.R. Co. v. City of Cleveland*, 235 U.S. 50, 53-54 (1914), the United States Supreme Court explained "that an impairment of the obligation of the contract, within the meaning of the Federal Constitution, must be by subsequent legislation." See also *People v. Ottman*, 353 Ill. 427, 430 (1933) ("The constitutional provision denying the power to pass any law impairing the obligation of a contract has reference only to a statute enacted after the making of a contract."). The legislative *omission* about which Plaintiffs

[8] See U.S. Const., Art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); Ill. Const. art. I, § 16 ("No . . . law impairing the obligation of contracts . . . shall be passed.")

complain, by definition, cannot violate the constitutional prohibition against *passage* of a law impairing contract obligations.

Plaintiffs attempt to get around this obstacle by arguing Public Act 99–0524 was a legislative enactment that impaired their contractual rights. (Pl. Br. at 24-27.) But that contention turns logic on its head. That Act provided funding that allowed Plaintiffs to receive "full or nearly full payment for [their] contracts in fiscal year 2016." (*Id.* at 9.) By providing some funding for Plaintiffs' contracts, Public Act 99–0524 made their situation better, not worse, and so cannot plausibly be characterized as an "impairment" of their rights or remedies.

Plaintiffs also contend that their contracts have been unconstitutionally impaired because resort to the Court of Claims would not give them an effective remedy. (Pl. Br. at 27-28.) This contention again erroneously reads the Contracts Clause to impose an affirmative duty on government to fulfill its contracts, instead of just prohibiting post-contract legislation that eliminates or materially reduces existing contractual rights or remedies. See, e.g., *Ex parte Ayers*, 123 U.S. 443, 505 (1887) (holding that sovereign immunity does not violate Contracts Clause); *Thompson v. Auditor General*, 247 N.W. 360, 364-65 (Mich. 1933) (same); see *S.J. Groves & Sons Co. v. State of Illinois*, 93 Ill. 2d 397, 404-05 (1982) (holding that sovereign immunity denying a contracting party the right to sue in circuit court does not affect the validity of a contract or the State's legal liability), *overruled in part on other grounds*, *Rossetti Contracting Co. v. Court of Claims*, 109 Ill. 2d 72, 79 (1985). Where, as here, no law is enacted that eliminates or materially diminishes existing contractual rights or remedies, the validity of that law, under the Contracts Clause, does not depend on the effectiveness of pre-existing remedies that remain unchanged. See *Horwitz-Matthews, Inc.*, 78 F.3d at 1250 ("when a state repudiates a contract to which it is a party it is doing nothing different from what a private party does when the party repudiates a contract; it is committing a breach of contract"); see also *S.J. Groves & Sons Co.*, 93 Ill. 2d at 404 ("Because the State is obligated under a contract it signed does not mean that a remedy to institute a suit in a circuit court for a breach is implied.").

B. The Remedy for a Law Impairing Contractual Obligations Is Not Judicial Enforcement of the Alleged Contractual Right.

Finally, Plaintiffs' Contracts Clause claim fails because the remedy for a violation of the constitutional prohibition against passing a law impairing contractual obligations is to invalidate the law, not to enforce the parties' contract rights. See *Carter v. Greenhow*, 114 U.S. 317, 322 (1885); see also *Ex parte Ayers*, 123 U.S. 443, 504 (1887); *Andrews v. Anne Arundel County, Md.*, 931 F. Supp. 1255, 1267 & nn.13-14 (D. Md. 1996), *aff'd in unpublished op'n* 114 F3d 1175 (4th Cir. 1997). The remedy sought by Plaintiffs, if accepted, would risk supplanting traditional breach-of-contract principles with a body of constitutional law governing the enforcement of government contracts alleged to have been impaired. Because Plaintiffs do not seek to declare invalid and enjoin enforcement of a post-contract law allegedly impairing their contract rights or remedies, the dismissal of their Contracts Clause claim should be affirmed.

VI. The Lack of Appropriations for Plaintiffs' Contractual Services Does Not Violate their Constitutional Right to Equal Protection.

Plaintiffs' attempt to convert their breach of contract claim into one for violation of their constitutional right to equal protection also fails.

A. Defendants' Actions Are Not Subject to Heightened Scrutiny.

Plaintiffs do not assert that they are a protected class for equal protection purposes. Thus, the legislative and executive decisions they challenge are subject to judicial scrutiny only to determine whether there is a "rational basis" for treating them differently than other persons who they maintain are similarly situated. *People v. Masterson*, 2011 IL 110072, ¶ 24. That scrutiny is "limited and generally deferential." *Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 37 (1996). "The challenged classification need only be rationally related to a legitimate state goal, and if any state of facts can reasonably be conceived to justify the classification, it must be upheld." *Id.* (citations omitted).

Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Comm'ns, Inc.*, 508 U.S. 307, 313 (1993). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* That is especially true with respect to determinations about how to allocate limited public resources. See *Miller v. Ill. Dep't of Pub. Aid*, 94 Ill. App. 3d 11, 19-20 (1st Dist. 1981) (rejecting equal protection challenge to policy eliminating public aid coverage for certain optical and dental conditions in light of "the obvious constraints of finite financial resources”).

B. Plaintiffs Are Not Similarly Situated to Persons Being Paid Without an Appropriation.

Regardless of the standard of review, an equal-protection plaintiff must establish that it is similarly situated, in all relevant respects, to someone treated differently. See *Masterson*, 2011 IL 110072, ¶ 25 (“As a threshold matter, ... it is axiomatic that an equal protection claim requires a showing that the individual raising it is similarly situated to the comparison group,” and “when a party fails to make that showing, his equal protection challenge fails”); see also *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Plaintiffs have not alleged facts showing that they are similarly situated to other persons receiving state funds. Plaintiffs do not allege they are similarly situated to persons for whom the legislature has enacted appropriations or for whom federal law or the Illinois Constitution itself requires payments for specific purposes without such appropriations. Instead, Plaintiffs seek to compare themselves with state employees, who are receiving court-ordered payments without legislative appropriations pursuant to a preliminary injunction. (Pl. Br. at 7, 18-19, 21.) But that comparison falls far short of establishing an equal protection violation. As described above, the Appropriations Clause and Section 9(c) of the State Comptroller Act (subject to limited exceptions not applicable here) prohibit payments of public funds without a supporting appropriation. Without a contrary court order, Defendants were thus legally obligated not to make payments to Plaintiffs, and Plaintiffs cannot be considered similarly situated to state employees who are being paid pursuant to preliminary injunction, not a final judgment.

To the extent there is a difference in treatment between Plaintiffs and state employees, it does not result from intentional discrimination by Defendants, but instead from a judicial ruling in a separate court proceeding. Plaintiffs do not claim that the state *courts* have denied them equal protection, nor could they do so in this case. The constitutional guarantee of equal protection extends to judicial decisions, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972), but establishing intentional discrimination against similarly situated persons normally requires action by the same decision-maker, not independent actions by different persons. See, e.g., *United States v. Moore*, 543 F.3d 891, 897 (7th Cir. 2008) (rejecting defendant's equal protection claim where the alleged "differential treatment from the state defendants cannot be attributed to a single decision-maker"); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 618 (7th Cir. 2000) ("when different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects") (citation and internal quotation marks omitted).

In the St. Clair County litigation on which Plaintiffs rely for their equal protection claim, the People have argued, and continue to argue, that the legal theory advanced by the plaintiffs — that the failure to pay amounts specified in a collective bargaining agreement violates the Contracts Clause, despite the absence of enacted appropriations for those payments — is constitutionally unsound and contrary to the Illinois Supreme Court's ruling in *State (CMS) v. AFSCME*. Whether that theory is legally valid is subject to the normal process of appellate review. But until that process is complete, equal protection cannot possibly prevent other circuit court judges from exercising their constitutional responsibility to determine the content of the law based on the application of precedent and other governing legal principles.

VII. The Legislature's Decision Not to Appropriate More Funds for Plaintiffs' Contractual Services Does Not Deprive Them of a Property Right Without Due Process.

Finally, the circuit court properly dismissed Plaintiffs' due process claim. The due process clause of the Illinois Constitution states that "[n]o person shall be deprived of life, liberty or property without due process of law." (Ill. Const., art. I, § 2.) Its language is "nearly identical to its federal counterpart," and, absent specific evidence indicating an intent to adopt a different meaning, it is interpreted in the same manner. *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 47 (citing *People v. Caballes*, 221 Ill.2d 282, 297 (2006)); see also *In re M.A.*, 2015 IL 118049, ¶ 38 (refusing to read procedural due process guarantee in state Constitution "to provide greater protection than its federal counterpart"). Here, Plaintiffs' due process claim has no merit because they did not allege either the deprivation of a property interest or the denial of any process due, and the remedy they seek is not available for a due process violation.

A. Plaintiffs Lack a Property Interest in Payments Under Their Contracts Without Legislative Appropriations.

Because Plaintiffs' contracts are explicitly subject to appropriations, that contingency placed a limit on Plaintiffs' property interests for due process purposes. The failure of that contingency, as specifically contemplated by Plaintiffs' contracts, therefore could not deprive them of a property interest. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (holding that dimensions of property rights protected by due process are typically defined by state law, and where plaintiffs' contract was for limited term, nonrenewal could not deprive him of a protected property right); *S & D Maint. Co. v. Goldin*, 844 F.2d 962, 967 (2d Cir. 1988) (holding that plaintiff lacked protected property interest where its contract expressly authorized termination "without cause").

B. The Legislative Process for Making Appropriations of State Funds Provides Plaintiffs All the Process Due.

Even if Plaintiffs had a property interest in receiving payments under their contracts, the legislative process resulting in the lack of appropriations for such payments (including the Governor's vetoes of appropriations bills, which are legislative in nature, see *Williams*, 30 Ill. 2d at 14, provides all the process due. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Ind.*, 57 F.3d 505, 513 (7th Cir. 1995); *Village of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 34 ("the enactment of a statute itself generally affords all of the process that is due").

Nor did Defendants' refusal to authorize payment to Plaintiffs absent appropriations deprive them of a property interest without due process. Plaintiffs' contracts were always subject to governing law, and the refusal to pay them without appropriations followed that law, including the Appropriations Clause and the Comptroller Act. And even if that refusal could be considered a breach of contract, it would not constitute the deprivation of a property interest without due process, and the constitutionally required process would be satisfied by Plaintiffs' right to a post-deprivation hearing in the form of action in the Court of Claims. See *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001); *Khan v. Bland*, 630 F.3d 519, 531-33 (7th Cir. 2010); see also *Shawnee Sewerage*

& Drainage Co. v. Stearns, 220 U.S. 462, 471 (1911) ("The breach of a contract is neither a confiscation of property nor a taking of property without due process of law."); *City of Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co.*, 197 U.S. 178, 181 (1905) (holding that municipal repudiation of contract to construct waterworks did not support constitutional claim of property deprivation without due process); *Friends of Children, Inc. v. Matava*, 766 F.2d 35, 36 (1st Cir. 1985) (Breyer, J.) ("a simple breach of contract by a state official is not a deprivation of property without *constitutional* due process of law") (emphasis in original, citation and internal quotation marks omitted); *Leavell v. Illinois Dep't of Natural Res.,* 600 F.3d 798, 805 (7th Cir. 2010) (holding that post-deprivation procedure in Court of Claims satisfies due process).

C. Plaintiffs' Due Process Claim At Most Entitles Them to Process, Not Breach-of-Contract Relief.

In any event, because due process guarantees procedural protections, not any particular substantive outcome, *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982), the remedy for any due process violation is an outcome-neutral hearing to contest the legitimacy of the claimed deprivation, see *Evers v. Astrue*, 536 F.3d 651, 660 (7th Cir. 2008), not the specific outcome of paying Plaintiffs the amounts they claim. Accordingly, even if Plaintiffs had stated a due process claim, the remedy would be to give Plaintiffs whatever process is constitutionally due (e.g., notice and a hearing). But that is not the relief Plaintiffs seek, and their due process claim therefore was rightly dismissed.

CONCLUSION

Although Plaintiffs have undoubtedly experienced substantial hardship as a result of the State's prolonged budget impasse, their attempt to obtain judicial redress for this hardship is misplaced. Even if, despite the express appropriation contingency in Plaintiffs' contracts, nonpayment of the amounts they claim for their services did violate their contractual rights, the relief they seek — a court order granting monetary recovery from the State based on those contracts — is barred by the State's sovereign immunity. That relief is also foreclosed by the lack of enacted legislative appropriations to pay for those services. Plaintiffs' reliance on actions by executive-branch officials cannot overcome the absence of such appropriations because the Illinois Constitution gives the General Assembly the exclusive power to authorize the expenditure of state funds. Plaintiffs' attempt to transform their breach-of-contract claims into constitutional claims is also unavailing. Plaintiffs have not alleged the elements of such claims, and even if they did, the available relief would not be the monetary recovery they seek. Thus, however difficult Plaintiffs' situation may be as a result of the absence of appropriations for the contractual payments they desire, they may not turn to the courts to obtain those payments.

For the foregoing reasons, the circuit court's judgment should be affirmed.

February 24, 2017

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Supreme Court Rule 341(c) 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 47 pages.

Richard S. Huszagh

Certificate of Filing and Service

The undersigned declares under penalty of law as provided in 735 ILCS 5/1–109, that on February 24, 2017, the foregoing Brief of Defendants-Appellees was filed with the Clerk of the Illinois Appellate Court, First District, and he e-mailed an electronic copy to:

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