No. _____

In The
Supreme Court of the United States

THE CITY OF NEW ORLEANS, et al.,

Petitioners,

v.

NEW ORLEANS FIRE FIGHTERS PENSION AND RELIEF FUND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The City of New Orleans (the "City") annually contributes millions of dollars in funding to the New Orleans Fire Fighters Pension and Relief Fund (the "Fund"). For many years, the Fund's trustees mismanaged contributions from the City by imprudently investing those contributions in violation of the "prudent man" rule and breaching the trustees' fiduciary duties. The City has been required to pay inflated contributions due to the trustees' financial mismanagement.

The first question presented is whether there is a violation of Petitioners' fundamental right to present every available defense under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, when the court excludes evidence of mismanagement of a pension fund in calculating the City's contribution to that fund, and simply rubber stamps the increased contribution sought by the trustees without taking into account the trustees' misconduct.

2. In issuing a writ of mandamus directing the City to make an additional contribution to the Fund for fiscal year 2012, the District Court, affirmed by the Court of Appeal, ordered the City Council to appropriate approximately $17.5 million to the Fund. As the City's legislative branch, the City Council is solely vested with the power of appropriation.

QUESTIONS PRESENTED – Continued

The second question presented is whether a court order to a state or local legislative body to perform the legislative act of appropriating public funds constitutes a violation of the separation of powers in the United States Constitution.

LIST OF PARTIES

Petitioners are the City, the Honorable Mitchell J. Landrieu, in his official capacity as Mayor of the City of New Orleans; Norman S. Foster, in his official capacity as Chief Financial Officer and Director of Finance of the City of New Orleans; Jacquelyn Brechtel Clarkson, in her official capacity as President of the New Orleans City Council; Stacy Head, in her official capacity as Vice-President of the New Orleans City Council; Susan G. Guidry, in her official capacity as Member of the New Orleans City Council; Diana Bajoie, in her official capacity as Member of the New Orleans City Council; Kristin Gisleson Palmer, in her official capacity as Member of the New Orleans City Council; and Cynthia Hedge-Morrell, in her official capacity as Member of the New Orleans City Council.

Respondents are the Fund; William M. Carrouche, Richard J. Hampton, Jr., Nicholas G. Felton, Terrell P. Hampton, Darryl P. Klumpp, Sr., Dean DiSalvo, and Keith Noya, in their official capacities as trustees of the Fund.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this Petition for a Writ of Certiorari to review the judgments of the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeal, which judgments were left undisturbed by the Louisiana Supreme Court.

DECISIONS BELOW

The District Court's judgment and reasons for judgment have not been reported and are reprinted in the Appendices to this Petition ("App.") at App. 36 to 69. The Louisiana Fourth Circuit Court of Appeal's judgment affirming the District Court's judgment has been reported at 131 So. 3d 412 (La. App. 4 Cir. 12/18/13), and is reprinted in App. 1 to 35. The Louisiana Supreme Court's denial of Petitioners' application for a writ of certiorari has been reported at 135 So. 3d 623 (La. 3/21/14) and is reprinted in App. 70.

JURISDICTION

The judgment of the Civil District Court for the Parish of Orleans was entered March 28, 2013. The judgment of the Louisiana Fourth Circuit Court of Appeal affirming the District Court's judgment was entered December 18, 2013. The Louisiana Supreme Court denied Petitioners' application for a writ of certiorari on March 21, 2014, and, thus, Petitioners

have until June 19, 2014 to file this Petition. *See* U.S. SUP. CT. R. 13. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Pursuant to this Court's Rule 29.4(c), Petitioners aver that 28 U.S.C. § 2403(b) may apply and, accordingly, Petitioners are serving contemporaneously herewith on the Attorney General of the State of Louisiana the requisite service copy of this Petition, in which Petitioners challenge the constitutionality of Louisiana Revised Statutes § 11:3384(F).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states:

> nor shall any State deprive any person of life, liberty, or property without due process of law.

U.S. CONST. amend. XIV, § 1.

The Appropriations Clause of the United States Constitution states:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

U.S. CONST. art. I, § 9, cl. 7.

Louisiana Revised Statutes § 11:3363(D) states:

> The board may employ personnel, professional advisors, legal and technical assistants, and pay compensation for services rendered and shall employ an actuary who shall annually certify to the board the amount of contributions required from the city and other sources to maintain the system on an actuarial basis.

LA. REV. STAT. ANN. § 11:3363(D).

Louisiana Revised Statutes § 11:3384(F) states:

> On account of each member who comes under the provisions of this Section applying to persons employed after December 31, 1967, either because of date of employment or due to election as provided herein, there shall be paid annually by the city and credited to the pension accumulation account a certain percentage of the earnable compensation of each member, to be known as the "normal contributions", and an additional percentage of this earnable compensation to be known as the "accrued liability contribution". The percentage rates of such contribution shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuation.

LA. REV. STAT. ANN. § 11:3384(F).

STATEMENT OF THE CASE

This Petition affords this Court the opportunity to address federal issues of exceptional importance concerning the deprivation of due process rights of municipalities and municipal officials who perform the discretionary, legislative acts of budgeting and appropriating public funds and the usurpation of those acts by the judiciary.

In particular, this case is about the Louisiana judiciary's improper usurpation of the exclusive province of legislative bodies to appropriate and the fundamental due process right of a defendant to present every available defense. The Louisiana judiciary reached beyond its constitutional boundaries by issuing a mandamus judgment that forces a municipal legislative body to exercise its inherently discretionary power to budget and appropriate a supplementary payment of $17.5 million to a mismanaged pension fund. The Louisiana courts departed from due process by ordering City officials to pay for reckless fiscal mismanagement by the former trustees of the Fund without regard for the effects of that mismanagement on the financial status of the Fund.

Petitioners seek reversal of the judgments of the lower courts ordering Petitioners to immediately budget, appropriate, and pay approximately $17.5 million to the Fund. Although budget adoption and appropriation are quintessentially legislative acts, the judgment below constitutes a judicial order that oversteps the limits of due process and forces the

hand of a municipal legislative body. Additionally, an unchecked Louisiana judiciary has invaded the province of that legislative body's discretionary authority to appropriate public money.

In addition to violating the separation of powers between the judiciary and the legislature, the judgment violates due process by denying Petitioners the fundamental right to introduce evidence that City appropriations to the Fund have been squandered year after year by the Fund's former trustees, who imprudently invested those appropriations and breached their fiduciary obligations. Accordingly, this Court should exercise its jurisdiction on the grounds of due process and separation of powers to reverse the state courts' decisions that conflict with relevant decisions of this Court and, alternatively, to settle important questions of federal law.

A. Factual Background

The courts of Louisiana improperly imposed upon the City a supplementary funding requirement to pay an additional sum beyond the millions of dollars already appropriated by the City to the Fund for the 2012 fiscal year. The $17.5 million judgment disregards the ignoble origins of the New Orleans firefighter pension crisis – a tale of woe to which the Louisiana judiciary turned a deaf ear in unjustly laying the blame at Petitioners' feet.

1. The Fund: A History of Reckless Mismanagement

The former trustees of the Fund long engaged in a practice of financial mismanagement, poor fiscal administration, credit card abuse, and imprudent investment of public monies that the City has paid from its coffers to the Fund.[1] In recent years, independent auditor reports, including the report of the Louisiana Legislative Auditor, have unveiled that the Fund's former trustees made millions of dollars of non-diversified direct investments and loans in speculative real estate ventures, and many of those loans are now in default.[2] For example, the trustees invested in the New Orleans Lakewood Golf Course and the Falconhead Golf Club in Austin, Texas. As of the end of 2011 – around the time the City budgeted for fiscal year 2012 (the year at issue in this litigation) – the partnerships that owned these golf

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[1] Reference to the trustees relates to the trustees that were in office at the time of filing of the subject lawsuit.

[2] *See, e.g.*, Louisiana Legislative Auditor Daryl G. Purpera, Select Louisiana Retirement Systems, Investment Processes, Performance Audit Issued May 30, 2012, *available at* http://app.lla.state.la.us/PublicReports.nsf/96F6DB256A4FC65686257A0E00763D29/$FILE/0002A902.pdf; Independent Auditor's Report, Firefighters' Pension and Relief Fund of the City of New Orleans and Subsidiaries, December 31, 2011, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=9&cad=rja&uact=8&sqi=2&ved=0CF0QFjAI&url=http%3A%2F%2Fs3.documentcloud.org%2Fdocuments%2F449999%2Ffire-pension-2011-audit.pdf&ei=fDRMU46cIMPf0gHf64CgCQ&usg=AFQjCNFibwoIYjBOzeQdhO-ipMSgOD_jWg&sig2=pkMlOUBZH3bgkFVrsmrE0A&bvm=bv.64542518,d.dmQ.

courses were named defendants in numerous lawsuits. As to Falconhead, all of the assets and income of the partnership that owned the golf course were pledged as collateral for millions of dollars in lines of credit. As to Lakewood, a multi-million dollar line of credit was collateralized by assets of the partnership that owned the golf course. In addition to investing in unprofitable golf courses, the Fund's former trustees made loans that, as of December 31, 2011, were either in default or had a high likelihood of being uncollectible. A 2012 report of the Louisiana Legislative Auditor found that the Fund had nearly $140 million invested in real estate and that, through October 2011, those investments had lost about $29 million in market value.

These specific instances of high-risk investments are indicative of more general, pervasive problems. The Fund's former trustees failed to document and retain a formal asset implementation plan, as is required by best practices. The failure to develop such a plan for different classes of assets led to unnecessary risk and overinvestment in certain asset classes. The former trustees' failure to have such a plan also resulted in investments being made without crucial information regarding potential risk, liquidity, investment manager experience, and expected net return. The former trustees also borrowed money to fund investments, imprudently granted cost of living adjustments when the Fund was not actuarially sound, and failed to perform due diligence in investigating borrower credit-worthiness and investment liquidity.

The proverbial wool that had been pulled over the eyes of the public has come off, as the press has begun to unearth what the former trustees did with public monies appropriated to the Fund by the City. *The New York Times* recently reported that the former trustees invested with a risky hedge fund, the FIA Leveraged Fund.[3] The FIA Leveraged Fund is run by Alphonse Fletcher, Jr. and has elements of a Ponzi scheme. The former trustees acted contrary to good judgment by investing approximately $15 million in the FIA Leveraged Fund based on bad advice from Joe Meals and his advisory firm, Consulting Services Group, LLC, even after the trustees learned that Meals and his firm had been fined and censured by the Securities Exchange Commission and were subjected to further scrutiny and limitation pursuant to an investigation by the United States Department of Labor. The aftermath of the former trustees' reliance on bad advice and waste of taxpayer money is that the firefighter pension fund is unable to recoup any monies from Mr. Fletcher's hedge fund. Now, the assets of the FIA Leveraged Fund are "virtually worthless" and "[m]illions of dollars have been lost."[4] According to the Louisiana Legislative Auditor, the former trustees failed to periodically monitor the FIA Leverage Fund's ability to liquidate its assets, but had they done so, they may have been able to redeem

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[3] *See* Rachel Abrams, *Pension Funds Sue on a Deal Gone Cold*, N.Y. TIMES, Feb. 25, 2014, at B1-B2.

[4] *Id.*

the firefighter pension fund's initial investment and earned interest.

The former trustees' bad investments and mismanagement of assets – including millions of dollars in contributions from the City – unsurprisingly devastated the Fund's financial performance. The former trustees' investment decisions led to the Fund's failure to meet its actuarial assumption of a 7.5% rate of return, for the years 1990 to 2010. From 2000 to 2010, the former trustees' investment decisions produced a 1.6% annual rate of return, far below the required 7.5% and the performance of similar retirement funds in Louisiana and nationwide during that same time period. The Fund's average actuarial rate of return for the years 2005 to 2010 was 0.1%, and its average market rate of return was less than zero, at -0.9%.

Perhaps even more disturbing than knowing that the former trustees gambled with taxpayer money is not knowing where the money has gone, due to a lack of internal controls within the Fund. The New Orleans Office of Inspector General issued a February 17, 2014 report finding a woeful absence of credit card controls.[5] According to the Inspector General's report, the Fund gave its board members unlimited access to credit cards and did not require proof for expense

[5] *See* Richard A. Webster, New Orleans Firefighters' Pension Fund hit for lack of credit card controls in OIG report (Feb. 18, 2014), http://www.nola.com/politics/index.ssf/2014/02/new_orleans_firefighters_pensi_2.html.

reimbursements totaling tens of thousands of dollars. Contrary to best practices, unlimited credit card access was given to nine of ten board members, an administrative employee, and two individuals unrelated to the Fund. The Fund's Board of Trustees agreed with the Inspector General's findings concerning the lack of controls governing credit card spending.

From the shadows of this troubled history, the former trustees turned to the City to foot the bill for their reckless mismanagement.

2. The Lawsuit: A Demand to Fund Reckless Mismanagement

In 2011, even though of every $9 the City spent on general operations, it spent $1 on the Fund, the former trustees demanded increased contributions to cure alleged underfunding of the Fund. Prior to the City's adoption of its 2012 budget, the Fund and its trustees, in their official capacities (collectively, "New Orleans Firefighters Fund" or simply "NOFF"), sought from the City an appropriation of approximately $29.4 million for the Fund's "New System" (for firefighters employed from 1968 onward). After conducting legislative hearings, the New Orleans City Council appropriated $9 million directly to the New System and an additional $3.7 million that was split between the New System and the "Old System" (for firefighters employed prior to 1968). The City also appropriated an additional $19 million to the Old

System. Taken together, the City's appropriations to the Fund's two systems for the 2012 fiscal year totaled $31.7 million. Notably, the City made these appropriations in addition to $87.55 million appropriated for the New Orleans Fire Department, bringing the total of firefighter-related appropriations to 10% of the City's total budget for 2012. Yet, NOFF demanded that the City pay an additional $17.5 million to the Fund's New System – an amount that the City maintains is within the discretion of the City Council to pay or not to pay, as it is not statutorily mandated.

Notwithstanding the unfounded nature of NOFF's demand for another $17.5 million, City officials attempted in good faith to negotiate with NOFF. In July 2012, after the Fund's then-CEO Richard J. Hampton, Jr. demanded that City Mayor Mitchell J. Landrieu make an additional contribution, City First Deputy Mayor and Chief Administrative Officer Andrew Kopplin, on behalf of Mayor Landrieu, responded with a proposal that the City take concrete steps to help solve alleged funding problems. The City's proposed solution included the incorporation of $16.2 million into the City's 2013 budget for the Fund's New System; the incorporation of $19 million into the City's 2013 budget for the Fund's Old System; in future years, directing any funding needs for the Old System below $19 million per year toward the New System; and implementing a cap on the rate of annual growth in general fund budgetary requirements for the City's pension funds. In exchange for the City granting these concessions, Kopplin proposed

that the Fund's former trustees agree to several changes, including an end to the unlawful issuance of cost of living adjustments; joint development with the City of changes to Board membership; and joint development with the City of shared principles to address the Board's investment policy, cost of living policy and annual decisions, and interest policies.

NOFF rebuffed the City's proposals by filing a petition for a writ of mandamus directing Petitioners to pay an additional $17.5 million to the Fund. The lawsuit essentially constituted a demand that Petitioners fund the former trustees' history of reckless financial mismanagement without changing the existing governance and investment structure.

B. Proceedings Below

On July 19, 2012, NOFF filed its petition for a writ of mandamus in the Civil District Court for the Parish of Orleans, naming as defendants the City, Mayor Landrieu, City CFO and Director of Finance Norman S. Foster, and members of the City Council. NOFF's lawsuit sought an extraordinary writ of mandamus directing the defendants (Petitioners in this Court) to retroactively budget, appropriate, and pay to the Fund's New System an additional $17.5 million contribution to the Fund for fiscal year 2012. Petitioners filed an answer and a reconventional demand (the Louisiana equivalent of a counterclaim) seeking to recoup monies the City has been and will be called upon to pay due to the former trustees'

imprudent investments and financial mismanagement.[6]

Petitioners' answer to NOFF's petition detailed the former trustees' financial mismanagement as a defense to the relief sought in NOFF's petition. Additionally, Petitioners filed several exceptions to NOFF's suit based upon NOFF's improper use of a summary mandamus proceeding, request for a judicial order violating the separation of powers, and failure to state or possess a valid cause of action against Petitioners.

Among various defenses raised, Petitioners asserted that trial by a summary mandamus proceeding, as opposed to ordinary process, was inappropriate based on the nature of the relief sought by NOFF. It is well-established that a writ of mandamus may only issue to compel the performance of a ministerial, completely non-discretionary act.[7] Petitioners argued

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[6] On September 17, 2013, the District Court dismissed Petitioners' reconventional demand for an alleged lack of standing. Judgment, R., Vol. II, at 364, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, No. 2013-CA-1684 (La. App. 4 Cir. Sept. 17, 2013). That ruling presently is on appeal to the Louisiana Fourth Circuit Court of Appeal.

[7] *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (recognizing historical precedent holding that "[t]he mandamus remedy was normally limited to enforcement of 'a specific, unequivocal command,' the ordering of a ' "precise, definite act . . . about which [an official] had no discretion whatever" ' "); LA. CODE CIV. PROC. ANN. art. 3863 ("A writ of mandamus may be directed to a public officer to compel the

(Continued on following page)

that the City's only ministerial duty to the Fund is to contribute the percentages specified in Louisiana Revised Statutes § 11:3361.[8] It was undisputed that the City had already complied with its funding obligation under § 11:3361 for fiscal year 2012. Therefore, Petitioners argued, there existed no unfulfilled ministerial duty that could be compelled by a writ of mandamus.

Not disputing that the City had fulfilled its duty under § 11:3361, NOFF instead relied upon the ambiguously worded § 11:3384(F). Petitioners argued that mandamus relief was not available under § 11:3384(F), because it only creates a vague obligation to contribute based on a multi-variable "actuarial valuation" process that yields an indefinite value. Because the City's obligation depends on an actuarial valuation, which incorporates many variables, such as investment performance, the trustees' imprudent investments constitute a defense to the City's payment of an additional $17.5 million to the Fund.

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performance of a ministerial duty required by law. . . ."); *Hamp's Constr., L.L.C. v. Hous. Auth. of New Orleans*, 2010-0816 (La. App. 4 Cir. 12/1/10), 52 So. 3d 970, 973 ("Mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised. The remedy is not available to command the performance of an act that contains any element of discretion, however slight.") (citation omitted).

[8] *See* LA. REV. STAT. ANN. § 11:3361 (requiring City annually to pay into Fund one percent of certain license revenues and not less than five percent of fire department budget).

Petitioners, in their exceptions to NOFF's lawsuit, also raised as a defense that the mandamus relief sought by NOFF would violate the constitutional separation of powers. In particular, Petitioners emphasized in several pleadings in support of their exceptions that a judicial order to the City's legislative body to appropriate funding would constitute judicial intrusion into an area of exclusive legislative authority – the power of the purse.[9]

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[9] *See* Exceptions of No Cause of Action and No Right of Action and Improper Use of Summary Proceedings, R., Vol. I, at 99, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, La. App. 4 Cir. No. 2013-CA-0873 (excepting that "[t]he use of the judicial process to direct a legislative body to appropriate public funds, which is an inherently discretionary act, violates the separation of powers doctrine"); Exceptions of No Cause of Action, No Right of Action, and Unauthorized Use of Summary Proceedings and Answer to Petition for Writ of Mandamus, R., Vol. I, at 27, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, La. App. 4 Cir. No. 2013-CA-0873 (excepting on basis of separation of powers argument); Defendants' Memorandum in Support of Exceptions of Improper Use of Summary Proceedings and No Right of Action and No Cause of Action, R., Vol. I, at 104, 107, 110-11, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, La. App. 4 Cir. No. 2013-CA-0873 (same); Defendants' Pre-Hearing Memorandum in Opposition to Petition for Writ of Mandamus and Reply Memorandum in Support of Exceptions of Unauthorized Use of Summary Proceeding, No Cause of Action and No Right of Action, R., Vol. I, at 211, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, La. App. 4 Cir. No. 2013-CA-0873 (same).

The District Court rejected Petitioners' defenses and, following a December 19, 2012 hearing, denied Petitioners' exceptions. Petitioners sought immediate supervisory review from both the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court, asserting that the District Court's denial of Petitioners' exceptions was contrary to the constitutional separation of powers between the legislature and the judiciary.[10] Both the Louisiana Fourth Circuit and the Louisiana Supreme Court, in turn, denied relief.

On January 7-8, 2013, the District Court held a hearing on NOFF's petition for mandamus. During

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[10] *See* Original Application of Defendants, for Supervisory and/or Remedial Writs of Review to Reverse District Court's Denial of Exceptions of Improper Use of Summary Proceedings, No Right of Action, and No Cause of Action, R., Vol. II, at 439, 442-43, 451-53, and 457, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, La. App. 4 Cir. No. 2013-CA-0873 (requesting supervisory review by Louisiana Fourth Circuit Court of Appeal to reverse District Court's denial of Petitioners' exceptions on basis that "grant of mandamus relief would violate the separation of powers between the judicial and legislative branches of government, as such an action impermissibly intrudes upon the inherently discretionary right of the legislature to appropriate funds"); Original Application for Supervisory and/or Remedial Writs of Review on Behalf of Defendants City of New Orleans, et al., R., Vol. III, at 677, 679-81, 683-84, 693-94, and 697, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, La. App. 4 Cir. No. 2013-CA-0873 (making separation of powers argument and requesting supervisory review by Louisiana Supreme Court to reverse District Court's denial of Petitioners' exceptions).

the hearing, the District Court denied Petitioners the ability to introduce evidence of the former trustees' financial mismanagement of and breaches of fiduciary duties to the Fund. By excluding this evidence, the District Court effectively ruled that the courts of Louisiana should avert their eyes from the history of the former trustees' wrongdoing and leave the City to pick up the pieces year after year by requiring the City to make increased contributions to cover any alleged consequent funding shortfall. Petitioners immediately sought emergency review with the Louisiana Fourth Circuit Court of Appeal regarding the District Court's denial of Petitioners' fundamental right to present a defense,[11] but were denied relief.

On March 28, 2013, the District Court issued a judgment ordering that a writ of mandamus issue, directing the City to immediately budget, appropriate, and pay to the Fund's New System $17,524,329 as the "Actuarially Required Contribution," with judicial interest from the date of judicial demand. *See* App. 36 to 69. Petitioners appealed the District Court's approximately $17.5 million judgment to the Louisiana Fourth Circuit Court of Appeal. Petitioners

[11] *See* Original Application of Defendants, for Supervisory and/or Remedial Writs of Review to Reverse District Court's Exclusion of Evidence, at 13, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, No. 13-C-0025 (La. App. 4 Cir. Jan. 8, 2013) (during trial in District Court, requesting emergency supervisory review by Louisiana Fourth Circuit Court of Appeal to reverse District Court's denial of Petitioners' right to present a defense).

argued to the Louisiana Fourth Circuit that the District Court's judgment violated the constitutional separation of powers and also that the judgment had to be reversed because the District Court violated Petitioners' fundamental right to present a defense by excluding evidence of the trustees' financial mismanagement.[12] On December 18, 2013, the Louisiana Fourth Circuit issued a judgment affirming the District Court's judgment in all respects. *See New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans*, 2013-0873 (La. App. 4 Cir. 12/18/13), 131 So. 3d 412; App. 1 to 35.

On January 17, 2014, Petitioners timely filed an application for a writ of certiorari seeking review by the Louisiana Supreme Court of the Louisiana Fourth Circuit's judgment that affirmed the District Court's judgment. Petitioners argued to the Louisiana Supreme Court that the judgments of the lower courts violated the constitutional separation of powers

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[12] *See* Original Brief on Behalf of Defendants/Appellants The City of New Orleans, et al., at pp. ix-x, xiv, 15-17, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, No. 2013-CA-0873 (La. App. 4 Cir. July 19, 2013) (appealing District Court's judgment to Louisiana Fourth Circuit Court of Appeal based on separation of powers violation); *id.* at 17-20 (appealing based on right to introduce evidence relevant to affirmative defenses); Reply Brief on Behalf of Defendants/Appellants The City of New Orleans, et al., at 11, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, No. 2013-CA-0873 (La. App. 4 Cir. Aug. 19, 2013) (arguing that "the Judgment violates the constitutional separation of powers doctrine").

and Petitioners' fundamental right to present a defense.[13] On March 21, 2014, with one of seven justices recused, in a 4-2 decision, the Louisiana Supreme Court denied the City's writ application.

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[13] *See* Original Application for Writ of Certiorari on Behalf of Defendants/Applicants, City of New Orleans, et al., at 1-2, 6, 8-9, 19-20, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, No. 2014-C-0142 (La. Jan. 17, 2014) (applying for writ of certiorari from Louisiana Supreme Court directed to lower courts based on separation of powers violation); *id.* at 5 ("The Fourth Circuit's erroneous interpretation of Louisiana law will cause material injustice in our governmental system that is premised upon each branch of government taking care not to intrude upon the province of the other branches."); *id.* at 18 ("The separation of powers doctrine fundamentally bars NOFF's request for a court-ordered appropriation because such an order intrudes upon the legislative function of government."); *id.* at 10, 22-23 (applying for writ of certiorari from Louisiana Supreme Court directed to lower courts based on denial of right to present a defense); *id.* at 1 ("[T]he District Court trampled the City's fundamental right to present evidence to prove its affirmative defenses related to the Trustees' financial mismanagement and breaches of fiduciary duty."); *id.* at 6-7 ("The lower courts' decisions constitute an abuse of judicial power that denies the City its fundamental right to put on a defense."); Reply of Defendants/Applicants, City of New Orleans, et al., to Opposition Filed by Plaintiffs/Respondents, New Orleans Fire Fighters Pension and Relief Fund, et al., at 1, 6, *New Orleans Fire Fighters Pension and Relief Fund, et al. v. The City of New Orleans, et al.*, No. 2014-C-0142 (La. Feb. 13, 2014) (reemphasizing separation of powers argument); *id.* at 5 ("NOFF fails to refute that the Judgment – a judicial command to the City Council to make a legislative appropriation – violates the constitutional separation of powers doctrine."); *id.* at 2 (reemphasizing argument based on "the denial of the City's fundamental right to put on evidence supporting its affirmative defenses").

New Orleans Fire Fighters Pension & Relief Fund v. City of New Orleans, 2014-0142 (La. 3/21/14), 135 So. 3d 623; App. 70. On March 28, 2014, Petitioners sought a stay of the judgment from the Louisiana Supreme Court pending review on certiorari in this Court, but the Louisiana Supreme Court denied Petitioners' request for a stay on April 17, 2014.[14]

Having been rebuffed at every turn on their request for vindication of federal constitutional rights, including due process and rights flowing from the separation of powers, Petitioners now timely seek review from this Court.

REASONS FOR GRANTING THE PETITION

The Louisiana courts have violated Petitioners' fundamental right to present a defense inherent in the Due Process Clause of the Fourteenth Amendment. This Court's precedent recognizes that due process requires that a defendant be afforded the opportunity to present every available defense. The state courts denied Petitioners due process by excluding evidence necessarily diminishing an alleged multi-million dollar funding obligation. This Honorable

[14] Pursuant to this Court's Rule 23, on May 9, 2014, Petitioners sought a stay of the judgment from the Honorable Justice Antonin Scalia pending review on certiorari in this Court. Justice Scalia denied Petitioners' application for stay on May 19, 2014.

Court should grant certiorari to address the circumstances under which due process requires that a defendant be permitted to introduce evidence in support of its defense. The lower courts' denial of Petitioners' fundamental right to present a defense makes it necessary for this Court to intervene to uphold Petitioners' constitutional right of due process.

Additionally, the Louisiana courts have violated the federal separation of powers between the legislature and the judiciary. This Court's precedent, and precedent of the federal courts of appeals, have recognized that the power to appropriate public monies to pay a public debt exists solely in the legislative branch of government. The Louisiana courts violated this exclusive vesting of the powers of budgeting and appropriation in legislative bodies by ordering the City Council to perform these acts. This Court should grant certiorari to address the extent to which the United States Constitution's characterization of the appropriation power as legislative applies to state and local legislative bodies. Due to the important federal issues presented, this Court should grant this Petition for a Writ of Certiorari.

I. THE LOUISIANA COURTS VIOLATED PETITIONERS' DUE PROCESS RIGHTS BY EXCLUDING EVIDENCE OF THE TRUSTEES' MISCONDUCT.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution "requires that there be an opportunity to present every

available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). The Louisiana courts denied Petitioners this fundamental right by entirely precluding them from introducing relevant evidence of the former trustees' imprudent investment practices and reckless financial mismanagement. The state courts' exclusion of this evidence denied Petitioners their right of due process, requiring reversal of the judgments below.

Petitioners, including the City, are "persons" entitled to due process under the Fourteenth Amendment.[15] This Court in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), held that a municipality such as the City is a "person" under 42 U.S.C. § 1983. A logical extension of this Court's holding in *Monell* is that the City is a "person" under the Due Process Clause. To hold otherwise would unfairly treat a municipality as a "person" who can be liable for constitutional harms, but who is not permitted to recover for constitutional harms that the municipality suffers. The fact that a *state* is not a "person" under the Due Process Clause does not alter this conclusion because this Court has recognized that municipalities are "persons" even though states are not. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (holding that although

[15] *See* U.S. CONST. amend. XIV, § 1 (providing that state may not deprive any "person" of property without due process of law).

states are not "persons" under § 1983, municipalities are); *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 122 (2003) (holding that although states are not "persons" under the False Claims Act, local governments are).

This Court recently has stated that "municipal corporations, like private ones, 'should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.'" *Cook Cnty.*, 538 U.S. at 127 (quoting *Monell*, 436 U.S. at 687-88). Further, both private corporations and municipal corporations, such as the City, are "treated alike in terms of their legal status as persons capable of suing and being sued." *Id.* at 126. Therefore, just as a private corporation must receive due process, the City is a municipal corporation entitled to due process.

NOFF relies on *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36 (1933), but this Court has clarified that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960). In fact, members of this Court have questioned the continuing validity of the rule that "a political subdivision of a State may not raise constitutional objections to the validity of a state statute," which would prevent a municipality from asserting a due process claim. *See City of S. Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1041-42 (1980) (White & Marshall, JJ., dissenting). This Court should adhere to its decisions in *Monell* and

Cook County and recognize that the City is a "person" entitled to due process.

The Louisiana courts violated Petitioners' right to due process by excluding evidence at the heart of their defense, thereby denying them the fundamental right to present that defense. Because the state court judgments below are based upon a denial of due process, they are constitutionally infirm, and this Court should grant certiorari and reverse.

A. The Trustees' Acts and Omissions Are at the Heart of Petitioners' Defense.

Under Louisiana legislation governing the City's contributions to the Fund, the former trustees' acts and omissions are relevant because they affect the actuarial valuation of retirement system liabilities upon which the City's contribution is based. The main statute upon which the Louisiana courts relied in granting the writ of mandamus was Louisiana Revised Statutes § 11:3384(F). That statute provides, in pertinent part, that the City contributes to the Fund based on "percentage rates of [a] contribution [that is] fixed on the basis of the liabilities of the retirement system **as shown by *actuarial valuation***." LA. REV. STAT. ANN. § 11:3384(F) (emphasis added). It was undisputed in the courts below that this actuarial valuation is a process that entails numerous considerations, including employee turnover, retirement, disability, mortality, salary increases, marital status, and demographics. This list of relevant considerations

includes the former trustees' poor investment choices because those choices affect Fund performance and, therefore, are incorporated into an actuarial valuation performed under the statute.

Additionally, a related pension statute, upon which the lower courts relied in rendering judgment, provides that the Fund's actuary calculates an "**amount** of contributions required from the city **and other sources** to maintain the system on an actuarial basis." LA. REV. STAT. ANN. § 11:3363(D) (emphasis added). Under that statute, the actuarially calculated amount must be derived by summing intertwined contributions from the City "and other sources." *See id.* The statute does not delimit the scope of those "other sources," which, therefore, include evidence of the former trustees' bad acts and omissions. In other words, funding sources that would have been available, but for the former trustees' mismanagement, are "other sources" of payments to the Fund. For example, the money that the former trustees foolishly invested in Alphonse Fletcher, Jr.'s FIA Leveraged Fund is a source of funding that should be, but is not, available to maintain the actuarial soundness of the retirement system. Therefore, the "other sources" statute makes evidence of that foolish investment relevant to the amount of the City's contribution. Petitioners had a fundamental right to put on such evidence in support of their defense that the City's alleged funding obligation is reduced by the public monies that NOFF has squandered.

B. The Louisiana Courts' Ruling Eviscerates Petitioners' Right to Present a Defense and Renders § 11:3384(F) Unconstitutional.

The courts below violated Petitioners' right of due process by excluding evidence of NOFF's history of fiscal waste. The state courts' exclusion of Petitioners' evidence constitutes an abuse of judicial power that denied Petitioners of property without due process of law by violating Petitioners' fundamental right to present every available defense and to conduct discovery in an ordinary proceeding. The excluded evidence is directly relevant to NOFF's claim because the evidence bears upon the issue of whether the City must appropriate additional funding to NOFF while NOFF continues to make unsound investments. The Louisiana judiciary's denial of Petitioners' right to introduce this evidence is a denial of procedural due process – of the opportunity to present "every available defense." *Lindsey*, 405 U.S. at 66.

Applying *Lindsey*, this Court has acknowledged that a defendant's right to an opportunity to present "every available defense" includes the ability to present to the factfinder circumstances capable of reducing liability. In *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), this Court held that due process forbids a state from using a punitive damages award to punish a defendant for injury that it inflicts on nonparties. Otherwise, this Court reasoned, a defendant would have "no opportunity to defend against the charge, by showing, for example in a case

such as this, that the other [nonparty] victim was not entitled to damages. . . .” *Id.* Whereas in *Williams,* due process prevented a defendant from being liable for harm to victims other than the plaintiff, here, due process prevents Petitioners from being liable for harm caused by other actors not related to Petitioners. As the defendant in *Williams* could not be held liable without consideration of the relevant circumstances, Petitioners cannot be held liable under state law without consideration of the trustees' financial mismanagement.

To the extent the Louisiana judiciary interpreted § 11:3384(F) to exclude such evidence from consideration, the judgments of the state courts violate Petitioners' right of substantive due process. A central reason that the Fund is underfunded is the former trustees' misconduct. Requiring Petitioners to appropriate additional funds irrespective of the former trustees' fault condones their fiscal irresponsibility, leaves the City to pick up the pieces year after year, and places the burden of unwise investments and mismanagement on the citizenry. But that is precisely what the Louisiana courts have done. They essentially have ruled that § 11:3384(F) requires Petitioners unconditionally to fund financial mismanagement. Such a statute cannot pass constitutional muster.

Due process forbids a state from enacting a law that is arbitrary, capricious, or irrational. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980) (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)) (holding that due process demands that “the

law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained"). Under the Louisiana courts' construction of § 11:3384(F), the Louisiana Legislature has acted arbitrarily and irrationally by imposing upon Petitioners an obligation to fund a pension system based upon an actuarial valuation process, and simultaneously excluding from consideration investment decisions by the former trustees that are an important component of that valuation process. Due process condemns such a law that arbitrarily requires a party to pay an amount demanded by the very individuals whose misconduct necessitates the additional contribution.

The due process violation inherent in the state courts' exclusion of evidence is compounded by the District Court's separate judgment – which is currently on appeal to the Louisiana Fourth Circuit Court of Appeal – holding that Petitioners lack standing to bring a separate suit to recoup the City's losses incurred due to the trustees' acts and omissions. In other words, the Louisiana courts have held not only that Petitioners' funding obligation is *not reduced* by the former trustees' mismanagement, but also that Petitioners have *no claim* against those trustees for losses incurred due to such mismanagement. These two rulings deny Petitioners substantive due process because there can be no legitimate state interest in mandating increased contributions and simultaneously prohibiting Petitioners from receiving

indemnification from the persons whose misconduct necessitated the increased contributions.

In sum, the denial of federal due process wreaked by the State of Louisiana's mandate that Petitioners fund unlawful fiscal behavior is worthy of certiorari. The state courts' decisions conflict with this Court's holding that due process "requires that there be an opportunity to present every available defense." *Lindsey*, 405 U.S. at 66. The Louisiana courts denied Petitioners the right to due process of law by forcing the City unconditionally to fund financial mismanagement. This Court should grant this Petition and reverse the judgments of the lower courts with a remand for consideration of this evidence, so that due process is satisfied.

II. THE LOUISIANA COURTS VIOLATED THE SEPARATION OF POWERS BY USURPING A LEGISLATIVE BODY'S EXCLUSIVE POWER OF APPROPRIATION.

The separation of powers is a federal issue of perennial importance due to the tripartite division of authority in government. This Court has acknowledged, "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" *Freytag v. C.I.R.*, 501 U.S. 868, 870 (1991). The constitutional

placement of the power of appropriation with the legislature is "a bulwark of the Constitution's separation of powers among the three branches of the National Government." *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). Thus, the constitutional safeguard of the sacrosanct appropriation authority of legislative bodies, such as the New Orleans City Council, is a federal issue worthy of this Court's certiorari.

To the extent this Court has yet to address whether the federal Constitution's characterization of the appropriation power as legislative applies to state legislative bodies, the Louisiana courts have decided an important question of federal law that should be settled by this Court. This Court has indicated that such a question is of vital importance not only with respect to the federal tripartite system, but also to state governments. *See Freytag*, 501 U.S. at 870 (stating that framers of the federal Constitution viewed the separation of powers "as the central guarantee of a just government"). Although this Court has stated that the federal separation of powers does not apply to the states, this Court *also* has analyzed the separation of powers in state governments by reference to the federal Constitution. *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (analyzing issue of state legislative privilege by reference to Speech and Debate Clause of United States Constitution). Further, the United States Constitution assumes the necessary existence of a tripartite

separation of powers in state governments,[16] suggesting that the Constitution *does* impose limits on the separation of powers in state governments. Thus, this Court should grant review to determine the extent to which federal principles flowing from the Appropriations Clause – and the structure of the United States Constitution – apply to state and local legislative bodies.

The judgment below violates the separation of powers that is at the heart of the United States Constitution. The Constitution requires that a state or local legislative body's power of appropriation be separate from the judiciary. In violation of the separation of powers, the mandamus judgment is a judicial order to the legislative body (the City Council) of the City of New Orleans to perform the **legislative act of appropriating** $17.5 million to the Fund. Based upon well-established federal separation of powers principles flowing from the Appropriations

[16] *See, e.g.*, U.S. CONST. art. V (providing for constitutional amendments "ratified by the *Legislatures* of three fourths *of the several States*") (emphasis added); U.S. CONST. art. I, § 2, cl. 1 (providing for election of representatives by "Electors in each State [having] the Qualifications requisite for Electors of the most numerous *Branch of the State Legislature*.") (emphasis added); U.S. CONST. amend. XVII (with respect to senatorial vacancies, providing that "*the legislature of any State may empower the executive* thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct") (emphasis added); U.S. CONST. art. VI, cl. 2 (with respect to supremacy of federal law, providing that "*the Judges in every State* shall be bound thereby") (emphasis added).

Clause and the very structure of the Constitution, the Louisiana judiciary is not permitted to compel the City Council to engage in such discretionary acts.

A. The Constitutional Separation of Powers Prohibits a Court from Ordering a Legislative Body to Appropriate.

The exclusive power of legislative bodies to appropriate flows from the exclusive vesting of such power in the Congress by virtue of Section 9 of Article I of the Constitution, which provides, in pertinent part, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. This Court has stated that "the straightforward and explicit command of the Appropriations Clause" is "that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (citing *Reeside v. Walker*, 52 U.S. 272 (1850))). The power to make appropriations was vested in legislative bodies "in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'" *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 510 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013) (quoting The Federalist No. 58, at 357 (Clinton Rossiter ed., 2003)). Therefore, the

appropriation power is reserved for legislative bodies to the exclusion of its use by the judiciary.

The limiting principle in Article I of the federal Constitution extends to legislative bodies in the several states. The separation of powers, including the vesting of the appropriation power in the legislature, is a bedrock principle embraced by both the national government and the states. *Ernst v. Rising*, 427 F.3d 351, 363 (6th Cir. 2005). In fact, "the National Government and virtually **every State** have an explicit appropriations clause in their constitutions that mandates legislative, rather than judicial, control of the treasury." *Id.* (emphasis added). Therefore, the New Orleans City Council's appropriation power is a federally derived right upon which the Louisiana judiciary is not permitted to trample.

This Court's explicit protection of the legislative power of appropriation dates back at least to 1850, when this Court in *Reeside v. Walker*, 52 U.S. 272 (1850), held that the holder of a debt against the United States could not obtain a court order to pay that debt, but was required to approach Congress to appropriate money to pay the debt. James Reeside, a post office contractor, sought a writ of mandamus directing payment of the alleged debt. *Id.* at 273-75, 289. This Court held that Mr. Reeside could not obtain a court order directing payment of the debt because Congress had made no appropriation to pay his claim. *Id.* at 291. Citing the Appropriations Clause, this Court held:

> However much money may be in the Treasury at any one time, **not a dollar of it can be used in the payment of any thing not thus previously sanctioned**. . . . **Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it**. . . . [W]ithout such an appropriation it cannot and should not be paid by the Treasury, whether the claim is by a verdict or judgment, or without either, and no mandamus or other remedy lies against any officer of the Treasury Department, in a case situated like this, where no appropriation to pay it has been made.

Id. at 291-92 (emphasis added).

More recently, in 1990, this Court reaffirmed its timeless holding in *Reeside*. In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), this Court held that erroneous advice given by a government employee to a claimant for benefits cannot give rise to estoppel against the government, so as to permit a payment not appropriated by the legislature. In rendering its decision in *Richmond*, 496 U.S. at 424-25, this Court quoted a significant portion of *Reeside*. This Court reasoned that the purpose of the separation of the power to appropriate between the legislature and the coordinate branches of government is "to assure that public funds will be spent according to the letter of the **difficult judgments reached by Congress as to the common good** and **not according to** the individual favor of Government agents or the **individual pleas of litigants**."

Id. at 428 (emphasis added). Put simply, this Court's precedent affirms that the power to appropriate public monies to pay an alleged public debt exists solely in the legislative branch of government.

The federal courts of appeals have relied on this Court's rulings in both *Reeside* and *Richmond* to hold invalid judicial action as violative of the Appropriations Clause. In *Rochester Pure Waters District v. E.P.A.*, 960 F.2d 180, 184 (D.C. Cir. 1992), in holding invalid a court order to the EPA to set aside money to pay a claim, the United States Court of Appeals for the District of Columbia Circuit cited this Court's holdings in *Reeside* and *Richmond*. The plaintiffs in *Rochester* sought and obtained from the district court an order to the EPA to set aside funds for a sewage treatment plant from an appropriation that Congress had rescinded. *Id.* at 181.

Reversing the district court, the D.C. Circuit held that the court order erroneously permitted the court to appropriate funds, which was "the job of Congress." *Id.* The D.C. Circuit found it "beyond dispute" that a court "cannot order the obligation of funds for which there is no appropriation." *Id.* at 184 (citing *Reeside*, 52 U.S. 272; *Richmond*, 496 U.S. 414). The district court's order violated the separation of powers because it essentially appropriated funds from the treasury, whereas Congress actually had rescinded its prior appropriation to fund the sewage treatment project. *Id.* Therefore, the district court's order "was not, nor could it have been," binding on the legislature. *Id.* at 185. As in *Rochester*, here, the Louisiana courts' order

to the legislative body of the City of New Orleans is not, and cannot be, binding on the City Council.

The D.C. Circuit is joined by other federal courts in its interpretation of this Court's precedent respecting the legislative power of appropriation. Both the United States Court of Appeals for the Fourth Circuit and the United States Court of Federal Claims have relied upon *Rochester*'s holding that the judiciary lacks the power to order an appropriation. *See Md. Dep't of Human Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1481-82 (4th Cir. 1992) (holding that court lacked power to enjoin government agency from recovering overpayments drawn on the treasury in violation of statute, because such an injunction effectively transferred public funds to payee without a legislative appropriation); *Figueroa v. United States*, 66 Fed. Cl. 139, 147 (2005), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006) (holding that due to "the court's complete lack of authority to order Congress to spend money," court had no power to enjoin legislature from appropriating money generated from patent application fees). Thus, it is well-established that the constitutional separation of powers prohibits a court from ordering a legislative body to appropriate.

B. The Louisiana Courts Overstepped the Constitutional Separation of Powers by Commandeering the Legislative Power of Appropriation.

Under well-settled constitutional principles, the mandamus judgment ordering the City Council to

budget and appropriate $17.5 million violates the separation of powers between the legislature and the judiciary. Both this Court's precedent and the precedent of the federal courts of appeals underscore the unconstitutional nature of the Louisiana courts' order to a municipal legislative body to exercise its discretion to budget and appropriate public funds.

An adjudication of the City's liability and an order to the City's legislative arm to appropriate a sum to pay a liability are two different animals. The latter species is constitutionally infirm because it wrests the City Council's authority "to assure that public funds will be spent according to the letter of the difficult judgments reached by" that legislative body "as to the common good and not according to the . . . individual pleas of litigants." *See Richmond*, 496 U.S. at 428. The City Council must make difficult judgments in allocating scarce public resources, including the payment of liabilities. The Louisiana courts' directive of how to allocate those resources violates the separation of powers.

There are strong policy reasons for which the Constitution mandates respect from coordinate branches of the exclusive power of legislative bodies to budget and appropriate. An appropriation is a matter of legislative grace. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). As such, it is discretionary. The New Orleans City Council should not be judicially ordered to expend funds outside of the normal budgetary process because of the inherently discretionary nature of allocating

revenues to various cost centers that govern the provision of City services to the public.

Numerous competing interests are addressed in the budgetary process, including but not limited to public safety, healthcare, economic development, sanitation, and municipal pensions. Where there is an increase in municipal spending without a corresponding increase in City revenues, there necessarily will be funding cuts elsewhere in the City's budget. The decision of where to cut expenditures is a policy choice reserved for the City Council. The mandamus judgment directing Petitioners to immediately budget and appropriate $17.5 million to the Fund for a prior-year budget not only impinges upon the City Council's policymaking function, but also orders the impossible – a reduction in municipal expenditures for a prior year.

The constitutional separation of powers mandates reversal of the Louisiana court-ordered appropriation because that judicial order intrudes upon the legislative function of municipal government. The judgment is a fundamentally flawed usurpation of the City Council's power to perform the inherently discretionary acts of budgeting and appropriation. Therefore, this Court should grant the Petition and reverse the separation of powers violation wrought by the judgments of the courts of Louisiana.

CONCLUSION

For the foregoing reasons, the Petition should be granted, and this Court should reverse the judgments of the lower courts.

Respectfully submitted,

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NEW ORLEANS FIRE FIGHTERS PENSION AND RELIEF FUND, ET AL.	*	**No. 2013-CA-0873**
VERSUS	*	**COURT OF APPEAL FOURTH CIRCUIT**
THE CITY OF NEW ORLEANS, ET AL.	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2012-07061, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * * *

Judge Daniel L. Dysart

* * * * * *

(Court composed of Judge Terri F. Love, Judge Daniel L. Dysart, Judge Sandra Cabrina Jenkins)

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AFFIRMED

DECEMBER 18, 2013

The City of New Orleans (the "City") and its co-defendants seek review of the district court's grant of a writ of mandamus directing the City to "immediately budget, appropriate for and pay to the New Orleans Fire Fighters [sic] Pension & Relief Fund . . . the sum of $17,524,329 as the Actuarially Required Contribution to the 'New System' administered by the Fund."[1]

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[1] Named as defendants are the City of New Orleans, Mayor Mitchell J. Landrieu, the City's CFO, Norman Foster, and members of the City Council (Jacquelyn Brechtel Clarkson, Stacy Head, Susan G. Guidry, Diana Bajoie, Kristin Gisleson Palmer and Cynthia Hedge-Morrell). The defendants will collectively be referred to as "the City." We note that the trial court's judgment does not include Diana Bajoie as a member of the City Council and adds Latoya Cantrell and James Gray as members of the Council, although no amending Petition was filed for the substitution of those parties.

The City raises several issues on appeal, the most significant of which is whether mandamus is the proper procedure for the enforcement of a statutory provision regarding the funding of the New Orleans Firefighters Pension and Relief Fund (the "Fund"). The City contends that the statute upon which appellees rely, and upon which the trial court's judgment is based (La. R.S. 11:3384), is vague and ambiguous. It further maintains that, because of the statute's ambiguity, it cannot be used in the context of a mandamus proceeding, as that applies strictly to "ministerial" acts which are, by their very nature, definitive and not subject to interpretation. The City also contends that the statute is discretionary and creates no affirmative obligation on its part to contribute to the Fund.

We have reviewed all of the issues raised by the City in this appeal. For the reasons set forth below, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2012, the Trustees of the Fund filed a Petition for Writ of Mandamus ("Petition"), requesting that the court order defendants to pay sums allegedly owed to the Fund by the City pursuant to La. R.S. 11:3384. More particularly, the Petition alleged that an actuary, retained by the Fund as

required by La. R.S. 11:3363(D),[2] determined certain amounts to be paid into the fund for the years 2010 forward. The City contributed those funds through July, 2010. However, according to the Petition, beginning in August, 2010, the City unilaterally reduced the amount it contributed to the Fund and has continually failed to make contributions based on the figures determined by the actuary.

The Petition alleged that the amounts owed by the City and the City's contributions have been as follows:

Year	Amount allegedly owed	Amount contributed
2010	$13,913,495	$10,635,430
2011	$23,782,819 (or $1,981,901.58 monthly)	$750,000 per month (resulting in a shortage of $12,546,131)
2012	$29,424,359	$11,900,000[3]

The Petition thus maintained that, by December 31, 2012, the cumulative projected amount of the underfunding would be $34,163,319. The Petition

[2] That statute provides, in pertinent part, that the Board of Trustees for the Fund "shall employ an actuary who shall annually certify to the board the amount of contributions required from the city and other sources to maintain the system on an actuarial basis." La. R.S. 11:3363(D).

[3] This was the projected amount for the year 2012; the Petition was filed prior to the year's end, in July, 2012.

sought the immediate appropriation and payment of $17,524,359 by the City to the Fund.[4]

In response to the Petition, defendants filed an Answer, along with Exceptions of No Cause of Action, No Right of Action and Unauthorized Use of Summary Proceedings. The Exceptions were denied after a hearing held on December 19, 2012. Defendants applied for a supervisory writ with this Court, which was denied on December 28, 2012. The Louisiana Supreme Court also denied defendants' writ application. *New Orleans Fire Fighters Pension and Relief Fund v. City of New Orleans,* 13-0009 (La.1/4/13), 106 So.3d 540.

In the interim, on September 11, 2012, defendants filed a Reconventional Demand against the Trustees, alleging that they mismanaged the "investments of the assets of the Fund."[5] The Reconventional

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[4] The sum of $17,524,359 is the amount by which the Petition alleges the Fund was to be underfunded for the year ending in December, 2012. It is unclear why the Petition sought the immediate payment of only the amount allegedly owed in 2012 and not the amounts by which the Fund was also allegedly underfunded in 2011 or 2010.

[5] Defendants alleged mismanagement in a number of ways, including: (1) relying on "ill-advised investment advice;" (2) authorizing speculative loans to private entities; (3) failing to properly investigate the credit worthiness of its borrowers "in whom they chose to invest the assets of the Fund;" (5) failing to "undertake proper due diligence in the investigating of the liquidity promised by the FIA Leveraged Fund;" and (6) overinvesting in real estate.

Demand sought injunctive relief, precluding the Trustees from using certain financial consultants and damages in the form of "any amounts that [the City] has been or will be called to pay into the Fund due to any deficit pursuant to La. R.S. 11:3361 and 11:3375." Defendants also sought the right to take over management of the Fund.

Trial on the mandamus was held on January 7-8, 2013. During the course of the trial, counsel for defendants attempted to cross-examine a witness regarding investment choices made by the Trustees. The trial court sustained the Trustees' objection to this line of questioning and refused to allow any evidence of the Trustees' fiscal mismanagement as alleged in the City's reconventional demand. A supervisory writ to this Court on this issue was denied on January 8, 2013.[6]

On March 28, 2013, the District Court issued its Judgment, ordering that a writ of mandamus issue directing the City to immediately budget, appropriate and to pay to the Fund the amount of $17,524,329 together with judicial interest from date of demand. A

[6] *New Orleans Fire Fighters Pension and Relief Fund v. City of New Orleans,* 13-C-0025, ***unpub.*** (La.App.4.Cir.1/8/13). The record before us is incomplete and does not contain a copy of the writ application; only a copy of the writ disposition is included.

Motion for New Trial filed by the City was denied and this timely suspensive appeal followed.[7]

DISCUSSION

The City's required contributions to the Fund

The Firefighters' Pension and Relief Fund is made up of two distinct retirement plans: the "old system," covering firefighters employed prior to January 1, 1968 and the "new system," covering all firefighters employed after December 31, 1967, as well as those employed before 1968 who have elected to come under the new system. The distinction between the two systems was detailed by this Court in *Rapp v. City of New Orleans,* 98-1714, pp. 31-32 (La.App. 4 Cir. 12/29/99), 750 So.2d 1130, 1149:

> . . . New Orleans firemen contributed retirement income into one of two retirement plans. Employees, who were hired prior to January 1, 1968, invested into a benefits package, which is commonly referred to as the "old" plan. The old plan was not actuarially funded in advance. In other words, the calculations of firemen's benefits in this plan did not consider the extent of retirement

[7] The record before us reflects that a pre-trial conference was held on May 20, 2013, following which a Trial Order was issued setting a jury trial on defendants' Reconventional Demand, to begin on March 17, 2014.

> payments to an individual employee based on life-expectancy figures. Also, the contributions made by the current employees under the old plan are not invested to cover future benefits. Therefore, the old plan was referred to as the pay-as-you-go plan. Additionally, the employer did not make any contributions in the old plan . . .
>
> Conversely, employees who were hired after January 1, 1968, invested in an actuarially determined defined benefit plan, which is known as the "new" plan. Under the new plan, both the employee and the employer contribute to the plan, and interest accumulates on these contributions from various outside sources. In the new plan, benefits paid to the employee are funded on an overall basis, meaning the benefits due to each individual employee was funded by the pool, not by funds accumulated, set aside, segregated or accounted for separately for that individual.

There is no question that the City is to contribute to the Fund; however, the parties dispute what funding is statutorily required of the City. The City argues that the only *mandatory* funding requirement for the entire Fund, old and new alike, is found in La. R.S. 11:3361, which provides, in pertinent part, that:

> [T]he city shall pay into the fund annually one percent of the revenues derived from all licenses issued by the city, except the drivers and chauffeurs licenses, and an

> annual appropriation in the budget of the city of a sum equal to not less than five percent of the money annually appropriated by the city for the operation and maintenance of the fire department of the city.

The record reflects that the City has consistently complied with the requirements of this statute and it is not at issue herein.[8] It is the City's obligation under La. R.S. 11:3384(F) which is in dispute. That statute provides:

> F. On account of each member who comes under the provisions of this Section applying to persons employed after December 31, 1967, either because of date of employment or due to election as provided herein, there **shall** be paid annually by the city and credited to the pension accumulation account a certain percentage of the earnable compensation of each member, to be known as the "normal contributions", **and** an additional percentage of this earnable compensation to be known as the "accrued liability contribution". The percentage rates of such contribution **shall** be fixed on the basis of the

[8] Indeed, the City contributed $9 million to the Fund for the fiscal year 2012. This amount represents approximately 10% of the Fire Department budget, which for 2012 was $87.55 million. La. R.S. 11:3361 only requires that the City pay "not less than five percent." We note that the City contributed ten percent, rather than five percent; however, the statute only prescribes the *minimum* contribution required by the City. It does not negate the City's other statutory obligations.

> liabilities of the retirement system **as shown by actuarial valuation**. (Emphasis added).

Thus, La. R.S. 11:3384(F) *requires* the City to contribute two separate and distinct amounts: the "normal contribution" and the "accrued liability contribution," both of which are to be determined by "actuarial valuation." This actuarial valuation is to be computed by an actuary retained by the Board; La. R.S. 11:3363(D) mandates that the Board of Trustees "**shall** employ an actuary who shall annually certify to the board the amount of contributions required by the city and other sources to maintain the system on an actuarial basis." (Emphasis added).[9] Construed

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[9] This Court explained the function of the actuary in *Palisi v. New Orleans Fire Department,* 95-1455 (La.App. 4 Cir. 3/12/97), 690 So.2d 1018, 1041-1042:

> Where an actuarially determined defined benefit plan is involved, only overall funding proportions have any meaning. Such plans are funded on an overall basis, i.e., the pool as a whole is funded . . . An actuary tries to project the needs of the group as a whole . . . The projections are modified every time a new contribution amount is determined in order to take into account the amount by which actual plan experience varied from the previous projection. Some firemen may retire early, some late, some will be disabled, some will quit, some will be terminated and some new ones will be hired, and some years the plan investments will perform either better or worse than projected. All of these deviations affect pool funding. As even the most skilled actuary does not have a crystal

(Continued on following page)

together, the statutes *require* the Board to retain an actuary to determine the amount the City *shall* contribute to the Fund. The statute does not indicate, as the City suggests, that these contributions are discretionary. The statute's use of the term "shall," rather than "may," leaves no doubt that the legislature intended to require that the City make these contributions. If, as the City argues, the only mandated funding statute is La. R.S. 11:3361, then the legislature's enactment of La. R.S. 11:3384 was meaningless and the statute has no effect.

We find, as did the trial court, that the mandates provided in 11:3385(F) [sic], as well as 11:3363(D), were specific enactments of the legislature to provide an actuarial funding mechanism for the new system. This is in keeping with this Court's recognition that "the new system is legally required to have advanced funding" so that "the annual contributions made by the city are sufficient not only to pay anticipated benefits for that year, but also to build up the fund." *Nicolay v. The City of New Orleans,* 546 So.2d 508, 511 (La.App. 4 Cir.1989). We can find no other reasonable alternative explanation for the existence of both statutes.

We recognize that the statutes at issue require the City to contribute to the Fund an amount "to

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ball such deviations from projections are absolutely certain to occur.

maintain the system on an actuarial basis,"[10] but do not prescribe the precise manner or specific formula by which the actuary is to determine the appropriate amount to be paid each year by the City. However, until 2010, the City annually paid the full amount an actuary determined to be owed under this La. R.S. 11:3384(F); clearly the statute has been interpreted and implemented in the same manner for many years without objection as to how the accrued liability contribution was determined. Moreover, although actuarial science is necessarily imprecise and requires that various assumptions be made, this does not render the statutory scheme impermissibly vague in application.

According to the Fund's actuary since 2000, Michael Conefry, who was accepted without objection as an expert in the field of actuarial science,[11] La. R.S. 11:3384 is vague only in that the terms "normal contribution" and "accrued liability contribution" are not "typical terms" used by actuaries. Rather, as Mr. Conefry explained, and as is contained in his September 10, 2012 report, these terms have traditionally been interpreted by Louisiana actuaries as meaning the "Normal Cost" and "Unfunded Accrued

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[10] *See:* La. R.S. 11:3363(D).

[11] Mr. Conefry described an actuary as "a mathematician who specializes in life insurance and related fields, such as employee benefits and casualty insurance." His specialties are "employee benefits in general, and defined benefit and defined contribution pension plans."

Actuarial Liability Amortization Amount" under the "Entry Age Normal Cost Method," which is "an actuarial cost method widely used in the funding of defined benefit pension plans in both the public and private sectors."[12]

Mr. Conefry further explained that the statute requires an actuarial valuation, which is:

> . . . a process whereby the actuary collects census data and financial information concerning the defined benefit plan and calculates the projected actuarial present value of the benefits to be delivered under the plan, and uses certain mathematical processes called actuarial cost methods, or at least one actuarial cost method, to produce the annual funding contributions. It's a self-correcting annual process where the census and financial data is updated each year with changes of the usual dates of birth, hiring and salary information, retirees, turnover and so forth.
>
> * * * * * *
>
> . . . the basic fundamental goal is to take the amount to be funded for the future, the total actuarial present value of benefits expected to be delivered, less the current value – actuarial value of the assets, and spread that

[12] According to Mr. Conefry, this method is "generally accepted both by actuaries and by regulators at the state and national levels in establishing regulations and guidelines for defined benefit pension plan funding."

> over the future on a reasonable and consistent basis so that the value of the benefits is paid for. And the ideal goal and funding for a defined benefit plan is to fund for the liabilities or the value of benefits as they are accruing and that's what the actual cost method is designed to do.

Necessarily, the valuation determines on a yearly basis the amount of the contribution required of the City, which, according to Mr. Conefry, takes into account "the known sources of such contributions, typically member contributions and sometimes other sources such as dedicated taxes and the like." The balance comes from the employer contributions; that is the amount "not provided by all of the other sources" which "must be delivered by the employer."

Mr. Conefry further explained that "the value of the member contributions are determined in this case, by subtracting the total actuarial present value from the amount necessary, the total present value of all benefits. And then the net amount to be funded is what the employer and employer-related sources are required to pay."

This accepted practice of actuarial methodology had been used for the Fund since 1987 and Mr. Conefry continued to use this method after becoming the Fund's actuary in early 2000. Every year until 2009, the City paid the sum (or the approximate sum) which Mr. Conefry determined to be the actuarially required contribution. Beginning in 2010, however,

the City failed to make the full contribution as determined by Mr. Conefry and the City has failed to fully contribute since that time. Although the City maintains that it has complete and total discretion to contribute the actuarially required contribution, it offered nothing at trial to indicate what it believes is the appropriate amount for its actuarially required contribution. Its expert actuary, Adam Reese, while critical of certain aspects of Mr. Conefry's evaluation and assumptions, failed to offer his own recommendation for the actuarially required contribution of the City. Rather, Mr. Reese was only retained to assist the City "in understanding the plaintiffs' case and how the actuarial elements of that fit into it." Mr. Reese did not testify as to what, in his opinion, the City's payments should have been for the period in question. And, the City offered no other witness on this issue.

The only testimony at trial concerning the amount owed by the City as its actuarially required contribution to the Fund came from Mr. Conefry. His testimony in this regard was consistent with the allegations of the Petition. There was no other evidence presented as to the amount owed by the City. Accordingly, we affirm the trial court's award of $17,524,329.00 as the City's actuarially required contribution at this time.

We note that the statutes do not contain any specific provision by which the City may challenge the amount determined by the Fund's actuary to be

the City's accrued liability contribution. However, "[i]t is not our function as a court of appeal to legislate." *Simmons v. Louisiana Dept. of Public Safety and Corrections,* 2007-0572 (La.App. 4 Cir. 12/12/07), 975 So.2d 1, 3. *See also, Hamilton v. Royal International Petroleum Corp.,* 05-846, p. 10 (La.2/22/06), 934 So.2d 25, 33 ("[c]ourts are not free to rewrite laws to effect a purpose that is not otherwise expressed."). Rather, "[t]he function of statutory interpretation and the construction to be given to legislative acts rests with the judicial branch of the government." *Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.,* 13-0749, p. 14 (La.10/15/13) --- So.3d ----, 2013 WL 5788791, citing *Livingston Parish Council on Aging v. Graves,* 12-0232, pp. 3-4 (La.12/4/12), 105 So.3d 683, 685. To the extent that any deficiencies in the statutory scheme exist, those are matters for the legislative branch to address.

Availability of mandamus procedure

Having determined that the City must contribute to the Fund pursuant to La. R.S. 11:3384(F), we turn to the City's argument that mandamus is an improper procedure for this matter, which the City maintains should have been tried by ordinary process.

La. C.C.P. article 3863 provides that a writ of mandamus may be issued "to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the

office to his successor." Under La. C.C.P. art. 3862, a mandamus "may be issued in all cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice."

This Court has repeatedly determined that the proper procedure for the enforcement of obligations set forth in the pension statute is mandamus, as the City's funding requirement is a ministerial function. The *Nicolay,* supra, court specifically noted:

> This court has already determined that the proper procedure for enforcement of the obligations set forth in the pension statute is mandamus because payment by the City requires the City as a ministerial function to make an appropriation. *Board of Trustees of Firemen's Pension & Relief Fund v. City of New Orleans,* 217 So.2d 766 (La.App. 4th Cir.1969). Mandamus lies to compel the performance of prescribed duties that are purely ministerial and in which no element of discretion is left to the public officers, but there must be a clear and specific legal duty which ought to and can be performed. *Felix v. St. Paul Fire and Marine Ins. Co.,* 477 So.2d 676 (La.1985).

Id., 546 So.2d at 512. This Court then held that, as "the trial court's judgment require[d] the City to perform a purely ministerial function in making the payments to the Fund, it should have included a writ of mandamus." *Id.*

The *Board of Trustees* case, cited by the *Nicolay* court, involved a petition for mandamus seeking to compel the City to appropriate a sum for cost of living increases in conformity with La. R.S. 33:2117 (redesignated as La. R.S. 11:3382), which authorized the board of trustees of the Fund to "use interest earnings on investments of the system in excess of normal requirements as determined by the actuary to provide a cost of living increase in benefits for members who have retired, in an amount not to exceed two percent of the original benefit for each year of retirement." The statute is similar to La. R.S. 11:3384(F) in that it required an actuarial determination of the amount to be funded. The *Board of Trustees* court found that mandamus was the appropriate procedure, noting:

> The statute which has formed the subject matter of this tedious litigation is a mandatory law, and the defendants, the City of New Orleans, are required as a ministerial function to make the appropriation, and it is for this reason that mandamus is the proper procedure for the enforcement of this obligation.

Id., 217 So.2d at 769.

Accordingly, in this matter, we find that mandamus was a proper procedural vehicle to direct the payment by the City of its mandatory contribution to the Fund. We agree with the trial court's finding that the City's funding obligations are ministerial in nature and that any delay in that funding process "may" cause an injustice, thereby warranting the

issuance of the writ of mandamus. We therefore affirm the trial court's issuance of a mandamus directing the City to make the actuarially required contribution to the Fund.[13]

We now turn to the City's remaining arguments: (1) that the trial court erred in denying its Peremptory Exception of No Right of Action insofar as the relief requested violates the separation of powers doctrine; (2) that the mandamus improperly destabilizes the City's 2012 balanced budget and (3) that the trial court erred in refusing to allow evidence of the Trustees' financial mismanagement of the Fund and breaches of their fiduciary duties.

Separation of powers

Relying heavily on *Hoag v. State,* 04-0857 (La.12/1/04), 889 So.2d 1019, the City argues that it

[13] Because of our finding that mandamus was proper, the City's contention that the trial court erred in denying its Dilatory Exception of Improper Use of Summary Proceedings is moot. Similarly, we find no error in the trial court's denial of the City's Peremptory Exception of No Cause of Action. That exception questions whether the law extends a remedy to anyone under the factual allegations of the petition. *Fink v. Bryant,* 01-0987, p. 3 (La.11/28/01), 801 So.2d 346, 348. The City maintains that its exception should have been granted because the statutes "do not establish [the Fund's] clear entitlement to relief" and "do not impose any obligations that may be enforced through a writ of mandamus." Having determined that the statutes *do* clearly require the City to make the required contributions, the trial court properly denied the City's exception.

"cannot be judicially ordered to expend funds outside of the normal budgetary process" and that the trial court's issuance of a mandamus violates the separation of powers doctrine. This doctrine prohibits any one of the three branches of government from exercising power belonging to another branch. *State v. Lanclos,* 07-0082, pp. 10-11 (La.4/8/08), 980 So.2d 643, 651. In the instant matter, we find that the trial court's judgment issuing a mandamus is not an improper exercise by the courts of a legislative function, as the City contends. In so finding, we distinguish this case from *Hoag* and its progeny.

In *Hoag,* the plaintiffs, a group of coroners, sought past and future compensation pursuant to a statute enacted in 1984 which provided for coroners to receive an additional $548 per month from the State as supplemental pay. The State did not pay this additional compensation for ten years. In 2000, the plaintiffs filed suit and were granted a summary judgment awarding each coroner a certain amount owed under the statute.[14] Efforts were initiated in the legislature to appropriate funds to partially pay the judgment; however, the funds were never appropriated.[15] The coroners then filed another suit in 2003, seeking a writ of mandamus directing the legislature

[14] The summary judgment was appealed and affirmed by the First Circuit. The Supreme Court denied writs.

[15] A similar suit had been filed in 1996 by several coroners, which resulted in a judgment for which the legislature appropriated funds and made payment on the judgment.

to appropriate the funds to pay the judgment. Thereafter, the trial court issued a mandamus, directing all legislators to appropriate the funds to pay the judgment.

In reversing the trial court, the Supreme Court, citing La. R.S. 13:5109(B),[16] recognized the settled jurisprudence that "judgment creditors cannot mandamus political subdivisions to appropriate funds for payment of a judgment rendered against the respective political subdivisions." *Id.,* 04-0857, p. 5, 889 So.2d at 1023. It then noted, as have we, that a writ of mandamus may only be issued where the actions sought to be performed "are purely ministerial in nature." *Id.,* 04-0857, p. 6, 889 So.2d at 1023. The *Hoag* court defined a ministerial duty as a "'simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.'" *Id.,* 04-0857, p. 7, 889 So.2d at 1024. Finding that "[t]he very act of appropriating funds is, by its nature, discretionary and specifically granted to the legislature by the constitution," the court held that "[a]lthough . . . plaintiffs are entitled to payment of the judgment, a

[16] La. R.S. 13:5109(B)(2) provides, in pertinent part, that "[a]ny judgment rendered in any suit filed against the state, a state agency, or a political subdivision, or any compromise reached in favor of the plaintiff or plaintiffs in any such suit shall be exigible, payable, and paid only out of funds appropriated for that purpose by the legislature, if the suit was filed against the state or a state agency, or out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision."

writ of mandamus directing the legislature to appropriate funds is an impermissible usurpation of legislative power by the judiciary." *Id.,* 04-0857, pp. 7-8, 889 So.2d at 1024-25.

It is clear that the *Hoag* decision was based largely on the constitutional grant to the legislature, under La. Const. art. III, § 16,[17] of the "sole authority . . . to control the funds of this state and to appropriate funds within its control." *Id.,* 04-0857, p. 8, 889 So.2d at 1024. It is this constitutional provision which supports the court's finding that the act of appropriating

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[17] La. Const. art. III, § 16 provides, in pertinent part:

(A) Specific Appropriation for One Year. Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or for longer than one year.

(B) Origin in House of Representatives. All bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills.

(C) General Appropriation Bill; Limitations. The general appropriation bill shall be itemized and shall contain only appropriations for the ordinary operating expenses of government, public charities, pensions, and the public debt or interest thereon.

(D) Specific Purpose and Amount. All other bills for appropriating money shall be for a specific purpose and amount.

funds is discretionary, which power is expressly reserved to the legislature.

In the instant matter, we have already determined that the City's obligation to contribute to the Fund is a ministerial duty. As such, the trial court's mandamus is not an improper usurpation of a legislative function and does not violate the separation of powers doctrine. Our affirmation of the trial court's ruling is compatible with the *Hoag* decision. It is likewise consistent with our jurisprudence allowing the issuance of a mandamus against a political subdivision compelling it to comply with statutory duties that are ministerial in nature. *See, e.g., Nicolay, supra.* In so finding, we are guided by the Louisiana Supreme Court case of *Carriere v. St. Landry Parish Police Jury,* 97-1914 (La.3/4/98), 707 So.2d 979.

Carriere involved a suit by a St. Landry Parish coroner for a writ of mandamus, compelling the Parish Police Jury to provide office space and pay his salary, health insurance and retirement benefits, and to fund the budget for the office's annual operating expenses. The trial court issued a mandamus ordering the Police Jury to pay the coroner's salary and budget for operating expenses. The Third Circuit affirmed the trial court's judgment only insofar as it ordered the Police Jury to pay the "necessary or unavoidable" operational expenses. *Id.,* 97-1914, (La.3/4/98), 707 So.2d at 981. The judgment as to other sums awarded was reversed.

The Supreme Court granted writs to consider, among other issues, whether the payment of coroner salaries by the parish governing bodies is statutorily mandated obligation or one arising from constitutional provisions. The *Carriere* court did not expressly address the issue of the separation of powers between the judiciary and the legislature; however, the court observed that "[o]nce the legislature places the burden of paying salaries or other expenses of a state official on parish governing authorities, those bodies are generally *obligated* to pay these mandated expenses." *Id.,* 707 So.2d at 981 (citing *Reed v. Washington Parish Police Jury,* 518 So.2d 1044, 1049 (La.1988)). (Emphasis added). The court reasoned:

> Prior to a 1991 constitutional amendment, it was not uncommon for the legislature to impose mandatory duties on parish governing bodies that required the appropriation of funds without providing a corresponding funding source. However, it is beyond our powers to act in a similar fashion and place responsibility for funding state officials on parishes *unless there already exists a clear legislative mandate to do so.*

Id., 707 So.2d at 981-82. (Emphasis added).

The Supreme Court later reiterated these principles in *Perron v. Evangeline Parish Police Jury,* 01-0603 (La.10/16/01), 798 So.2d 67, also a mandamus action by a parish coroner seeking to compel the parish police jury to fund his office. The trial court rendered judgment in favor of the coroner, including

an award for attorney's fees. The court of appeal reversed and the Supreme Court granted writs to consider whether attorney's fees may be awarded in connection with the mandamus proceeding.[18] The court, addressing the separation of powers issue, stated:

> Under the particular facts of this case, we do not find that an order directing the police jury to appropriate funds for the coroner's attorney fee expenses violates the doctrine of separation of powers. In concluding that it was prohibited from awarding attorney fee expenses to plaintiff, the court of appeal cited *Gongre v. Mayor and Bd. of Aldermen of Town of Montgomery,* 98-677 (La.App. 3d Cir.10/28/98), 721 So.2d 968, *writ denied,* 98-2954 (La.1/29/99), 736 So.2d 834, and *Landry v. City of Erath,* 628 So.2d 1178 (La.App. 3d Cir.1993), *writ denied,* 94-0275 (La.3/25/94), 635 So.2d 235, each of these cases finding a violation of the separation of powers doctrine when a court orders a governing body to appropriate money when there is no statutory duty to do so. In *Carriere,* 707 So.2d at 982, this court did recognize the separation of powers principle, which limits a court's power to place the

[18] The issue centered on whether La. R.S. 33:1556(B)(1) (amended and redesignated as La. R.S. 33:5707(B)(1)) which provides that the coroner shall receive "[a]ll necessary or unavoidable expenses," included an award for attorney's fees expended in the mandamus action.

> responsibility of funding state officials on parishes unless a clear legislative mandate exists compelling such funding. While cognizant of this principle, we nonetheless conclude that the legislature has determined that attorney fee expenses incurred by the coroner's office, so long as they are "necessary or unavoidable expenses . . . incident to the operation and functioning of the coroner's office," are payable by the parish police jury. La.Rev.Stat. 33:1556(B)(1). In finding that the legislature has mandated the parish to pay these expenses, we are simply interpreting and enforcing this statute, not legislating a judicial solution. Thus, we discern no violation of the doctrine of separation of powers.

Id., 01-0603, pp. 9-10, 798 So.2d at 73.

In *Parish of St. Charles v. R.H. Creager, Inc.,* 10-180 (La.App. 5 Cir. 12/14/10), 55 So.3d 884, *writ denied,* 11-0118 (La.4/1/11), 60 So.3d 1250, after their property was expropriated by the Parish of St. Charles, the plaintiffs contested the Parish's valuation of the property and obtained a judgment against the Parish. When the Parish failed to pay the judgment, the plaintiffs sought and obtained writ of mandamus compelling the Parish authorities to "cause payment of the amount awarded in the final, definitive judgment." *Id.,* 10-180, p. 4, 55 So.2d at 884. While mandamus was noted to be specifically authorized by La. R.S. 38:390(A) as a procedure by which to collect the amount awarded in excess of that

deposited by an expropriating authority, the Fifth Circuit also considered the Parish's argument that "the judiciary is without authority to issue a writ of mandamus in any matter to enforce a money judgment . . . unless the money for payment of the judgment has been specifically allocated." *Id.,* 10-180, p. 11, 55 So.2d at 881.

Rejecting that argument, the Fifth Circuit stated:

> We recognize that the Louisiana constitution establishes a separation of powers among the three branches of government. . . . However, a mandamus will lie against the State when the duty to be compelled is purely ministerial and not discretionary. We find the wording of the expropriation laws and the constitution set forth by the legislature make payment of fair and just compensation mandatory and not discretionary. Accordingly, we find the judiciary has the constitutional authority to issue a mandamus in this matter if warranted.

Id., 10-180, p. 13, 55 So.2d at 892.

With this background, we conclude, as did the *Perron* court, that "a clear legislative mandate exists" which requires the City to pay into the Fund the "accrued liability contribution" under La. R.S. 11:3384(F). While we recognize that our constitution provides, under Article VI, § 14(A)(1) that "[n]o law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved

by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision . . . ,"[19] it specifically exempts "[a] law providing for civil service, minimum wages, hours, working conditions, *and pension and retirement benefits,* or vacation or sick leave benefits for firemen and municipal policemen." La. Const. art. VI, § 14(A)(1)(e). (Emphasis added).

Furthermore, by enacting La. R.S. 11:3361 and La. R.S. 11:3384(F), the legislature placed the responsibility on the City of paying into the Fund which we conclude is a "clear legislative mandate . . . compelling such funding." *See: Perron, supra,* 01-0603, pp. 9-10, 798 So.2d at 73. As did the *Perron* and *Carriere* courts, we find no violation of the separation of powers doctrine in compelling the City to contribute to the Fund by way of mandamus. We find that, because

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[19] The full text of that article is as follows:

(A)(1) No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue. This Paragraph shall not apply to a school board.

"the legislature has mandated the [City] to pay [into the Fund], we are simply interpreting and enforcing this statute, not legislating a judicial solution." *See: Perron,* 01-0603, p. 10, 798 So.2d at 73. To hold otherwise would allow the City to altogether disregard its mandatory statutory funding obligations with the protection of the courts, under the guise that a court issued mandamus ordering such payment violates the separation of powers doctrine. Such a result would render meaningless both the statutory scheme for the Fund and the legislatively mandated mechanism for its funding.

Effect on the City's 2012 budget

The City's next argument is that the trial court's judgment has the effect of retroactively destabilizing the City's balanced budget for 2012. It maintains that the City's Home Rule Charter, which requires that the City annually balance its budget, prohibits any amendment which "increase[s] the aggregate of authorized expenditures to an amount greater than the estimate of revenues for the year."[20] The City also contends that the Charter does not allow its finance department to "approve any expenditure under any portion of an annual operating budget ordinance until sufficient estimated revenues have been provided to finance the proposed expenditures."[21]

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[20] New Orleans Home Rule Charter Art. III, § 3-115(3).

[21] New Orleans Home Rule Charter Art. III, § 3-116(2).

The City further argues that the trial court's mandamus violates the Louisiana Local Government Budget Act ("LLGBA"), citing La. R.S. 39:1310(A), which states, in part, that "[i]n no event shall a budget amendment be adopted proposing expenditures which exceed the total of estimated funds available for the fiscal year." Finally, the City argues that La. C.C. Pr. art. 3862 prohibits the issuance of mandamus against a state agency when "the expenditure of such funds would have the effect of creating a deficit in the funds of said agency. . . ."

We recognize that the Louisiana Constitution grants municipalities the power to set up home rule charters,[22] and permits a municipality's home rule charter to "provide the structure and organization, powers, and functions of the government of the local governmental subdivision, which may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution."[23] We also recognize that "[p]ursuant to Article VI of the Louisiana Constitution, a municipal authority governed by a home rule charter possesses powers, in affairs of local concern within its jurisdiction, that are as broad as those of the state, except when limited by the constitution, laws permitted by the constitution or its own

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[22] La. Const. art. VI § 5(A)

[23] La. Const. art. VI, § 5(E)

home rule charter." *Fransen v. City of New Orleans,* 08-0076, p. 10 (La.7/1/08), 988 So.2d 225, 234, citing La. Const. art. VI, §§ 4-5; *Civil Serv. Comm'n of the City of New Orleans v. The City of New Orleans,* 02-1812, p. 4 (La.9/9/03), 854 So.2d 322, 326.

We note, too, that La. R.S. 39:1310(A) does provide, as the City indicated, that a budget amendment is not to be adopted that proposes expenditures that exceed the total of estimated funds for a given year. However, the City seems to suggest that, because of this provision, it can never be ordered to pay any sums which have not been included in its budget for any given year. A full reading of La. R.S. 39:1310(A) reflects that amendments *are* permitted when "there has been a change in operations upon which the original adopted budget was developed." *Id.*[24] There is little jurisprudence addressing what is meant by a "change in operations." The First Circuit, in *Tardo v. Lafourche Parish Council,* 476 So.2d 997, 1003 (La.App. 1 Cir.1985), declined to find a change in economic circumstances to be such a "change in operations," instead suggesting "such things as curtailing, eliminating or adding a particular service for the people would meet the criteria, as well as adopting additional revenue producing measures to

[24] The New Orleans Home Rule Charter authorizes amendments as well. Section 3-115(3) states that "[a]mendments to the annual operating budget ordinance shall be considered and approved by the Council under the same procedures prescribed for its original adoption. . . ."

permit the enhancement of services for the people." We, too, will not attempt to define what constitutes a "change in operations." We simply find that amendments to the budget are permissible and neither the Home Rule Charter nor La. R.S. 39:1310(A) prohibit the trial court from issuing a mandamus compelling the City to comply with its statutory obligations under La. R.S. 11:3384(F). We likewise find the City's reliance on La. C.C. Pr. art. 3862 to be misplaced.

We are guided, as was the trial court, by the case of *Penny v. Bowden,* 199 So.2d 345 (La.App. 3 Cir.1967), a case filed by retired policemen seeking to have a mandamus issued to the City of Alexandria to appropriate annually to their pension fund any deficit in that fund, as required by statute (then La. R.S. R.S. [sic] 33:2222). In rejecting the City's argument that it had "no funds with which to comply with a judgment directing it to appropriate monies into the requirement fund," the Court stated:

> . . . [T]he duty to appropriate and pay any yearly deficit which occurs in the operation of the policemen's retirement fund is a statutory duty imposed by the will of the Legislature on the municipality. Our system of local government contemplates that statutory charges imposed on a municipality by the Legislature take precedence over a more permissive use of municipal funds, and it is settled that the State has the power to require a municipality to set up and appropriate money to a pension system . . . We are of the opinion, therefore, that though in the

> City Council's view the Council might better serve the inhabitants of the city by allocating the proceeds from the ad valorem tax to other functions, the will of the Legislature in this regard is supre [sic] and must be obeyed.

Id., 199 So.2d at 350-51.

We agree with the *Penny* court and find that, in this matter, the duty to pay into the Fund is statutorily imposed. As such, we find no merit in the City's contention that the mandamus is unlawful insofar as it has the effect of "destabilizing" the "balanced budget."

Evidence of the Trustees' mismanagement of the Fund

The City's final argument is that the trial court erred in excluding evidence of the Trustees' mismanagement of the Fund and their breaches of their fiduciary duties at trial. It maintains that, because it was unable to develop its affirmative defenses, it was "unfairly prejudice[d]" at trial.[25] We disagree and find no error in the trial court's ruling as the evidence sought to be introduced by the City is not relevant to the issues in this matter. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination

[25] As previously noted, the City filed a writ of supervisory review with this Court after the trial court ruled the evidence inadmissible and the writ was denied.

of the action more probable or less probable than it would be without the evidence." La. C.E. art. 401.

The issues in this matter center on the City's obligations under La. R.S. 11:3384(F). The statute clearly and simply provides that the City is to pay both the "normal contribution" and the "accrued liability contribution." Nowhere in the statute, or any other statute, is there a mechanism for offsetting the amount actuarially determined to be owed by he [sic] City. Likewise, the statute makes no reference to any considerations to be taken into account in determining what the City owes.[26] As we noted previously, as a judiciary, our task is to interpret the law, as enacted by the legislature. *See, e.g., Unwired Telecom Corp. v. Parish of Calcasieu,* 03-0732 (La.1/19/05), 903 So.2d 392, 404. ("interpreting the law is the designated function of the judiciary, not the Legislature"). Conversely, it is strictly within the legislature's province to write the laws. *See, e.g., CLK Company, L.L.C. v. CXY Energy Inc.,* 98-0802 (La.App. 4 Cir. 9/16/98), 719 So.2d 1098, 1109. We cannot interpret the statutes to include a consideration of the manner in which the Fund has been handled as a factor in determining the amount the City owes, as doing so would effectively rewrite the laws.

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[26] Presumably, the Fund is evaluated by the actuary, whose calculations, as Mr. Conefry indicated, include the Fund's overall performance.

Thus, we conclude that the alleged mismanagement of the Fund or breaches of the Trustees' fiduciary duties are not relevant to the issue of the City's mandatory contributions to the Fund. The trial court properly excluded this evidence.

CONCLUSION

For the reasons discussed herein, the trial court's judgment is affirmed.

AFFIRMED

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2012-7061 DIVISION G SECTION 11

NEW ORLEANS FIRE FIGHTERS PENSION AND RELIEF FUND, ET AL

VERSUS

THE CITY OF NEW ORLEANS, ET AL

JUDGMENT

This matter came on for hearing before the Court beginning on January 7, 2013 and concluding on January 8, 2013 on an alternative writ of mandamus ordering the Defendants to show cause why a peremptory writ of mandamus should not issue, directing the Defendants to budget and immediately make payment to the New Orleans Fire Fighters Pension & Relief Fund by appropriating and paying the sum of $17,524,329.00 to the Fund as the Actuarially Required Contribution for the Fund's New System for the fiscal year 2012. The matter was left open for the filing of post-hearing memoranda.

Present and representing the parties were:

Louis L. Robein, Esq.
Christina L. Carroll, Esq.
Robein, Urann, Spencer, Picard & Cangemi
Attorneys for Petitioners

James M. Garner, Esq.
Debra J. Fischman, Esq.
Sher Garner Cahill Richter Klein & Hilbert, LLC
Attorneys for Defendants

Nolan P. Lambert, Esq. – Associate City Attorney
Sharonda Williams, Esq. – Chief Deputy City Attorney
Attorneys for Defendants

Byron Arthur, Esq.
Attorney for Defendants

The Court received testimony and exhibits from the parties, as well as extensive briefing of the issues and oral argument on the merits and various exceptions lodged by the Defendants. Having heard the testimony and reviewed the record and the pleadings,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a peremptory writ of mandamus shall issue, directing the City of New Orleans and its public officers, Honorable Mitchell J. Landrieu, Norman S. Foster, Jacquelyn Brechtel Clarkson, Stacy Head, Susan G. Guidry, Latoya Cantrell, Kristin Gisleson Palmer, Cynthia Hedge-Morell, and James Gray to immediately budget, appropriate for and pay to the New Orleans Fire Fighters Pension & Relief Fund ("Fund") the sum of $17,524,329.00 as the Actuarially Required Contribution to the "New System" administered by the Fund, with judicial interest from the date of judicial demand.

JUDGMENT SIGNED, NEW ORLEANS, LOUISIANA this 28 day of March, 2013.

/s/ RMG
JUDGE ROBIN M. GIARRUSSO
DIVISION G

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2012-7061 DIVISION G SECTION 11

NEW ORLEANS FIRE FIGHTERS PENSION AND RELIEF FUND, ET AL

VERSUS

THE CITY OF NEW ORLEANS, ET AL

REASONS FOR JUDGMENT

The Louisiana Legislature mandates that the Firefighters' Pension and Relief Fund for the City of New Orleans receive contributions from the City of New Orleans sufficient to meet actuarial liabilities. At issue here is the Fund's "New System," a defined benefit pension plan created in 1968 for Firefighters employed after December 31, 1967. The "Old System," also a defined benefit plan, was retained for Firefighters hired before then. The New System is to be actuarially funded; the Old System is a "pay as you go" pension plan, requiring the City to fund the benefit payments in advance by appropriating to the

Fund the next year's anticipated pension "payroll" and associated Fund administrative expenses, a hybrid actuarial funding mechanism.

The funding mandate for the New System is stated at R.S. 11:3384(F) and (G):

> (F) On account of each member who comes under the provisions of this Section applying to persons employed after December 31, 1967, either because of date of employment or due to election as provided herein, there shall be paid annually by the City and credited to the pension accumulation account a certain percentage of the earnable compensation of each member, to be known as the "normal contributions," and an additional percentage of this earnable compensation to be known as the "accrued liability contributions." The percentage rates of such contributions shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuation.
>
> (G) All such contributions shall, in addition to the contributions made by the member, be invested in accordance with the laws set forth in this Part and shall be maintained in a fund separate from all other funds held for any other purpose. . . .

(emphasis added).

This statute was originally enacted in 1967 as La. R.S. 33:2117D(2),(3), but was re-enacted and re-numbered in the Title 11 series of the Revised

Statutes in 1991. This re-enactment was part of a legislative overhaul of public pension laws following a 1987 state constitutional amendment. La. Const., Art. 10, § 29; La. R.S. 11:3. All state, statewide, and municipal systems are now codified in Title 11.

Critically, the funding needs of the New System, as well as the Old System, are facilitated by R.S. 11:3363(D), which authorizes the Fund's Trustees to employ professional advisors and mandates that the Board of Trustees "shall employ an actuary who shall annually certify to the board the amount of contributions required from the city and other sources to maintain the system on an actuarial basis." (emphasis added).

The City argues that the only funding requirement for the Fund (presumably Old and New System alike) lies in R.S. 11:3361, which, in pertinent part, provides that "the city shall pay into the fund annually one percent of the revenues derived from all licenses issued by the city, except the drivers and chauffeurs licenses, and an annual appropriation in the budget of the city of a sum equal to not less than five percent of the money annually appropriated by the city for the operation and maintenance of the fire department of the city." (emphasis added.) The City attempts to ignore the meaning of R.S. 11:3384(F) and (G) and their interrelationship with § 3361 [sic].

In *Board of Trustees of Firefighter's Pension and Relief Fund for the City of New Orleans v. City of New Orleans,* 365 So. 2d 889 (La. App. 4th Cir. 1978), *writ*

denied, 366 So. 2d 915 (1979), the Fourth Circuit reasoned in a matter dealing with another Trustee action – mandatory reinstatement of a disabled Firefighter pursuant to R.S. 33:2113 – that the City's "legal duty does not become less mandatory or ministerial simply because the statute creating the duty may require to some extent construction of statutory language." (*citing Groves v. Board of Trustees of Teachers' Retirement System,* 324 So. 2d 587 (La. App. 1st Cir. 1975)).

The funding mandate (appropriation of not less than 5% of NOFD operating budget) contained in § 3361 [sic] was first legislated in 1948 by Act No. 304. When originally established by Act No. 43 of 1902, the Fund was funded solely by a 1% assessment on Firefighter's salaries. Act No. 403 of 1969 amended the law to enact what is now § 3361 [sic], but was then codified as R.S. 33:2101. In 1969, the Legislature expanded the scope of the Fund by creating the New System, then codified as R.S. 33:2117.3(3), (4). It is clear that the Legislature then and now expressly and unambiguously mandated a distinct funding requirement for the New System. As discussed herein, the Fourth Circuit has carefully parsed through the statute as a whole and has determined that both the Old System and the New System must be actuarially funded on an annual basis.

It is hornbook law that the paramount consideration in a case involving statutory interpretation is ascertainment of the legislative intent and reason or reasons which prompted the Legislature to enact the

law. Courts construe a statute to accomplish the purpose for which it was enacted and to give effect to the legislative will therein expressed. The Legislature is presumed to have enacted each statute with deliberation and with full knowledge of all existing laws on the same subject. The meaning and intent of a statutory provision, therefore, is to be determined by a consideration of the statute in its entirety and all other laws on the same subject matter, and a construction should be placed on the provision in question which is consistent with the express terms of the statute and with the obvious intent of the Legislature in enacting it. *St. Martin Police Jury v. Iberville Parish Police Jury,* 212 La. 886, 33 So. 2d 671 *1947) [sic]; *Legros v. Conner,* 212 So. 2d 177 (La. App. 3d Cir. 1968).

Here, there is no ambiguity in the statutes as to funding. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written without further interpretation in search of the intent of the legislature. La. C.C. art. 9; *New Orleans Rosenbush Claims Service, Inc. v. City of New Orleans,* 653 So. 2d 538, 544 (La. 1995). The Legislature is presumed to have enacted a statute in light of preceding statutes involving the same subject matter and court decisions construing those statutes, and where a new statute is worded differently from the preceding statute, the Legislature is presumed to have intended to change the law. *Id.*; *Louisiana Civil Service League v. Forbes,* 258 La. 390, 246 So. 2d 800, 809 (La. 1971).

In addition, where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *City of Pineville v. American Federation of State, County & Municipal Employees,* 2000-1983 (La. 6/29/01), 791 So. 2d 609, 612.

This Court concludes that § 3384(F) [sic] and (G), as well as § 3363(D) [sic], were deliberate legislative mandates enacted by the Legislature with full knowledge of less onerous funding mandates enacted long before the creation of the New System. The latter enactment is readily harmonized with the original funding mandate. To the extent they conflict, the actuarial funding mandate is an exception to the earlier enactment given that it was specially tailored for creation of a "new" plan of benefits.

Michael A. Conefry, FCA, MAAA, ASA, has performed the actuarial services for the Fund since January 1, 2000. He is the Fund's Actuary contemplated by R.S. 11:3363(D), who must certify to the Board of Trustees the actuarially required contribution for the New System (and Old System) each year. The Court accepted him as an expert, and the City did not challenge his expertise. Conefry testified at length, and the Court received into evidence a written report and analysis dated September 12, 2012. It is found in the record as he explained that defined benefit plans must be actuarially funded because the member benefit is "defined" and contributions are

determined actuarially based on anticipated costs to deliver those benefits. The old system is pay-as-you-go by design; the new system is actuarially funded by design. The overall amount to be funded is the total actuarial value of benefits – that is the actuarial liability less the actuarial value of System assets – which is the amount to be funded over the future. The actuarial valuation is a "self-correcting" process which determines how much should be put aside in the coming year in order to fund either System on a reasonable basis over time. The "aggregate level normal cost" method is utilized, which seeks to take the amount to be funded, less the current value, and spread that over future years on a consistent basis so that benefit payment obligations can be met. Specifically, this method "takes the entire amount that's required and spreads it into the future as a percentage of the actuarial value of future payroll to the active employees." That actuarial value is calculated using the same assumptions used to calculate benefits. "(T)he percentage of payroll so determined is then applied to the current payroll to produce a dollar amount, which would be the funding amount for the coming year." Other sources of funding – the members' payroll deduction (6%) and dedicated proceeds from the State's collection of foreign fire insurance premium taxes – are netted out of the funding amount for the coming year, leaving the City's contribution as the employer contribution required for the coming year.

Conefry established that for fiscal year 2012, the Fund's actuarially required contribution ("ARC") for the New System was $29.4 million. He emphasized that the crucial purpose of the valuation is to determine the annual contribution due from the plan sponsor. The valuation accounts for all sources: member contributions and dedicated tax revenues. Members are assessed not less than 6% of salary, deducted monthly, for the first 20 years of service. R.S. 11:3363(B). Since 1978, the State collects foreign fire insurance premium taxes pursuant to R.S. 22:343, *et seq.* and remits a portion to the Fund. That "contribution" is dedicated to funding cost-of-living increases. R.S. 11:3382(B). The balance due is the employer or City contribution. The required employer contribution is annually determined for the coming year by the actuarial valuation Conefry performs. In this case, the 2011 Valuation reported the required City contributions to the New and Old Systems for the then-coming 2012 Fiscal Year (January 1). Actual appropriations in 2012 for the New System from all sources was $11,900,000, resulting in a shortfall of $17,524,359.00 for the New System. The shortfall for 2010 was $12,546,131, and the shortfall for 2009 was $3.1 million. The projected shortfall for 2013 is $20,312,794, given that the City has just recently budgeted the same $11,900,000 for FY 2013. For the most recent four years, the "cumulative" employer contribution shortfall is $54,476,113 noted in Pet. Ex. 1(k), (l).

The annual shortfalls in funding necessarily aggregate each year as a "cumulative shortfall." The valuation process amortizes the cumulative shortfall; it is "implicitly included" in contribution amounts to be funded in future years. Conefry noted that the ARC to funding match was "good" through 2009, but that in 2010, there was a sizeable shortfall as projected by the 2009 valuation. Multiple factors were in play. The dramatic investment losses of 2008 experienced in the global economy were a factor, as were the significant increases in active payroll resulting from court-ordered historic longevity increases. Tr. I, 55; Pet. Ex. 6(b). On top of that were benefit increases awarded to retirees, also as a result of the longevity class action. Tr. I, 55, 56; Pet. Ex. 6(d).

Conefry explained that the terms "normal contribution" and "accrued liability contribution," valuation components identified in La. R.S. 11:3384(F), "have traditionally been interpreted by actuarial practitioners in Louisiana as meaning the 'Normal Cost' and 'Unfunded Accrued Actuarial (UAAL) Amortization Amount,' respectively, under the 'Entry Age Normal (EAN) Cost Method.'" The "accrued liability contribution" has not been determined for many years because the aggregate level cost method was used. The aggregate level cost method lumps together the "normal cost" and "unfunded accrued actuarial liability." Under this aggregate method, only a normal cost is determined, and it is the contribution necessary to fund the actuarial value of all benefits, less the actuarial value of assets, over the future working

lifetime of the active members. In recent years, the amortization period has been 14 to 15 years under the aggregate level cost method. Therefore, he explained, the normal contribution and the accrued liability contribution have not been separated.

Conefry explained that the language in § 3384(F) [sic] is vague and incomplete. The terms "Normal Contribution" and "Accrued Liability Contribution" are not typical terms. While the Legislature has clarified the operative concepts in other laws affecting local, state or statewide systems, Conefry and other actuaries addressing the stated terms have universally interpreted the statutory language to be the Entry Age Normal Cost Method as the Normal Cost Method until such time as the Unfunded Accrued Liability Contribution becomes zero. This methodology has been fully disclosed and explained in his annual Valuations and in annual meetings with the Board of Trustees. City representatives have attended these sessions.

The City's consulting actuary, Adam Reese, was also accepted as an expert. He opined that Actuary Conefry, who continued the actuarial valuation methods he inherited from the predecessor actuaries, had not followed the methodology contained in § 3384(F) [sic]. He also offered opinions as to the assumptions Conefry utilized to project retirements, disabilities, salary increases, and investment returns. He suggested that some assumptions may be "too conservative" and therefore overestimating expected benefits. He did not offer any opinion as to what the ARC

should have been in 2012 or in any other fiscal year before or after 2012.

Reese readily conceded that § 3384(F) [sic] was "unclear" and "incomplete." He expressed understanding of the legal Doctrine of Contemporaneous Construction. But instead of addressing the reasonableness of Conefry and prior actuaries' application of § 3384(F) [sic] over the past three decades or more, he instead opined that the cost of living provisions of the statute had been administered unreasonably over time. He did concur, however, that Fund liabilities have increased for a number of reasons and that "plan assets have been affected similarly through other actions, as well as internal to the Board." A "lot of forces feeding into one calculation," he testified. Nevertheless, when asked on cross examination to "parse the numbers," he said he could not without further study, which is "certainly doable."

"(S)ettled administrative practice may serve as a fair index of legislative intent," which is "of course, the doctrine of contemporaneous construction. . . ." *Washington v. St. Charles Parish School Bd.,* 288 So. 2d 321, 323 (La. 1974). The decades of administrative practice engaged in by the Fund through its actuaries in applying an ambiguous statute "is to be considered; it is perhaps decisive in case of doubt." *Id.* at 324 (quoting Sutherland on Statutory Construction, par. 309). Further, a governmental agency is accorded deference in its interpretation of the statutory scheme it is charged with administering. *Oakville Community Action Group v. La. Dept. of Env. Quality,* 2005-1365

(La. App. 1 Cir. 5/5/06), 935 So. 2d 177 ("A state agency is charged with interpreting its own rules and regulations and great deference must be given to the agency's interpretation.") The Court concludes that § 3384(F) [sic] is vague and ambiguous and that the Fund actuaries over a long period of time have reasonably interpreted and applied the actuarial methods expressed or implied by the statute.

Therefore, the Court concludes that the ARC for 2012, as determined by the Fund's actuarial valuation, is the required contribution mandated by § 3384(F) [sic] for fiscal year 2012.

La. C.C.P. art. 3861 defines mandamus: "Mandamus is a writ directing a public officer or a corporation or an officer thereof to perform any of the duties set forth in Articles 3863 and 3864." Article 3863 provides that "[a] writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law, or to a former officer or his heirs to compel the delivery of the papers and effects of the office to his successor." "A writ of mandamus may be issued in all cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice." La. C.C.P. art. 3862. Mandamus is available to compel an officer's submission of a claim for payment. *Felix v. St. Paul Fire and Marine Ins. Co.,* 477 So. 2d 676, 682 (La. 1985) (applying R.S. 40:1299(44)(B)((2)(a). In the same way, as discussed more fully below, the City has a ministerial duty to comply with the mandate of R.S. 11:3384. The law for

funding *this* pension fund is well settled in the Fourth Circuit. "[T]he proper procedure for enforcement of the obligations set forth in the pension statute is mandamus because payment by the City requires the City as a ministerial function to make an appropriation." *Nicolay v. City of New Orleans,* 546 So. 2d 508, 512 (La. Ct. App. 4th Cir. 1989), *writ denied,* 551 So. 2d 1324 (Mem)(La. 1989). (emphasis added).

Further, mandamus is appropriate because the delay in obtaining ordinary relief may cause injustice. While the Supreme Court has ruled in two pension funding cases that mandamus was not an appropriate remedy, *Board of Trustees of Sheriff's Pension & Relief Fund v. City of New Orleans,* 02-0640 (La. 5/24/02), 819 So. 2d 290; *Louisiana Assessors' Retirement Fund v. City of New Orleans,* 01-0735 (La. 2/26/02), 809 So. 2d 955, it reasoned so only because the governing trustees delayed acting for many years. In the Sheriff's case, the delay was 38 years. *Board of Trustees of Sheriff's Pension & Relief Fund,* 819 So. 2d at 292. In the Assessors' case, the Court noted in 2002 that the City had failed to remit required contributions since 1974. *Louisiana Assessors' Retirement Fund,* 809 So. 2d at 956. By contrast, the Trustees of the New Orleans Fire Fighters Pension and Relief Fund have not sat on their rights or shirked their fiduciary responsibilities.

According to Actuary Conefry, the first year in which the City failed to appropriate the normal contribution and the actuarially required contribution

was 2010. Fund Secretary-Treasurer and Trustee Richard Hampton, without contradiction, detailed the persistent attention and due diligence applied by the Board to the underfunding beginning in 2010. On October 20, 2010, Hampton addressed both the new Mayor and his Chief Administrative Officer, alerting them to the funding crisis. Indeed, a full 18 months of correspondence and direct meetings with the Landrieu Administration was undertaken in good faith seeking a resolution to what was fast becoming chronic underfunding.

This action was filed July 19, 2012. The City engaged the Fund's Trustees in July 2011 and asked for forbearance. During the discussions that followed, the City proceeded to knowingly continue deliberate underfunding into the 2012 fiscal year (the $17.5 million now at issue), while fully funding other retirement systems, including the Municipal Police Officers Pension Fund for its uniformed police officers. The ensuing negotiations dragged on for a full year. These negotiations were preceded by a series of demands from the Board seeking correction of the underfunding. The City offered no meaningful resolution. The Trustees, after meeting with CAO Kopplin, resolved to go forward with this mandamus action, but only after amicable demand issued to the Mayor and CAO Kopplin.

The Court finds that more delay will cause injustice because of the critical funding status of the Fund. By 2012, the funding shortfall has snowballed and threatens the future viability of the Fund. At

present, the Fund is only 33% funded. In neither the Assessors' case nor the Sheriffs' case was the funding status an issue. That is, the Court did not mention any effect on the ability of those funds to pay current or future benefits. There is clearly a legislative mandate of actuarial funding of the New Orleans Firefighters Pension and Relief Fund. The City's contention that the Fund currently holds plan assets of approximately $175,000,000 and can therefore pay benefits at the moment, ignores reality. As Actuary Conefry explained, these assets are committed to both current benefit payments and years of future benefits. The City is legally obligated to pay its pension contribution on time. A significant amount of the income any defined benefit pension fund derives is from investments. If the City fails to make its required contribution, investment income is lost for the duration of the delinquency. Conefry explained that the resulting negative cash flow must be covered by liquidating investments. As explained by Hampton, the Fund's assets are being "cannibalized" in much the same way the special trust set up in 2000 by the Morial Administration to fund the Old System was depleted in 9 years. In essence, the City proposes that funds owed to current and future pensioners be diverted to cover the City's delinquency. The law does not countenance what is essentially an extension of credit. Therefore, unlike the situation in the 2002 pension cases, a delay here will cause manifest injustice. In the words of the non-partisan Bureau of Governmental Research: "By underfunding the Plan, the city is expanding the gap between the New Fund's

assets and liabilities. It is pushing the funding burden into the future [sic]

The Louisiana Constitution provides that "[m]embership in any retirement system of the state or a political subdivision thereof shall be a contractual relationship between employee and employer . . . " La. Const. art. 10 § 29(B). This constitutional provision also specifically authorizes the legislation creating the New Orleans Firefighters Pension and Relief Fund: "The legislature shall enact laws providing for retirement of officials and employees of the state, its agencies, and its political subdivisions, including persons employed jointly by state and federal agencies other than those in military service, through the establishment of one or more retirement systems." La. Const. art. 10 § 29(B). As noted, in 1968, the Louisiana Legislature established the New System.

Mandated funding for the Fund is not new to the courts. In 1989, the Fund's Trustees sued the City of New Orleans concerning the Old System. *Nicolay,* at 510. After its own actuarial study, the City argued then that the "Old System" should be required to exhaust $6.5 million it then had in reserve before the City was required to make additional contributions as indicated by the actuarial valuation. *Id.* at 509. The crux of the City's argument then was that La. R.S. 33:2117.3 (now La. R.S. 11:3384) (the actuarial funding mandate for the New System) did not apply to the Old System. "Since its creation, as mandated by section 2117.3, the new system has been funded in a way that the annual contributions made by the city

are sufficient not only to pay anticipated benefits for that year, but also to build up the Fund so that in a predetermined number of years, the Fund will be able to operate without any further employer contributions." *Id.* at 511. The Fourth Circuit contrasted the "specific method of advance funding" of the New System under La. R.S. 33:2117.3, to the "pay as you go" funding of the Old System. *Id.* at 511-12. Critically, it mandated funding for the Old System. It modified the trial court's judgment to include a writ of mandamus directed to the City, reasoning that "[t]his court has already determined that the proper procedure for enforcement of the obligations set forth in the pension statute is mandamus because payment by the City requires the City as a ministerial function to make an appropriation." *Id.* (citing *Board of Trustees of Firemen's Pension & Relief Fund v. City of New Orleans,* 217 So. 2d 766 (La. App. 4th Cir. 1969)).

Notably, the cited 1969 mandamus action compelled the City to appropriate for cost of living adjustments (COLA's) to pensioners under the Old System and the New System, then codified as R.S. 33:2117(B), today R.S. 11:3382. Now, the City, in answering the Petition, asserts that the Fund's Trustees have "cavalierly" granted COLA's, for which it now presumably seeks some "offset." Actuary Reese opined that COLA's have been overly awarded, but could offer no analysis. The City has previously been mandated to fund COLA's. "Mandamus lies to compel the performance of prescribed duties that are purely ministerial and in which no element of discretion is

left to the public officers, but there must be a clear and specific legal duty which ought to and can be performed." *Id.* at 769 (citing *Felix, supra.*). Mandamus was the proper remedy to compel the City to appropriate contributions for the then-newly-enacted statutory 2% cost of living increases. *Id.* at 769. "The statute which has formed the subject matter of this tedious litigation is a mandatory law, and the defendants, the City of New Orleans, are required as a ministerial function to make the appropriation, and it is for this reason that mandamus is the proper procedure for the enforcement of this obligation." *Id.* at 769.

The City, acting through CAO Kopplin, candidly acknowledged before the City Council on November 2, 2011 (budget presentations for 2012) the ministerial nature of its obligation:

> I think the fire pension does represent one of the most serious challenges that we face as a city. And I think the fundamental thing is important for you to understand about this process is that neither the administration nor the council has any ability to influence the course of the pension system in its obligations, its investments, its benefits <u>other than to write the check</u>.
>
> <u>The rules are set under state law.</u>
>
> Def. Ex. 37, pp. 11-12. (emphasis added).

The "rules" under § 3384(F) [sic] are mandatory and ministerial.

The mandate to fund here is wholly consistent with well-established methods approved by the Supreme Court with respect to statewide systems. As noted, the Legislature, since 1968, has required the City to fund the New System at a level to meet "accrued liability" based on "actuarial valuation." La. R.S. 11:3384(F). Likewise, it has legislated components in the "actuarially required employer contribution" for statewide public retirement systems, which are analogous to the Fund's New System. La. R.S. 11:103(B)(3). The statute applicable to statewide systems, including the Firefighters' Retirement System ("FRS"), requires payment of "unfunded accrued liability." La. R.S. 11:103(B)(3)(d).

The 1987 constitutional amendments require "the state and statewide retirement systems [to] attain actuarial soundness and that the legislature establish the particular method of actuarial valuation to be employed by each state and statewide retirement system for doing so." *Louisiana Municipal Ass'n v. State,* 04-0227 (La. 1/19/05), 893 So. 2d 809, 819. The New System law has required actuarial soundness since its inception in 1968. Subsection (E)(2) of La. Const. art. 10, § 29 "requires the elimination of unfunded accrued liability in these retirement systems by the year 2029, commencing with Fiscal Year 1989-1990." *Id.* Each statute enacted by the Legislature in accordance with this constitutional amendment contains a general formula for the actuarial calculation of employer liability. *Id.* at 821. This calculation, for all such statutes, has as a variable the

"projected liabilities of the system, including payments of unfunded accrued liabilities of the system, including payment of unfunded accrued liabilities over time." *Id.* at 821. La. R.S. 11:103 requires that any difference between the actuarially required employer contributions and employer contributions actually received (the "short fall") be included in the succeeding fiscal year's calculation, as amortized over five years. *Id.* at 823-24. In 2005, a number of local government employers challenged an employer contribution based on actuarial valuation, arguing that the contribution rate was fixed by statute at 9% for the FRS. *Id.* at 814-15. The Court, construing the applicable statutes, held that the only variable which can "move" or "float" to offset increased liabilities to achieve actuarial integrity is the direct employer contribution rate. *Id.* at 839. The "legislature understood the rate of direct employer contributions, as a portion of the gross employer contribution, could fluctuate from year to year based on periodic actuarial valuation." *Id.* at 839. Therefore, the legislation requires the public employers to pay the accrued actuarial liability, amortized according to the formula set forth in the statute.

The Court rejected the municipal employers' argument that legislative duties had been unconstitutionally delegated to the Public Retirement Systems Actuarial Committee (a creature of statute): "In effect, the legislature has asked actuaries to perform actuarial duties," following the "precise blueprint . . .

[of the] multi-level formula in La. R.S. 11:103 . . . " *Id.* at 846-48. The Court concluded:

> Ultimately, the Legislature is responsible for maintaining the actuarial soundness of the system. The Legislature has sole discretion within its funding authority to determine by which method it will maintain actuarial soundness of the statewide public retirement systems, *including increased employer contribution rates* . . .

Id. at 856 (emphasis added).

The actuarially driven funding paradigms in R.S. 11:3384 and R.S. 11:103 are closely aligned with the statutory construct for funding private sector defined benefit pension funds. There, the plan actuary plays more than a significant role. The actuary is required to estimate "such variables as the expected income on plan contributions and the expected retirement age and longevity of covered [parties]." *Vinson & Elkins v. Commissioner of Internal Revenue*, 7 F.3d 1235, 1236 (5th Cir. 1993). "Actuarial 'assumptions' constitute the data that an actuary uses to calculate the total present value of all future pension costs or liabilities." *Id.* at 1240 n. 4. The federal Fifth Circuit, interpreting the Tax Code, has held that an actuary's opinion is entitled to deference: "[B]y entrusting actuaries with the task of determining plan contributions, and by granting the latitude inherent in the statutory reasonableness test, Congress intended to give actuaries some leeway and freedom from second-guessing." *Id.* at 1238. *See also Concrete Pipe and*

Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S.Ct. 2264, 124 L. Ed. 2d 539 (1993) (multiemployer pension plan's actuary's selection of assumptions and methods to calculate employer withdrawal liability under the Employee Retirement Income Security Act of 1974 are not vulnerable to suggestions of bias or its appearance; actuaries are trained professionals subject to regulatory standards).

The City argues that mandamus is unavailable "because (Petitioners) have alleged claims that are contractual in nature." The City misunderstands paragraph VIII of the Petition. That single allegation alleges the "contractual relationship" between "employee and employer" created by Article 10, Section 29 of the Louisiana Constitution. This is a constitutional legal construct, which cannot be impaired. *See,* Cucinelli, Getchell and Russell, *Judicial Compulsion and the Public Fisc – A Historical Overview,* 35 Harv. J.2 & Public Policy, Spring, 2012. Nowhere is relief sought for enforcement of this "contractual" right of the participants and beneficiaries of the Fund. Indeed, the Petition unmistakably pleads a request for relief under R.S. 11:3384. It further alleges at paragraph XXV that the Petitioners, as Trustees, "have a fiduciary duty to demand performance of the City's ministerial act of budgeting. . . ." The Louisiana Trust Code obligates the Trustees to seek recovery of plan assets, in this case, required employer contributions. "A trustee is under a duty to a beneficiary to take reasonable steps to take, keep control of, and

preserve the trust property." La. R.S. 9:2091; Bogert, Trusts, 6th Ed, § 97. A pension plan trustee is expected "to use reasonable diligence to discover the location of the trust property and to take control of it without unnecessary delay." G. Bogert & G. Bogert, Law of Trusts and Trustees, § 551, p. 41 (2d rev. 1980); *Central States, Southeast and Southwest Area Pension Fund v. Central Transport, Inc.,* 472 U.S. 559, 570, 105 S.Ct. 2833 (1984). Indeed, where the trust settlor retains possession of trust assets, "the trustee must hold the settlor to (his) obligation." Bogert & Bogert, § 355.

When considering the effect of a collective bargaining agreement on a statutory provision related to firefighter salaries, the court of appeal held that "[t]he public purpose behind the enactment of these provisions [minimum wage standards, working conditions and benefits for firefighters] would be defeated if municipalities were allowed to contractually avoid their responsibility under statutes." *Aguillard v. City of Lake Charles,* 07-189 (La. App. 3d Cir. 09/26/07), 966 So. 2d 722, 726, *writ denied,* 07-2107 (La. 03/07/08), 977 So. 2d 907. Municipalities cannot contractually avoid statutory benefits for firefighters. So even if either side to this dispute were to contend that a "contract" is in play, no such "contract" can trump the clear mandate of R.S. 11:3384. The Trustees are obligated as fiduciaries to secure the constitutional mandate at hand. In short, they are duty bound to compel the City, which has by law promised pensions to its Firefighters, to fund this

constitutionally created "contract." A mandamus is an available and long-approved method for fulfilling this responsibility.

Louisiana Municipal Ass'n v. State also addressed the argument that the FRS funding statutes unlawfully delegated legislative functions to an executive department, the Public Retirement Systems' Actuarial Committee (PRSAC) (which is attached to the Department of Treasury). The Court held that the PRSAC's actuarial duties were administrative and ministerial, and did not violate La. Const. art. 3, § 1. "In effect, the legislature has asked actuaries to perform actuarial duties." 893 So. 2d at 845. *See also Neske v. City of St. Louis,* 218 S.W.3d 417 (Mo. 2007) (rejecting separation of powers argument because "[t]he PRS and FRS boards of trustees do not have unlimited discretion in determining the amount requested by the City, but rather request and certify the amount that an actuary determines is required for the systems to remain actuarially sound."); *Shelby Township Police & Fire Retirement Board v. Charter Township of Shelby,* 475 N.W.2d 249, 254 (Mich. 1991) (rejecting separation of powers argument, and noting "[p]ension system appropriation decisions do not become improper merely because the amount appropriated by the township is comparable to the contribution amount certified by the board.") In the same way, our Legislature has properly delegated the determination of the ARC for the New System to the actuary engaged by the Trustees of the Fund.

In 2007, the Court considered the constitutionality of statutes authorizing the Louisiana Assessors' Retirement and Relief Fund to obtain a portion of state-controlled revenue-sharing funds if a public employer failed to remit the dedicated taxes to the Fund. *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund,* 2005-2548 (La. 10/1/07), 986 So. 2d 1, 8-10. The Court rejected the City of New Orleans' argument that a statute allowing the Fund access to tax proceeds, upon the City's failure to remit contributions, violated the Separation of Powers Doctrine by giving judicial power to the legislative branch. *Id.* at 23. The delegation of pension contribution-setting functions is constitutionally settled.

The City relies heavily on *Hoag v. State,* 2004-0857 (La. 12/01/04), 889 So. 2d 1019, which applied the Separation of Powers Doctrine to the Judiciary's authority to mandate appropriation for the payment of a money judgment against the State of Louisiana. The *Hoag* court essentially held that the only process available to a litigant for collection on a judgment against the State lies under R.S. 13:5109(B). The Court disallowed use of a mandamus as an alternative means of executing on a judgment against the State of Louisiana.

Hoag is clearly distinguishable. Earlier, the Court held in *Perron v. Evangeline Parish Police Jury,* 2001-0603 (La. 10/10/01), 798 So. 2d 67, that our law prohibits the use of a mandamus where a "court orders a governing body to appropriate money when there is no statutory duty to do so." (Emphasis added).

Similarly, in *Carriere v. St. Landry Parish Police Jury,* 97-1914, 97-1937 (La. 3/4/98), 707 So. 2d 979, the Court recognized the Separation of Powers Doctrine, which limits a court's power to place responsibility of funding the offices of state officials serving in Parishes unless a clear legislative mandate exists compelling such funding. The *Perron* Court concluded its analysis by noting that the Legislature (not the courts) mandated payment of expenses and that any mandamus enforcing a legislative mandate is an interpretation of a statute, "not legislating a judicial solution." *Id.* at 73.

The City in brief also relies on *Landry v. City of Erath,* 628 So.2d 1178 (La. App. 3d Cir. 1993), *writ denied,* 94-0275 (La. 3/25/94), 635 So.2d 235. *Perron* held that *City of Erath* and similar cases were not controlling in a case where a "statutory duty" is at issue.

As *Nicolay* shows, this legislative mandate to the City of New Orleans and its City Council is exactly that: a statutory mandate to perform a ministerial duty. This Court is not "legislating" an appropriation; it is merely enforcing clear law. As the City well knows, any relief from any pension funding mandate must be legislatively obtained.

The Louisiana Constitution generally prohibits unfunded state mandates on political subdivisions:

> No law or state executive order, rule, or regulation requiring increased expenditures for any purpose shall become effective within

> a political subdivision until approved by ordinance enacted, or resolution adopted, by the governing authority of the affected political subdivision or until, and only as long as, the legislature appropriates funds for the purpose to the affected political subdivision and only to the extent and amount that such funds are provided, or until a law provides for a local source of revenue within the political subdivision for the purpose and the affected political subdivision is authorized by ordinance or resolution to levy and collect such revenue and only to the extent and amount of such revenue. This Paragraph shall not apply to a school board.

La. Const., art. VI, §14(A)(1).

However, this constitutional provision is inapplicable to firefighters' retirement benefits. Subsection (2) of La. Const., art. VI, § 14(A) provides as follows: "This Paragraph shall not apply to . . . (e) A law providing for the civil service, minimum wages, hours, working conditions *and pension and retirement benefits,* or vacation or sick leave benefits for firemen and municipal policemen." La. Const., art. 6, § 14(A)(2)(e) (emphasis added); *New Orleans Firefighters Ass'n v. Civil Service Commission of City of New Orleans,* 422 So. 2d 402 (La. 1982) ("Since the constitution plainly calls for the legislature to establish statewide rules for the measurement of firemen's wages and working conditions, we conclude that its power in this regard is exclusive."); *Johnson v. Marrero-Estelle Volunteer Fire Co. No. 1,* 04-2124 (La. 04/12/05), 898 So. 2d 351, 358

(holding that statute mandating sick leave benefits for firefighters did not violate La. Const. art. VI, § 14). *See also Neske v. City of St. Louis,* 218 S.W.2d 417 (Mo. 2007) (rejecting similar constitutional challenge to mandatory funding of City of St. Louis' fire and police retirement systems); *Shelby Township Police & Fire Retirement Board v. Charter Township of Shelby,* 475 N.W.2d 249 (Mich. 1991) ("How the township creates the revenues necessary to restore the 'actuarial integrity' of the pension system is not an issue for the board or this Court.")

The City of New Orleans is governed by the provisions of a home rule charter enacted prior to the 1974 Louisiana Constitution. *Morial v. Smith & Wesson Corp.,* 785 So. 2d 1 (La. 2001). "These pre-existing home rule charters were continued, and essentially constitutionalized by La. Const. art. VI, § 4." *Id.* at 14 (internal citations omitted). Section 9(B) of Article VI reserves power to the State: "Notwithstanding any provision of this Article, the police power of the state shall never be abridged." La. Const. art. VI, § 9(b). "Although the police power of the state is best defined on a case by case basis, it has been generally described as the state's 'inherent power to govern persons and things, within constitutional limits, for promotion of general health, safety, welfare, and morals.'" *Morial,* 785 So. 2d at 15 (quoting *City of Orleans v. Board of Directors of Louisiana State Museum,* 739 So. 2d 748, 757 (La. 1999)). For example, the State can prohibit the City of New Orleans from establishing minimum wage rates, and

an ordinance in violation of such State statute is unconstitutional. *New Orleans Campaign for a Living Wage v. City of New Orleans,* 825 So. 2d 1098 (La. 2002). Regulation of minimum wages is necessary to preserve the general welfare of the State's citizens. *Id.* at 1104-08. In the same way, ensuring the soundness of public pensions is necessary to preserve the general welfare of these employees. "The establishment of minimum wage standards, working conditions, *and benefits* for firefighters is not left to the discretion of each individual municipality, but is within the 'plenary power of the legislature' under the State constitution." *Aguillard,* 966 So. 2d at 726 (emphasis added) (citing *New Orleans Firefighters Ass'n v. Civil Service Commission,* 422 So. 2d 402, 409 (La. 1982)).

The City has also strongly argued that any order compelling an appropriation would "retroactively destabilize" the now balanced budget. It relies on Section 3-116(2) of the Home Rule Charter. It does acknowledge Section 3-115(3) of the Charter, which authorizes "(a)mendments to the annual budget ordinance" which can be considered and "approved by the Council under the same procedures prescribed for its original adoption. . . ." Indeed, ordinance-making authority is granted the Council to address a "state law" requiring "increased expenditures for any purpose. . . ." While the Council must "identify" a revenue source for the "increased expenditure" amended into the budget, nothing in the Charter or law limits the Council authority to amend <u>any</u> budget.

The Local Government Budget Act, R.S. 39:1301, *et seq.,* authorizes budget amendments. Applying the Act, the Fourth Circuit in *Yenni v. Parish Council of the Parish of Jefferson,* Nos. 93-C-0722, 93-CA-0898 (9/30/93), 625 So.2d 301 (La. App. 4 Cir.), held that a home rule charter council could amend a budget mid-year if its minimal charter provisions are complied with. "(I)n the absence of guidelines in the Charter or the Budget Act, this Court will not legislate minimum requirements for budget amendments." *Id.* at 305.

More to the point, in a police pension funding case, *Penny v. Bowden,* 199 So. 2d 345 (La. App. 3d Cir. 1967), the Court of Appeal addressed a similar balanced budget "defense":

> We would perhaps be persuaded by the City's plea of lack of funds if the current operating expenses as budgeted and appropriated by the City Council stood on equal footing with the City's obligation to appropriate and pay any yearly deficit which might occur in the policemen's retirement fund. However, they do not. The obligations comprising the great bulk of the City's current operating expenses are established because, In its discretion, the City Council deems it wise to provide the city with a certain measure of sanitation service, a certain level of police protection, a certain standard of fire protection, and certain utility services. But the duty to appropriate and pay any yearly deficit which occurs in the operation of the policemen's retirement fund is a statutory duty imposed by the will of the

> Legislature on the municipality. Our system of local government contemplates that statutory charges imposed on a municipality by the Legislature take precedence over a more permissive use of municipal funds, and it is settled that the State has the power to require a municipality to set up and appropriate money to a pension system. La. Const. Art. 14, sec. 40(d); 64 C.J.S. Municipal Corporations s 1890; McQuillin, The Law of Municipal Corporations, 3d ed., secs. 12:141 and 4:176; Mayor and Aldermen of the City of Vicksburg v. Crichlow, 16 So. 2d 749 (S.Ct. of Miss. 1944); Board of Trustees v. Village of Glen Ellyn, 337 Ill.App. 183, 85 N.E.2d 473 (1949); People ex. Rel. Kroner, et al. v. Abbott, 274 Ill. 380, 113 N.E. 696 (1960); State ex rel. Sewerage & Water Board v. Commission Council of New Orleans, 151 L. 938, 92 So. 392 (1922). We are of the opinion, therefore, that though in the City Council's view the Council might better serve the inhabitants of the city by allocating the proceeds from the ad valorem tax to other functions, the will of the Legislature in this regard is supreme and must be obeyed.

Id. at 351 (emphasis added). *See also Neske v. City of St. Louis,* 218 S.W.2d 417 (Mo. 2007) (ordering funding of fire and police pension system, rejecting argument that budget would not allow payment since "it has spent the monies elsewhere"); *Shelby Township Police & Fire Retirement Bd v. Charter Township of Shelby,* 475 N.W.2d 249 (Mich. 1991).

JUDGMENT SIGNED, NEW ORLEANS, LOUISIANA this 28 day of March, 2013.

/s/ RMG
JUDGE ROBIN M. GIARRUSSO
DIVISION G

The Supreme Court of the State of Louisiana

NEW ORLEANS FIRE FIGHTERS PENSION AND RELIEF FUND, ET AL. NO. 2014-C-0142

VS.

THE CITY OF NEW ORLEANS, ET AL.

IN RE: City of New Orleans, et al.; – Defendant; Applying For Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. G, No. 2012-7061; to the Court of Appeal, Fourth Circuit, No. 2013-CA-0873;

March 21, 2014

Denied.

MRC

JTK

JLW

GGG

JOHNSON, C.J., recused.

VICTORY, J., would grant.

HUGHES, J., would grant.

Supreme Court of Louisiana
March 21, 2014

/s/ [Illegible]
Deputy Clerk of Court
For the Court