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7/26/2019 8:28 AM
Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL
2019CH000235

IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

JOHN TILLMAN and **WARLANDER ASSET MANAGEMENT, LP**, Plaintiffs, v. **J.B. PRITZKER**, Governor of the State of Illinois, in his official capacity; **MICHAEL W. FRERICHS**, Treasurer of the State of Illinois, in his official capacity; and **SUSANA A. MENDOZA**, Comptroller of the State of Illinois, in her official capacity, Defendants.	)	Case No. 2019-CH-235

PETITIONER'S REPLY TO DEFENDANTS' OBJECTION TO
PETITION FOR LEAVE TO FILE TAXPAYER COMPLAINT

Nearly fifty years ago, the drafters of the Illinois Constitution anticipated that a case seeking to interpret Article IX, section 9(b) would come before the Court for an adjudication on the merits:

> MR. KAMIN: One additional thing, because I think the language is unclear on that—is it then meant that the determination of the specificity of the purpose [under Article IX, section 9(b)] is subject to judicial review?
>
> MR. S. JOHNSON: I would suppose so. . . . ***I would imagine that a case will, at some time in the future, come up questioning whether or not the purpose described in a debt issue is specific enough.***[1]

This is exactly that case. The State, in an attempt to avoid this Court's review, offers a strained reading of Article IX, section 9(b) that contradicts its plain text; misinterprets the governing case

[1] 3 Record of Proceedings, Sixth Illinois Constitutional Convention ("Proceedings"), at 1933 (emphasis added). Mr. S. Johnson presented the draft of Article IX, section 9 to the delegates on behalf of the Committee on Revenue.

law; and asserts meritless, irrelevant defenses. The State asks the Court to look no deeper. The Court should decline that invitation.

"In a constitutional government no injury can come to a State greater than the destruction of the safeguards provided in its constitution." *Peabody v. Russel*, 302 Ill. 111, 121 (1922). The results of the State's blatant disregard of the safeguards of Article IX, section 9 are obvious: Illinois has the lowest credit rating of any state in the country. The challenged outstanding debt encompasses over $14 billion, which the State is not scheduled to finish repaying until 2033. Far from trying to "recall a ship nearing its decommission date," as the State argues, Petitioner seeks to prevent a misguided voyage that will continue for another ***14 years*** and will carry away with it ***another $20 billion*** (in principal and interest payments) that belongs to the people of Illinois.

Of course, the State's prediction of dire consequences is irrelevant to whether Petitioner has "reasonable grounds" for invoking this Court's review. *See Peabody*, 302 Ill. at 120 ("[W]here an act of the legislature is manifestly unconstitutional it is the duty of the courts to so hold, however disastrous the consequences may be."). Petitioner's claim is plainly reasonable. The Court should grant the Petition and allow Petitioner to file his Complaint.

I. Petitioner Has Reasonable Grounds for His Suit, as Nothing Suggests His Purpose is Frivolous or Malicious, or that His Complaint is Otherwise Unjustified

A court may deny a taxpayer leave to file a complaint only if it finds that no "reasonable grounds" exist for the suit. *See Strat-O-Seal Mfg. Co. v. Scott*, 27 Ill. 2d 563, 566 (1963). The Illinois Supreme Court has stated that this standard is a low one, and that it entails considering whether the petitioner's purpose is "frivolous or malicious" or the "filing of the complaint is otherwise unjustified." *Id.* "[W]hether the allegations of the proposed complaint can, on

hearing, be sustained," by contrast, is a question to decide *after* the complaint has been filed, not before. *Id.*

Petitioner's purpose is plainly not "frivolous or malicious," and his Complaint is not "unjustified." Petitioner has asserted a colorable claim that the State incurred certain debt in violation of the Illinois Constitution. Whether those debt issues satisfied the "specific purposes" requirement in the Constitution is here disputed—just as the drafters anticipated at the 1970 Constitutional Convention—and requires judicial consideration, as the drafters also anticipated. Debt service on unconstitutional debt is a clear misuse of public funds, and Petitioner has a right as a citizen and taxpayer to sue to protect these funds. Accordingly, Petitioner has "reasonable grounds" for his suit.

None of the State's arguments undermines this conclusion. In fact, the State fundamentally misapprehends nearly every aspect of Petitioner's claim. For example, the State asserts that Petitioner's Complaint relies on the "erroneous premise" that the State may incur new long-term GO debt only for "capital improvements" (Obj. at 2-3, 7-9, 19). But that is not Petitioner's premise.[2] Petitioner interprets Article IX, section 9(b) to mean what it says: that the State may incur GO debt "for specific purposes" and must set forth those "specific purposes" in the authorizing statute. This interpretation follows the plain text and is also consistent with both the relevant Illinois Supreme Court case law and the drafters' intent.

The State also asserts that "Petitioner does not dispute that the laws authorizing the bonds . . . specif[ied] in sufficient detail the purposes for those bonds," and that the laws in

[2] Petitioner's proposed Complaint states that "specific purposes refers to specific projects *in the nature of* capital improvements" (Pet. Ex. A ¶ 27 (emphasis added))—*i.e.*, that "capital improvements" are an *example* of a "specific purpose," not the definition of the term. And as the State concedes, capital improvements are a particularly relevant example of a "specific purpose," because the drafters of the Constitution thought about "specific purposes" almost exclusively in those terms (Obj. at 9 n.4). *See* section II.C, *infra.*

question "plainly" did so (Obj. at 3, 5). But Petitioner ***does*** dispute that these laws provided sufficient detail and, in fact, they plainly did ***not*** (*e.g.*, Pet. Ex. A ¶¶ 9-10, 69, 89). The State also claims that the Petitioner is trying, belatedly, to unwind past State actions (Obj. at 1, 12 (discussing the recall of sailing ships and unscrambling of eggs)). But Petitioner seeks to sue under 735 ILCS 5/11-301, a statute that allows Illinois taxpayers to "enjoin the disbursement of public funds by any officer or officers of the State government" (Pet. ¶¶ 7-11; Pet. Ex. A ¶¶ 15, 96, 104). Consistent with that statute, Petitioner seeks to prevent *future* disbursements—not to undo *past* actions.

The State attempts to address the merits of Petitioner's claim without understanding it. The State's arguments are not only misdirected, but also premature. At this stage, Petitioner simply seeks permission to initiate a complaint. The parties dispute numerous issues, including the proper interpretation of Article IX, section 9. But the State has offered no valid reason why the Court should decide this dispute in an abbreviated petition procedure, rather than through an orderly merits adjudication. No valid reason exists. The Court should grant the Petition and allow Petitioner's claim to proceed.

II. Petitioner Interprets Article IX, Section 9 Consistent with its Plain Language, the Relevant Case Law, and the Drafters' Intent

As demonstrated below, Petitioner's interpretation of Article IX, section 9, unlike the State's, is consistent with (A) the Constitution's plain language; (B) the relevant Illinois Supreme Court precedent; and (C) the drafters' intent.

A. Petitioner's Interpretation of Article IX, Section 9 Is Consistent with the Constitution's Plain Language

The State concedes that the challenged 2003 and 2017 bonds were *not* authorized under Article IX, section 9(c), (d), or (e), and that only section 9(b) could have authorized these bonds (Obj. at 6 n.3). But the issuances fail the requirements of section 9(b), as well.

Article IX, section 9(b) states:

> State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.

Ill. Const. art IX, § 9(b) (emphases added).

As noted above, Petitioner interprets this language to mean exactly what it says: that the debt must be incurred "*for specific purposes*" (*i.e.*, not for general purposes), and the State must "*set forth*" those "specific purposes" in the authorizing law. *See Gregg v. Rauner*, 2018 IL 122802, ¶ 23 ("In construing a constitutional provision, . . . courts [should] look first to the common meaning of the words used.").

Contrary to this plain text, the State incorrectly asserts that section 9(b)'s requirement that the debt be incurred "for *specific* purposes" actually allows the State to incur debt "for *any* purpose" (Obj. at 8). But Section 9(b) does not say debt "for *any* purpose"—it says debt "for *specific* purposes." The words "specific purposes" clearly mean something other than "any purpose." *Cf. Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 466 (1976) ("[T]he fundamental rule that each word, clause or sentence must, if possible, be given some reasonable meaning is especially apropos to constitutional interpretation."). By reducing "specific purposes" to a mere "procedural" requirement with zero "substantive" content (Obj. at 10), the State thus effectively translates "specific purpose" into "any *stated* purpose." This reading cannot be squared with the text.[3]

[3] The State also bizarrely suggests that the opening of a bank account (*i.e.*, a "specific fund") to receive proceeds from a bond issuance establishes that the debt was incurred for a "specific

Petitioner further alleges that deficit financing, refunding debt, and market speculation—which are, by their very nature, *general* purposes for borrowing—are not "specific purposes" (*see* Pet. Ex. A ¶¶ 31, 65, 89). Section 9 uses "specific purposes" in paragraph (b) in direct contrast to the general purposes for borrowing authorized in the parallel paragraphs (c), (d), and (e):

(b) "State debt for specific purposes may be incurred . . . ."

(c) "State debt in anticipation of revenues . . . may be incurred . . . ."

(d) "State debt may be incurred . . . to meet deficits . . . ."

(e) "State debt may be incurred . . . to refund outstanding State debt . . . ."

Given this context, "specific purposes" in section 9(b) must denote a *type* of purpose for borrowing (as already stated above), and also logically must refer to purposes that are *more specific* than the *general* purposes described in paragraphs (c)-(e), such as deficit financing and refunding debt.[4] *See Gregg*, 2018 IL 122802, ¶ 23 ("Effective constitutional interpretation requires that the court view the constitution as a whole, construing provisions in context with other relevant provisions."). *Cf. People v. Grever*, 353 Ill. App. 3d 736, 758-59 (2d Dist. 2004)

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purpose" (Obj. at 7). Of course, the flow of funds at closing does not prove that the debt was incurred for a "specific purpose."

[4] Then-Attorney General Lisa Madigan came to a similar conclusion in declaring Public Act 96-18 unconstitutional. The General Assembly enacted Public Act 96-18, which authorized $2 billion in GO refunding bonds that would not mature within the term of the outstanding debt, on a three-fifths vote under section 9(b). *See* Pub. Act 96-18 (May 31, 2009). "This [Act] was declared unconstitutional by the Attorney General under Article IX Section 9(e) of the State Constitution." Comm'n on Gov't Forecasting & Accountability, Ill. General Assembly, *FY 2011 Capital Plan: An In Depth Analysis of the Illinois Capital Plan* 45, *available at* http://cgfa.ilga.gov/
Upload/fy11capital_plan.pdf.

Though the Attorney General's declaration is not public, the fact that she reviewed the constitutionality of the statute under section 9(e) (and concluded the bonds were improper due to section 9(e)'s maturity limitation) suggests that she believed that refunding debt, by itself, is *not* a "specific purpose" under section 9(b). If "any stated purpose" can be a "specific purpose," as the State now contends, then the legislature's three-fifths vote on Public Act 96-18 should have been sufficient to render the refunding bonds constitutional under section 9(b).

("There is a well-established rule of statutory construction which states 'an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance.'"), *rev'd in part on other grounds*.

The State, in claiming that section 9(b) allows debt for "*any* purpose" (including the general purposes already provided for elsewhere in section 9), acts as if the parallel paragraphs of Article IX, section 9 do not exist. *See Gregg*, 2018 IL 122802, ¶ 23 (stating that courts should "construe [constitutional] provisions in context with other relevant provisions").

Petitioner's interpretation of Article IX, section 9 plainly cannot be "frivolous" where the State's only alternative contradicts the plain text. Moreover, it simply cannot be correct—and certainly cannot be "unambiguously" correct, as the State suggests (Obj. at 3)—that a provision authorizing debt "for *specific* purposes," when used in a section that otherwise authorizes debt for various *general* purposes (but with strict limitations), actually means that the State may incur *unlimited debt for any purpose*. The Court should grant the Petition, and allow Petitioner to file his Complaint.

B. Petitioner's Interpretation of Article IX, Section 9 Is Consistent with the Relevant Illinois Supreme Court Precedent

Illinois Supreme Court precedent also supports Petitioner's interpretation. These cases make clear that the State's attempt to turn the "specific purposes" requirement into a mere "procedural" requirement *devoid of substantive content* is facile and misguided (Obj. at 10). Rather, consistent with the plain language of Article IX, section 9(b), a "specific purposes" review necessarily considers whether the State has clearly *articulated* the purpose for a debt, and also what that purpose *is* and whether it is specific. A court cannot conduct a meaningful review without considering both questions.

The State suggests that *People ex rel. Ogilvie v. Lewis*, 49 Ill. 2d 476 (1971), proves that "specific purposes" is only a "procedural" requirement with no "substantive" content (Obj. at 8, 10). But the words "procedural" and "substantive" appear nowhere in that opinion. To the contrary: *Lewis* establishes, consistent with Petitioner's allegations, (1) that "specific purposes" judicial review is not a rubber stamp for any purpose the State names; (2) that the inquiry asks whether the State has defined "in reasonable detail how the funds . . . are to be expended *and the objectives to be accomplished*," which necessarily involves considering what the purpose *is* and whether it is general rather than specific; and (3) that refunding existing debt, which Article IX, section 9(e) separately addresses, is not a "specific purpose."

The statute at issue in *Lewis* was the Transportation Bond Act, which authorized $900 million in State GO bonds for two purposes: (1) the "acquisition, construction, reconstruction, extension, and improvement" of various transit facilities; and (2) refinancing the debts of various State and local entities to "aid[] in achieving the maximum benefit for the public from the transportation capital improvement program." *Id.* at 478. The respondent, then-Secretary of State John Lewis, argued that the second purpose of debt relief was not "specific." *Id.* at 485.

The Court held that "the 'specific purposes' requirement of article IX, section 9(b) was intended to require that laws such as the Transportation Bond Act . . . define in reasonable detail how the funds from the sale of bonds are to be expended and the objectives to be accomplished." *Id.* at 484. It then examined the Act and concluded that the debt-relief purpose was "specific" because (a) public transportation is "an essential public purpose"; (b) the bond proceeds could be used for debt relief only "for the purpose of 'achieving the maximum benefit from the transportation capital improvement program'"; and (c) the bond proceeds could be used only to relieve debts that had been incurred "to obtain and finance transportation facilities" by entities

"authorized to provide public transportation." *Id.* at 486. In short, in reviewing whether the Act "define[d] in reasonable detail" the purpose for the debt, the Court considered not only whether the State had clearly *articulated* that purpose, but also *the nature of that purpose* (*i.e.*, the "objectives to be accomplished").

Lewis's analysis of the narrowly tailored purpose in the Transportation Bond Act confirms that the general purpose of refunding existing debt, which is addressed separately in Article IX, section 9(e), is not also a "specific purpose" under section 9(b). If merely refunding debt, without more, were a "specific purpose," presumably the Court in *Lewis* would have said so and saved itself a lot of trouble. Instead, the Court relied on the fact that the only debt to be refunded had itself been incurred for a "specific purpose," namely to finance the transportation facilities that were the bonds' primary purpose.

Lund v. Horner, 375 Ill. 303 (1940), a case the State cites in its Objection (Obj. at 10), further confirms that a *stated purpose* is not necessarily a *specific purpose*. *Lund* concerned Article V, § 16 of the 1870 Constitution, which required appropriations to "specify the objects and purposes for which the same are made." A taxpayer sought to challenge an appropriation "[f]or the making of traffic surveys, the maintenance of route markers, warning signs, direction signs, traffic signals, investigations and reporting motor vehicle accidents, $1,000,000." *Id* at 306-07. The circuit court denied the petition, but the Illinois Supreme Court reversed, stating: "[I]t is clear from the mere reading of that section that the objects for which this appropriation is made do not represent integral parts of a single purpose. There is no necessary relation between making traffic surveys and investigating and reporting motor vehicle accidents." *Id.* at 308. In other words, although the State *named* its purpose (and did so in great detail), the appropriation was nevertheless unconstitutional, because that purpose *was not specific*.

Petitioner's interpretation of "specific purposes" is also consistent with *Peabody v. Russel*, 302 Ill. 111 (1922), the "item veto" case on which the Revenue Committee relied in drafting the "specific purposes" language in section 9(b).[5] *Peabody*, which the State ignores, is thus valuable Supreme Court precedent for interpreting that language. *See Comm. for Educ. Rights v. Edgar*, 174 Ill. 2d 1, 16 (1996) (referring to cases interpreting 1870 Constitution in interpreting related language in 1970 Constitution). *Peabody*, like *Lewis*, establishes that a court conducting a "specific purposes" review does not merely ask whether any stated purpose appears on paper, as the State would have it, but actually considers the *nature* of the State's purpose and whether it is, in fact, specific. *Peabody* further indicates that deficit financing—that is, the incurrence of debt to pay general operating expenses, a purpose that Article IX, section 9(d) separately addresses—is not a "specific purpose" under section 9(b) because it involves a "sum for general distribution."

Peabody, like *Lund*, concerned Article V, section 16 of the 1870 Constitution (the "item veto" amendment), which stated that "bills making appropriations . . . *shall specify the objects and purposes* for which the same are made." Ill. Const. of 1870, art. V, § 16 (emphasis added). Under this section, a taxpayer challenged the constitutionality of an appropriation with the stated purpose: "To the Department of Finance: To be apportioned between the executive, judicial and military departments of the State government and allotted as emergencies arise by the director of finance with the approval in writing of the Governor." *Peabody*, 302 Ill. at 113.

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[5] *See* 3 Proceedings 1933 ("MR. KAMIN: One additional thing, because I think the language is unclear on that—is it then meant that the determination of the specificity of the purpose is subject to judicial review? MR. S. JOHNSON: I would suppose so. It has—*we ran into the same problem with the item veto, you recall, years ago*. The 'specific purposes' was put in there to assure that there was not a general statement that would circumvent the idea of the item veto[.]" (emphasis added)).

The State argued that the language "allotted as emergencies arise" adequately specified the appropriation's purpose. *Id.* at 115. The Court disagreed and struck down the appropriation. It reasoned that—despite the "emergencies" language—the appropriation was clearly a "sum for general distribution . . . to be apportioned into items among a number of possible objects which are in no way specified." *Id.* at 116-17. In other words, it did not matter that the bill named a purpose because a general grant of money for the executive to apportion as it sees fit is inherently a *general* purpose, not a *specific* one.

General deficit financing will always suffer from the same problem as the appropriation the Court struck down in *Peabody*. Simply naming a broad category of expenses does not transform a general purpose into a specific one.[6]

Petitioner's interpretation of Article IX, section 9 is not "frivolous." Unlike the State, Petitioner reads section 9 consistent with its plain text and the Illinois Supreme Court's governing precedents. The Court should grant the Petition, and allow Petitioner to file his Complaint.

C. Petitioner's Interpretation of Article IX, Section 9 Is Also Consistent with the Drafters' Intent

The Illinois Supreme Court has directed courts interpreting the Constitution to consider the "the history and condition of the times, the objective to be attained, and the evil to be remedied," *Gregg*, 2018 IL 122802, ¶ 23, as well as the drafters' "real object and intent," *People ex rel. Chi. Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 526-27 (1990) (citation omitted).

[6] The State does not cite *Peabody*. It does cite several other appropriations cases (Obj. at 9-10), but draws entirely the wrong conclusion from them. *See, e.g.*, *Cont'l Ill. Bank v. Ill. State Toll Highway Comm'n*, 42 Ill. 2d 385 (1969); *Turkovich v. Bd. of Trustees of Univ. of Ill.*, 11 Ill. 2d 460 (1957); *Winter v. Barrett*, 352 Ill. 441 (1933). These cases are all consistent with *Peabody*. None establishes, as the State claims, that a "specific purposes" review can consider only whether the State has *named* a purpose, with no inquiry into what that purpose *is* and whether it is specific.

To the extent any question remains about whether section 9(b) authorizes the incurrence of debt for the purposes of general deficit financing, refunding debt, or market speculation, the statements of the drafters of the Illinois Constitution show the answer is no.

At the time of the Sixth Illinois Constitutional Convention, most of the State's bonded debt was in the form of revenue bonds for capital projects; its only GO debt was for specific projects and programs that had been approved by popular referendum.[7] The concept of using GO debt for deficit financing did not exist.

The Revenue Committee's proposal for article IX, section 9 was designed to limit state borrowing to reasonable amounts and for reasonable purposes. It authorized long-term debt only for "specific purposes" (and only by supermajority vote or referendum). It authorized cash-flow borrowing as "necessary because revenue receipts lag behind expenditure requirements" and deficit financing "in case of [an] emergency or unforeseeable failure to collect anticipated revenue"—but only on a short-term basis. Such debt was required to be repaid in the same fiscal year (for what eventually became section (9)(c)), or within one year (for what eventually became section (9)(d)).[8]

As the State acknowledges, during the debates the delegates discussed "specific purposes" borrowing in terms of "capital improvements":

> MR. STAHL: In line 2, you used the phrase "for specific purposes." I am not sure I know exactly what the [drafting] committee means by that language. Normally indebtedness, of course, is created to finance capital improvements. Do you envision that "for specific purposes["] might include other things?

[7] 3 Proceedings 2180. This result was a function of the strict debt limitations in the 1870 Constitution, which effectively permitted the State to incur GO debt only up to $250,000 without a popular referendum. *See id.* at 2176.

[8] 3 Proceedings 2175, 2182.

> MR. S. JOHNSON: We have in mind when we use the term "specific purposes," that the improvement to be financed be described in such a way as it is identifiable and not just a general term[.][9]

(*See* Obj. at 9 n.4). This makes sense given that the State historically had used bonded debt almost exclusively for such projects.

As noted above, the short-term borrowing provisions authorized "new" types of State borrowing. These short-term borrowing provisions were controversial. Multiple delegates expressed concern that deficit financing—*even on a year-to-year basis*—would lead to irresponsible borrowing and "snowballing" debt:

> MR. FRIEDRICH: Now anyone who knows anything about it knows what is going to happen in [an] election year or the year before a governor gets down to the last part of his term. He's going to see a bunch of pet projects that he'd like to have about $50,000,000 or $100,000,000 borrowed . . . . Well, obviously the next administration has no choice except to borrow another $100,000,000 to perpetuate it, plus . . . interest . . . and the first thing you know you're living from hand to mouth . . . . You have a deficit this year, you borrow for next year. Next year you've got a deficit, you borrow for the next year and so on. And my prediction is it comes a little bigger each year because it's like a snowball.[10]

The short-term borrowing provisions (ultimately enacted as section 9(c) and 9(d)) were approved only after the delegates added percentage caps (5% and 15%, respectively) to ensure that deficit financing would not "become [the State's] continuous mode" of operation.[11]

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[9] 3 Proceedings 1932; *see also id.* at 1933 (discussing "specific purposes" as referring to "a specifically identifiable improvement"); *id.* at 2109 (discussing "specific purposes" as referring to "large projects"); 5 Proceedings 3855 ("MRS. NETSCH: I much prefer for the state to pay for things as it goes. . . . But it is economic conservatives . . . who have persuaded me . . . that there are some projects for which it is not appropriate to pay as you go. There are some projects which need to be financed on a debt basis.").

[10] 3 Proceedings 2105.

[11] 3 Proceedings 2107 ("MR. THOMPSON: I'm very disturbed that the state will, in a very few years, fall into the position of being one year behind on its financing and issuing tax anticipation warrants one year behind; and I can see probabilities of a governor, before an election—and the legislature—spending on a lot of popular programs out of next year's revenue and issuing tax anticipation warrants."); *id.* ("MR. LADD: … I do think that Delegate Thompson is absolutely correct that eventually the state government will increase its debt by the total current budget. In other words, they're going to eventually be one year behind. It's an open invitation to spending,

These exchanges make clear that the drafters did not see deficit financing, refunding debt, or market speculation as "specific purposes" for incurring debt under section 9(b). To them, the concept of long-term borrowing for such purposes was inconceivable. The drafters thought about long-term debt in terms of specific projects and programs, and recognized that, under *Peabody*, a general sum to pay unspecified, disparate expenses (*e.g.*, deficit financing) was not a "specific purpose."[12] Moreover, the drafters believed they had already addressed deficit financing and refunding debt (with strict limits) in sections 9(c)-(e). Finally, they agreed that the Constitution should prevent deficit financing from becoming the State's "continuous mode," and assumed that the amount and maturity limitations in sections 9(c) and 9(d) would check such

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and when we don't want to raise debt or we don't want to raise taxes, we'll just go into next year's revenues…"); 5 Proceedings 3871 ("MR. THOMPSON: We've been down here for eight months and have been in a constant state of emergency, and I just do not want this section to be used as an excuse for continual deficit financing. The 15 percent is a very generous figure . . . . I just do not want this 'emergencies or failures of revenues' to be used as an excuse to put this state in the position of continuous deficit financing."); *id.* at 3872 ("MR. CONNOR: I concur with Delegate Thompson's intent not to let deficit financing become a continuous mode[.]").

[12] 3 Proceedings 1933 ("MR. KAMIN: With regard to the reference to the specific purposes for which the indebtedness may be incurred, is that meant to apply to the specific purpose for the specific issue or is it contemplated that the General Assembly could make a general grant of power to a specific agency for a specific purpose up to a certain amount, which amount could then be expended over a period of years? MR. S. JOHNSON: No, it applies to specific purposes, the purpose for which the—or the improvement that is to be financed by the indebtedness must be described so it is a *specifically identifiable improvement*." (emphasis added)); *see also id.* at 1928-29 ("MR. MATHIAS: [W]ould [section 9(b)] require a separate authorization from the legislature on each project—each residence hall, for instance—or could it be by general legislation authorizing the board of the University of Illinois or Board of Regents or governing board to issue revenue bonds? MR. S. JOHNSON: The first line—or line 4 would cover that, and it would depend upon what the interpretation of the act was with regard to the specific purposes and amounts . . . in the law. If the General Assembly felt that they could line out—line item out four or five projects in one act of legislation, this would be possible. MR. MATHIAS: But you wouldn't have a general law authorizing a board from time to time to issue revenue bonds for residence halls or some such project? MR. S. JOHNSON: I don't believe this would be possible. What do you think? MR. KARNS: I don't believe it would be possible.").

Note that at this point in the debates, the delegates were considering a version of Article IX, section 9 that still included revenue bonds and GO bonds together under what is now section 9(b), rather than treating revenue bonds under a separate standard as the drafters later implemented in what is now section 9(f).

irresponsible behavior. If one were to ask the drafters whether the State should be permitted to use section 9(b) to issue 30-year debt to pay current expenditure deficits, as the State did in 2003, they would have been horrified.

Petitioner's interpretation of Article IX, section 9 is faithful to its text, the Supreme Court's precedents, and the drafters' intent. The State's competing interpretation, by contrast, does violence to all of those authorities. Petitioner clearly has "reasonable grounds" for his suit. This Court should grant the Petition and allow Petitioner to file his Complaint.

III. The State's Various Other Arguments Are Similarly Misplaced, and Do Not Provide Valid Reasons for Denying the Petition

The State's Objection raises a number of other points that are meritless, irrelevant, and also premature. None of these points provides a valid basis for denying the Petition.

A. The State's Factual Assertions about the Purposes of the Challenged 2003 and 2017 Bonds Are Irrelevant to Deciding the Petition

The State does not, and cannot, materially dispute Petitioner's allegations about the purposes for the challenged 2003 and 2017 bonds. These allegations are based on the bonds' authorizing statutes, their Official Statements, and other facts of public record (*see* Pet. Ex. A ¶¶ 52-65; 72-87). The State does, however, offer some erroneous "facts" and characterizations concerning the bonds (*e.g.*, that "vouchers incurred by the State prior to July 1, 2017" equates to "easily identifiable vouchers" (Obj. at 6-7), even though the State had a ***$15.245 billion*** backlog of unpaid bills of many different types by July 2017 (Pet. Ex. A ¶ 79)). Petitioner disagrees with the State's assertions, but the Court need not consider the parties' factual disputes to decide this Petition. As the State acknowledges, in deciding the Petition, the Court must presume Petitioner's factual allegations are true (Obj. at 2-3). *See Hamer v. Dixon*, 61 Ill. App. 3d 30, 31-32 (2d Dist. 1978). Petitioner has alleged ample facts showing that the State issued the challenged 2003 and 2017 bonds for the general purposes of deficit financing, refunding debt,

and market speculation, each of which does not satisfy the "specific purposes" requirement. At this stage, nothing more is required.

B. The State's Arguments about the "Balanced Budget" Clause Are Misdirected, as Petitioner Is Not Asserting an Independent Violation of that Clause

The State expends several pages claiming that Petitioner lacks a cause of action under the "Balanced Budget" clause (Obj. at 13-17). The State has again misunderstood Petitioner's claim. Petitioner is not asserting an independent violation under the "Balanced Budget" clause. His proposed Complaint mentions that clause as background for interpreting the State debt provision of Article IX, section 9. *See Gregg*, 2018 IL 122802, ¶ 23 (stating that courts should "constru[e] [constitutional] provisions in context with other relevant provisions"). It is therefore irrelevant whether a balanced-budget claim might be considered a "political question," or whether such a claim could be remedied only by overturning an entire fiscal year budget (Obj. at 14, 17). Petitioner is not making such a claim. Rather, he claims that, in incurring the debt reflected in the challenged 2003 and 2017 bonds, the State did not satisfy the "specific purposes" requirement of Article IX, section 9(b). As *Peabody* and *Lewis* demonstrate, and the drafters of the 1970 Constitution anticipated, *that* question is plainly subject to judicial review.[13]

C. The State's Suggestion that Petitioner Should Have Joined the Bondholders as Defendants Is Illogical Because Petitioner Has No Complaint against Them

The State also suggests that Petitioner somehow erred in failing to name the bondholders of the challenged bonds as defendants to his suit (Obj. at 1, 11). But Petitioner has no complaint against the holders of Illinois GO bonds. It is the State, not the bondholders, that violated the

[13] A related argument is the State's claim that Petitioner challenges debt that is backed by the "full faith and credit" of the State of Illinois and that thus must be paid even if future appropriations are enjoined (Obj. at 17). That argument also fails because Petitioner is suing to enjoin future *disbursements*—as 735 ILCS 5/11-301 expressly permits—not to enjoin future *appropriations*. Moreover, if the Court were to find that the debt was not authorized by Article IX, section 9, then the full faith and credit provision would no longer be in effect. The "full faith and credit" issue is therefore irrelevant.

Illinois Constitution. Petitioner is suing to enjoin State officials from unconstitutionally disbursing public funds. That suit concerns Defendants, and Defendants alone.

D. The Five-Year "Catch-All" Statute of Limitations Does Not Bar Petitioner's Claim Concerning the 2003 Bonds

A statute of limitations is an affirmative defense. It therefore cannot undermine Petitioner's "reasonable grounds" for filing his suit. Moreover, though the State asserts that the five-year limitations period in 735 ILCS 5/13-205 applies to Petitioner's claim concerning the 2003 bonds, it cites no case (and Petitioner is aware of none) applying the catch-all statute of limitations to a constitutional claim like Petitioner's. And, even if the statute did apply, it would not affect Petitioner's suit, because Petitioner is suing only to prevent the State's *future* disbursements in service of the 2003 bonds; he is not seeking any remedy concerning the State's *past* misconduct. As the Illinois Supreme Court has said, the State's "misuse of . . . funds for illegal or unconstitutional purposes is [the] damage which entitles [taxpayers] to sue" under 735 ILCS 5/11-301. *Barco Mfg. Co. v. Wright*, 10 Ill. 2d 157, 160 (1956) (citations omitted). The State is scheduled to make payments on the 2003 bonds ***for 14 more years***. Each such payment is a fresh injury to taxpayers, and creates a new claim for purposes of claim accrual. Petitioner cannot be out of time to sue on injuries he has yet to suffer.

Flynn v. Stevenson, 4 Ill. App. 3d 458, 460 (1972), which the State cites in support of its contention that Petitioner's claim concerning future payments on the 2003 bonds "accrued in 2003" (Obj. at 13), is inapposite. *Flynn*'s holding was based on the rule that a municipality's annexation of territory can be challenged in a *quo warranto* action, and *cannot* be challenged in a collateral proceeding. The *Flynn* plaintiff's taxpayer claim was a prohibited "collateral attack" on the annexations, and the one-year limitations period for the *quo warranto* challenge had run.

Id. at 460-62. There was no indication in *Flynn* that the court applied any statute of limitations to the *taxpayer action*, which after all was not the correct action to begin with.

E. The Affirmative Defense of Laches Should Not Bar Petitioner's Proposed Suit

A laches claim is likewise an affirmative defense that cannot undermine Petitioner's "reasonable grounds" for filing his suit. It is already evident from the State's argument, however, that the State's laches claim is fatally flawed.

First, the State cites no authority in support of its contention that a taxpayer must sue on a bond issuance *before* it occurs, and thus can never sue to enjoin future bond payments (Obj. at 1, 11-13). Such a rule cannot be correct, as it is flatly inconsistent with 735 ILCS 5/11-301, which authorizes taxpayer lawsuits to do that very thing.

Second, the State points to no facts that show the State was prejudiced by Petitioner's purported "delay."[14] The illogic of the State's claim is apparent from its discussion of *Bowman v. County of Lake*, 29 Ill. 2d 268 (1963). The State asserts that *Bowman* applies "[w]here an injunction is sought to restrain the disbursement of public funds" (Obj. at 11). But *Bowman* concerned a mandatory injunction. *Bowman*, 29 Ill. 2d at 280 ("[E]quity, *in all cases where a mandatory injunction is sought*, will strictly require that the application for relief be promptly made and holds that a failure to assert such right without a sufficient excuse therefor, until after the expenditure of large sums of money, operates as a bar to relief." (emphasis added)). An injunction to restrain the disbursement of public funds is, of course, a prohibitory injunction, not a mandatory one.

[14] The potential prejudice to third-party bondholders is not pertinent to the laches inquiry. *E.g.*, *First Nat'l Bank v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 364 (1997) ("Laches is an equitable principle which bars recovery by a litigant whose unreasonable delay in bringing an action for relief prejudices the rights *of the other party*." (emphasis added)).

As *Bowman* makes clear, whether a defendant is prejudiced by a purported delay depends on *what relief* the plaintiff is seeking, and specifically, whether the plaintiff is seeking to unwind past actions. Petitioner is not seeking to unwind anything. This case is exactly *Bowman*'s mirror image; the very facts the State claims show prejudice actually show the opposite. *Bowman* concerned a suit to compel a defendant to *repay* funds that it had already spent. *See id.* Petitioner seeks instead to compel the State to *keep* funds that it proposes to *repay*. Accordingly, the fact that the State has already "expended" the 2003 and 2017 bond proceeds does not show prejudice to the State (Obj. at 12), because Petitioner is not asking the State to do anything about the money that was expended. Petitioner's suit targets only the State's future *debt service payments*, not the *bond proceeds*. Similarly, the fact that the State has already made *some* bond payments is hardly a source of *prejudice* to the State (Obj. at 12), given that (a) the State wants to make *all* of the bond payments, and (b) Petitioner is not seeking any relief regarding those past payments. Under the State's reasoning then, any delay has been beneficial, not harmful.

The four other cases the State cites similarly bear no likeness to this case, and do not help the State's argument. Three cases involved plaintiffs attempting to stop projects that the defendant had already started, and the fourth concerned a plaintiff's attempt to eject his relative from his farm.[15] Here, no "project" exists that Petitioner seeks to halt. This case concerns only bond payments that have not yet been made.

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[15] *See DiSanto v. City of Warrenville*, 59 Ill. App. 3d 931, 933 (2d Dist. 1978) (lawsuit asking city to "rescind a contract by which [it] acquired a waterworks and [a] sewerage system from a private owner" and seeking "refunds on behalf of the class"); *Tibbetts v. W. & S. Town St. Ry. Co.*, 54 Ill. App. 180 (1st Dist. 1894) (lawsuit to enjoin continued construction of railroad) , *aff'd on non-laches grounds*, 153 Ill. 147 (1894); *Solomon v. N. Shore Sanitary Dist.*, 48 Ill. 2d 309 (1971) (lawsuit to enjoin construction of sewage treatment plant improvements where expenses had already been incurred and contractors had already been paid in furtherance of project); *Parks v. Parks*, 2019 IL App (3d) 170845 (lawsuit to eject plaintiff's relative from his farm).

F. Warlander's Standing Is Wholly Irrelevant to Deciding this Petition

Finally, the State contends that Warlander Asset Management, LP ("Warlander"), Petitioner's putative co-Plaintiff, would lack standing to enjoin the disbursement of public funds, if the Complaint were filed. (Obj. at 18-19.) This issue, like the others discussed above, is wholly irrelevant to deciding the Petition. The Petition concerns *Petitioner's* request for leave to file a *taxpayer* complaint under 735 ILCS 5/11-301 and 11-303. Warlander is not an Illinois taxpayer and is not suing under those statutes. No petition requirement applies to any cause of action that Warlander will assert.

Respectfully submitted,

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Case No. 19-CH-235

CERTIFICATE OF SERVICE

I, John E. Thies, hereby certify that I caused to be served a copy of the foregoing PETITIONER'S REPLY TO DEFENDANTS' OBJECTION TO PETITION FOR LEAVE TO FILE TAXPAYER COMPLAINT upon:

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by causing to be sent by electronic mail a true and correct copy of said document no later than 5:00 p.m. on the 26th day of July 2019.

/s/John E. Thies
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