

RECEIVED

UNITED STATES DISTRICT COURT
AUG 07 2008 NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL J. CLARK, U.S. CLERK
NATIONAL FOREIGN TRADE COUNCIL,)
INC., BOARD OF TRUSTEES OF THE)
VILLAGE OF ARLINGTON HEIGHTS)
POLICE PENSION FUND, BOARD OF)
TRUSTEES OF THE CITY OF)
BLOOMINGTON POLICE PENSION FUND,)
BOARD OF TRUSTEES OF THE CITY OF)
CHARLESTON FIREFIGHTERS' PENSION)
FUND, BOARD OF TRUSTEES OF THE)
CITY OF CHARLESTON POLICE PENSION)
FUND, BOARD OF TRUSTEES OF THE)
VILLAGE OF CRETE POLICE PENSION)
FUND, BOARD OF TRUSTEES OF THE)
VILLAGE OF LYONS POLICE PENSION)
FUND, BOARD OF TRUSTEES OF THE)
CITY OF NORTHLAKE POLICE PENSION)
FUND, BOARD OF TRUSTEES OF THE)
CITY OF PALOS HILLS POLICE PENSION)
FUND, KENNY BELLEAU, THOMAS)
CORBIN, DANIEL ENSIGN, DARRYL)
NEES, JAMES TURNER, JOSEPH VAN)
GUNDY, DAVID J. WALL, WENDALL)
WHITTED and THOMAS HURLEY,)

Plaintiffs,

v.

JUDY BAAR TOPINKA, in her official)
capacity as Treasurer of the State of Illinois, and)
LISA MADIGAN, in her official capacity as)
Attorney General of the State of Illinois and)
DEAN MARTINEZ, in his official capacity as)
Secretary of the Illinois Department of)
Financial and Professional Regulation,)

Defendants.

06C 4251

Case No. _____

JUDGE KENNELLY

MAGISTRATE JUDGE KEYS

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

Plaintiffs National Foreign Trade Council, Inc. ("NFTC"), Board of Trustees of
the Village of Arlington Heights Police Pension Fund, Board of Trustees of the City of

Bloomington Police Pension Fund, Board of Trustees of the City of Charleston Firefighters' Pension Fund, Board of Trustees of the City of Charleston Police Pension Fund, Board of Trustees of the Village of Crete Police Pension Fund, Board of Trustees of the Village of Lyons Police Pension Fund, Board of Trustees of the City of Northlake Police Pension Fund, Board of Trustees of the City of Palos Hills Police Pension Fund, Kenny Belleau, Thomas Corbin, Daniel Ensign, Darryl Nees, James Turner, Joseph Van Gundy, David J. Wall, Wendall Whitted, and Thomas Hurley (collectively "Plaintiffs"), by and through their attorneys, complain of Defendants Judy Baar Topinka, Treasurer of the State of Illinois, Lisa Madigan, Attorney General of the State of Illinois, and Dean Martinez, Secretary of the Illinois Department of Financial and Professional Regulation, as follows:

NATURE OF THE ACTION

1. This is an action under 42 U.S.C. § 1983 for declaratory, injunctive, and other relief barring enforcement of Illinois' Act to End Atrocities and Terrorism in the Sudan, Public Act 94-0079, codified at 15 ILCS 520/22.5, 15 ILCS 520/22.6, and 40 ILCS 5/1-110.5 (hereinafter, the "Illinois Sudan Act"), and declaring such act unlawful.

2. This action is not intended as a demonstration of support for the government of the Republic of the Sudan, which reportedly has been responsible for extensive human rights abuses, nor is it intended to downplay the magnitude of the atrocities that have occurred in the Darfur region. The situation in the Sudan is not relevant to the legal issues presented here.

JURISDICTION

3. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1337, and 1343.

4. This Court has authority to grant declaratory relief pursuant to 28 U.S.C. § 2201.

VENUE

5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because the defendants reside within this district and because a substantial part of the events giving rise to the claim occurred here.

ILLINOIS SUDAN ACT

6. The Illinois Sudan Act amended two existing Illinois laws: the Deposit of State Moneys Act, 15 ILCS 520/0.01–520/23, and the Illinois Pension Code, 40 ILCS 5/1-101–5/24-209.

7. The Illinois Sudan Act amended the Deposit of State Moneys Act to prohibit the State Treasurer from investing or reinvesting State money in bonds, notes, debentures, or other similar obligations of the government of the Republic of the Sudan or in the short-term obligations of any corporation defined by the Illinois Sudan Act as a "forbidden entity." 15 ILCS 520/22.5. The State Treasurer is also prohibited from depositing any funds into, or otherwise contracting with, any financial institution unless that institution annually certifies that it has implemented policies and practices that require loan applicants to certify that they are not "forbidden entities." 15 ILCS 520/22.6(a). The Illinois Sudan Act's definition of "forbidden entity" includes, *inter alia*, any company established or organized under the laws of the Republic of the Sudan or whose principal place of business is in the Republic of the Sudan, and any company that fails to certify under oath that it does not have certain business connections to the Republic of the Sudan or to any company domiciled therein. 15 ILCS 520/22.6(b). In effect this aspect of the Illinois Sudan Act compels financial institutions to choose between refusing to make loans to borrowers engaged in dealings with Sudan that are lawful under federal law, on the one hand, and abjuring the receipt of Illinois state funds, on the other.

8. The Illinois Sudan Act amended the Illinois Pension Code to prohibit a fiduciary of a retirement system or pension fund established under the Illinois Pension Code from

investing in any entity unless the company charged with managing the assets of the system or fund certifies that it has not loaned to, invested in, or otherwise transferred assets of such system or fund to a "forbidden entity" at any time after the Illinois Sudan Act's effective date, and that it has removed all assets of such systems and funds from "forbidden entities" within eighteen months of the Illinois Sudan Act's effective date. 40 ILCS 5/1-110.5. The Pension Code's definition of "forbidden entity" is similar to that set forth in the newly-amended Deposit of State Moneys Act, but also includes (1) any publicly traded company that has been identified by an independent research firm as having certain business connections to the Republic of the Sudan or to any company domiciled in Sudan, and (2) any nonpublic company that fails to submit a sworn affidavit averring that the company does not own or control property or assets in the Republic of the Sudan or transact commercial business in the Republic of the Sudan. 40 ILCS 5/1-110.5. In effect this aspect of the Illinois Sudan Act requires entities that manage Illinois state and local pension funds to divest all investments of such funds in entities that engage in transactions involving Sudan that are lawful under federal law.

9. The Illinois Sudan Act became effective on January 27, 2006. Under the Act, managers of Illinois state pension and retirement fund assets must have divested at least sixty percent of such assets from forbidden entities by January 27, 2007, and all such assets from forbidden entities by July 27, 2007.

THE PARTIES

10. Plaintiff NFTC is a nonprofit corporation, organized and existing under the laws of the State of New York. NFTC was founded in 1914 by a group of United States industrial companies engaged in international trade and investment. Since its founding, NFTC has been a leading spokesman on behalf of the private sector for an open international trade and investment regime.

11. NFTC's membership consists of approximately 300 United States manufacturing corporations, financial institutions, other service providers, and other firms having substantial international operations or interests.

12. NFTC is authorized by its members to represent their interests in international-trade-related matters before Congress, the executive branch, regulatory agencies, and the courts.

13. NFTC's members include national banks that have historically received deposits of Illinois state funds. Under the Illinois Sudan Act, such banks can receive deposits of state funds only if they certify annually that they have implemented policies and practices that require loan applicants to certify that they are not forbidden entities. NFTC members also include publicly traded companies that have been identified by independent research firms as having business connections with the Republic of the Sudan—i.e., as being "forbidden entities."

14. Plaintiff Board of Trustees of the Village of Arlington Heights Police Pension Fund is charged with the oversight of the Village of Arlington Heights Police Pension Fund, a pension fund organized by the Village of Arlington Heights, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for the benefit of the city's police officers and their surviving spouses, children, and other dependents.

15. Plaintiff Board of Trustees of the City of Bloomington Police Pension Fund is charged with the oversight of the City of Bloomington Police Pension Fund, a pension fund organized by the City of Bloomington, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for the benefit of the city's police officers and their surviving spouses, children, and other dependents.

16. Plaintiff Board of Trustees of the City of Charleston Firefighters' Pension Fund is charged with the oversight of the City of Charleston Firefighters' Pension Fund, a pension fund organized by the City of Charleston, Illinois under the Illinois Pension Code, 40 ILCS 5/4-101 et.

seq., for the benefit of the city's firefighters and their surviving spouses, children, and other dependents.

17. Plaintiff Board of Trustees of the City of Charleston Police Pension Fund is charged with the oversight of the City of Charleston Police Pension Fund, a pension fund organized by the City of Charleston, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for the benefit of the city's police officers and their surviving spouses, children, and other dependents.

18. Plaintiff Board of Trustees of the Village of Crete Police Pension Fund is charged with oversight of the Village of Crete Police Pension Fund, a pension fund organized by the Village of Crete, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for the benefit of the village's police officers and their surviving spouses, children, and other dependents.

19. Plaintiff Board of Trustees of the Village of Lyons Police Pension Fund is charged with oversight of the Village of Lyons Police Pension Fund, a pension fund organized by the Village of Lyons, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for the benefit of the village's police officers and their surviving spouses, children, and other dependents.

20. Plaintiff Board of Trustees of the City of Northlake Police Pension Fund is charged with the oversight of the City of Northlake Police Pension Fund, a pension fund organized by the City of Northlake, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for the benefit of the city's police officers and their surviving spouses, children, and other dependents.

21. Plaintiff Board of Trustees of the City of Palos Hills Police Pension Fund is charged with oversight of the City of Palos Hills Police Pension Fund, a pension fund organized by the City of Palos Hills, Illinois under the Illinois Pension Code, 40 ILCS 5/3-101 et. seq., for

the benefit of the city's police officers and their surviving spouses, children, and other dependents.

22. Plaintiff Kenny Belleau is a retired police officer of the City of Charleston and a beneficiary of the Charleston Police Pension Fund.

23. Plaintiff Thomas Corbin is a retired police officer of the City of Charleston and a beneficiary of the Charleston Police Pension Fund.

24. Plaintiff Daniel Ensign is a retired firefighter of the City of Charleston and a beneficiary of the Charleston Firefighters' Pension Fund.

25. Plaintiff Darryl Nees is a retired firefighter of the City of Charleston and a beneficiary of the Charleston Firefighters' Pension Fund.

26. Plaintiff James Turner is a retired police officer of the City of Charleston and a beneficiary of the Charleston Police Pension Fund.

27. Plaintiff Joseph Van Gundy is a retired police officer of the City of Charleston and a beneficiary of the Charleston Police Pension Fund.

28. Plaintiff David J. Wall is a retired police officer of the Village of Addison and a beneficiary of the Addison Police Pension Fund.

29. Plaintiff Wendall Whitted is a retired police officer of the City of Des Plaines, Illinois and a beneficiary of the Des Plaines Police Pension Fund.

30. Plaintiff Thomas Hurley is a retired State of Illinois employee and an annuitant of the State Employees Retirement System of Illinois.

31. Defendant Judy Baar Topinka is Treasurer of the State of Illinois. Pursuant to the Illinois Sudan Act, Defendant Topinka is required to establish compliance forms for financial institutions seeking market-rate deposits of State money, and is responsible for ensuring that State money is not invested in "forbidden entities." She is also prohibited from depositing funds into, or otherwise contracting with, any financial institution unless that institution annually

certifies that it has policies that require loan applicants to certify that they are not "forbidden entities." Defendant Topinka is also required under the Illinois Sudan Act to establish compliance forms for use by fiduciaries of state retirement systems or pension funds, and has promulgated such forms. Defendant Topinka, who is sued in her official capacity only, is a "person" within the meaning of 42 U.S.C. § 1983.

32. Defendant Lisa Madigan is Attorney General of the State of Illinois. Pursuant to 15 ILCS 205/4 and 15 ILCS 520/23, Defendant Madigan is responsible for prosecuting violations of the Deposit of State Moneys Act as amended by the Illinois Sudan Act. Pursuant to 40 ILCS 5/1-115, Defendant Madigan may bring a civil action to enjoin any act or practice that violates the Illinois Pension Code as amended by the Illinois Sudan Act. Defendant Madigan, who is sued in her official capacity only, is a "person" within the meaning of 42 U.S.C. § 1983.

33. Defendant Dean Martinez is Secretary of the Illinois Department of Financial and Professional Regulation. Pursuant to Executive Order 2004-6, 28 Ill. Reg. 6194 (April 16, 2004); 20 ILCS 1405/1405-5; and 40 ILCS 5/1A-101, Defendant Martinez is responsible for ensuring that the investments of Illinois public pension systems are in compliance with the Illinois Sudan Act. Defendant Martinez, who is sued in his official capacity only, is a "person" within the meaning of 42 U.S.C. § 1983.

FACTS COMMON TO ALL COUNTS

34. Defendants' enforcement of the Illinois Sudan Act has resulted in continuing injury to the Board of Trustees of the City of Bloomington Police Pension Fund, Board of Trustees of the City of Charleston Firefighters' Pension Fund, Board of Trustees of the City of Charleston Police Pension Fund, Board of Trustees of the Village of Crete Police Pension Fund, Board of Trustees of the Village of Lyons Police Pension Fund and Board of Trustees of the City of Palos Hills Police Pension Fund. These plaintiffs and their asset managers are now required to complete an arduous and poorly-defined certification process in which they must rely on

"independent researching firms" whose designations of particular companies as "forbidden entities" are often inconsistent. These plaintiffs will further be injured by the January 27, 2007 and July 27, 2007 deadlines for divestment of holdings in "forbidden entities" insofar as divestment from those holdings must proceed even if it adversely impacts the funds' investment portfolios, and notwithstanding the fact that it will involve otherwise unnecessary transaction costs.

35. Defendants' enforcement of the Illinois Sudan Act has injured Mr. Wall, Mr. Whitted, Mr. Hurley, Mr. Belleau, Mr. Corbin, Mr. Ensign, Mr. Nees, Mr. Turner and Mr. Van Gundy by forcing the managers of the retirement system and pension funds from which they receive their pensions to make investment decisions based on criteria that have nothing to do with the duties of care, skill, prudence and diligence owed to them by the fiduciaries of said system and funds.

36. NFTC member financial institutions have been injured by Defendants' enforcement of the Illinois Sudan Act insofar as it forces those financial institutions to condition their lending decisions on criteria that have nothing to do with an applicant's suitability for a loan, or else forego receipt of all state money deposits.

37. Defendants' enforcement of the Illinois Sudan Act has caused injury to NFTC member companies that have been branded as "forbidden entities" by making it more difficult for those companies to obtain investment capital, and by effectively depriving them of the ability to obtain loans from financial institutions to whom the newly-amended Deposit of State Moneys Act applies, irrespective of their suitability for loans from an economic standpoint.

**COUNT I: UNCONSTITUTIONAL STATE INTERFERENCE
WITH FEDERAL FOREIGN AFFAIRS POWER**

38. Paragraphs 1-37 are incorporated herein by reference.

39. Under the United States Constitution, the federal government is entrusted with full and exclusive responsibility for the conduct of foreign affairs.

40. The Illinois Sudan Act, on its face and as applied, is designed to, and does, conduct foreign affairs by imposing penalties on businesses that have virtually any connection—lawful or otherwise—to the Republic of the Sudan.

41. The Illinois Sudan Act thus intrudes on the federal government's foreign affairs power and has more than an incidental effect in conflict with the federal government's foreign policy.

42. The Illinois Sudan Act accordingly violates the United States Constitution and is unenforceable. Plaintiffs are entitled to relief pursuant to 42 U.S.C. § 1983.

COUNT II: VIOLATION OF FOREIGN COMMERCE CLAUSE

43. Paragraphs 1-42 are incorporated herein by reference.

44. U.S. Const. Art. I, § 8 cl. 3 (the "Foreign Commerce Clause") provides that "The Congress shall have Power . . . To regulate Commerce with foreign Nations . . ."

45. Under the Foreign Commerce Clause, state regulations that discriminate against foreign commerce, impede the federal government's ability to speak with one voice in the regulation of foreign commerce, or seek to regulate foreign commercial conduct are unlawful.

46. The Illinois Sudan Act, on its face and as applied, discriminates against foreign commerce and seeks to regulate foreign commercial conduct by requiring businesses that have certain connections with the Sudan to sever those connections, even if the connections with the Sudan are permitted or authorized under federal law, as a condition of doing business involving the State of Illinois or even of borrowing money from banks that do business with the State of Illinois.

47. The Illinois Sudan Act, on its face and as applied, impedes the federal government from speaking with one voice with respect to its regulation of commerce with the Republic of the Sudan.

48. The Illinois Sudan Act thus violates the Foreign Commerce Clause and is unenforceable. Plaintiffs are entitled to relief pursuant to 42 U.S.C. § 1983.

**COUNT III: VIOLATION OF SUPREMACY CLAUSE:
FEDERAL REGULATION OF U.S. - SUDAN RELATIONS**

49. Paragraphs 1-48 are incorporated herein by reference.

50. Under the U.S. Const. Art. VI, cl. 2, (the "Supremacy Clause"), the Constitution, laws and treaties of the United States are "the supreme Law of the Land any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

51. The Constitution, laws, and treaties of the United States therefore preempt state and local laws that conflict with federal authority, or that purport to regulate an area reserved exclusively to the federal government.

52. The federal government has established its own carefully calibrated scheme of regulation with respect to the Republic of the Sudan. That scheme includes Executive Order No. 13,067, 62 Fed. Reg. 59989 (Nov. 3, 1997); the Sudan Peace Act, Pub. L. No. 107-245, 116 Stat. 1504 (2002) (codified at 50 U.S.C. § 1701 note), the Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497, 118 Stat. 4012 (codified at 50 U.S.C. § 1701 note); and the Sudanese Sanctions Regulations ("SSR"), 31 C.F.R. §§ 538.101-538.901 (2005). The SSR are issued by the U.S. Department of the Treasury under the International Emergency Economic Powers Act and other federal statutes of general applicability to give effect to federal law governing relations between the United States and Sudan.

53. The SSR prohibit certain trade with Sudan and certain dealings in property in which Sudan has an interest. The SSR also reflect finely tuned foreign policy choices, however,

by permitting a wide variety of trade and other activities relating to Sudan that are penalized by the Illinois Sudan Act.

54. Activities relating to Sudan that are permitted under the SSR but penalized by the Illinois Sudan Act include (1) those of non-United States entities and foreign subsidiaries of United States entities, which generally are not covered by the SSR, (2) those—including travel to and from Sudan and the import and export of informational materials to and from Sudan—that expressly are exempted from the coverage of the SSR, (3) those—including reexport to Sudan by non-United States persons of some United States-origin goods and technology, telecommunications involving Sudan, certain intellectual property transactions involving Sudan, payments for aircraft overflights of Sudan, and the provision of certain legal services involving Sudan—for which “general licenses” are granted by the SSR, and (4) activities for which the U.S. Department of the Treasury issues “specific licenses” under the SSR.

55. The provisions of the Illinois Sudan Act differ significantly from, and are considerably more restrictive than, the comprehensive federal regulatory scheme effected by the SSR.

56. The Illinois Sudan Act, on its face and as applied, is preempted by federal law, and is therefore unconstitutional under the Supremacy Clause. Plaintiffs are entitled to relief pursuant to 42 U.S.C. § 1983.

**COUNT IV: VIOLATION OF SUPREMACY CLAUSE:
NATIONAL BANKING ACT**

57. Paragraphs 1-56 are incorporated herein by reference.

58. Pursuant to the National Bank Act, 12 U.S.C. §§ 21-216(d), federally-chartered financial institutions ("National Banks") are required to be "depositories of public money," 12 U.S.C. § 90, and are granted all powers "as shall be necessary to carry on the business of banking." 12 U.S.C. § 24.

59. National Banks are not subject to state laws regulating activities that are necessary to carry on the business of banking.

60. The Illinois Sudan Act regulates National Banks' lending activities by conditioning their receipt of Illinois state money deposits, and their conduct of other business with the State Treasurer, on the collection of information regarding loan applicants' relations with the government of the Republic of the Sudan and, effectively, on the banks' refusal to lend money to applicants that do business with or in the Republic of the Sudan, even if such activities are permitted or affirmatively authorized under the SSR. The Illinois Sudan Act does so without regard to whether the loan applicants do business with the State of Illinois, and without regard to whether a loan applicant's connections to the Republic of the Sudan have any bearing on such applicant's suitability for a loan.

61. The Illinois Sudan Act therefore conflicts with federal authority, is preempted by the National Bank Act, and is unconstitutional as applied to National Banks. Plaintiffs are entitled to relief pursuant to 42 U.S.C. § 1983.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request the following relief:

A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Illinois Sudan Act is null and void because it unconstitutionally interferes with the federal government's exclusive power over foreign affairs, violates the Foreign Commerce Clause, and violates the Supremacy Clause;

B. Preliminary and permanent injunctions, pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1651, and Rule 65 of the Federal Rules of Civil Procedure, enjoining Defendants Topinka, Madigan and Martinez, and all those acting in concert with Defendants, from enforcing the Illinois Sudan Act;

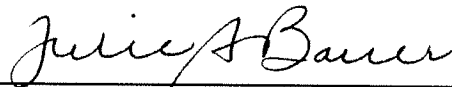
C. An order, pursuant to 42 U.S.C. § 1988, granting Plaintiffs costs, including reasonable attorney's fees; and

D. Any other relief that is just and proper.

Dated: August 7, 2006

Respectfully Submitted,

NATIONAL FOREIGN TRADE COUNCIL, INC.,
BOARD OF TRUSTEES OF THE VILLAGE OF
ARLINGTON HEIGHTS POLICE PENSION
FUND, BOARD OF TRUSTEES OF THE CITY
OF BLOOMINGTON POLICE PENSION FUND,
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CHARLESTON FIREFIGHTERS' PENSION
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CRETE POLICE PENSION FUND, BOARD OF
TRUSTEES OF THE VILLAGE OF LYONS
POLICE PENSION FUND, BOARD OF
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GUNDY, DAVID J. WALL, WENDALL
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