

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER,          COLORADO          Court Address: 1437 Bannock Street          Denver, Colorado 80202</p>	
<p><b>Plaintiffs:</b>          GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS, JR. and ROBERT LAIRD, JR., on behalf of themselves and those similarly situated          v.  <b>Defendants:</b>          STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <p>Case No. 2010cv1589</p> <p>Division/Courtroom: 6          Judge Robert S. Hyatt</p>
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<p><b>PERA DEFENDANTS' REPLY IN SUPPORT OF          MOTION FOR SUMMARY JUDGMENT</b></p>	

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	5
I. The Three-Part, Modern Contract Clause Analysis Adopted in <i>DeWitt</i> Applies to Both Plaintiffs’ Colorado and Federal Contract Clause Claims .....	5
A. <i>DeWitt</i> Did Not Create or Imply an Exception for Pension Benefit Challenges ....	5
B. Plaintiffs’ Assertion that Other States Reject Application of the Three-Part, Modern Contract Clause Test in Pension Benefit Cases Is Wrong .....	5
C. The Three-Part, Modern Contract Clause Test Developed After <i>McPhail</i> and <i>Bills</i> Fundamentally Changed the Analysis for Contract Clause Challenges .....	10
D. The Doctrine of Stare Decisis Has No Application Here .....	12
E. Plaintiffs’ Additional Arguments to Avoid <i>DeWitt</i> Are Inaccurate.....	14
F. Plaintiffs’ Continued Reliance on an Attorney General Opinion Is Misplaced Because the Opinion Does Nothing to Answer the Question of Whether Retirees Possess a Right to a COLA for Life Without Change .....	16
II. Plaintiffs’ Contract Clause Claims Fail Because They Have No Right to the COLA Formula in Place at Retirement for Life Without Change.....	18
A. The Court Must Presume that the COLA Change in Senate Bill 10-001 Is Constitutional Unless Plaintiffs Prove a “Clear and Unmistakable” Right to a COLA Frozen at Retirement.....	18
B. The Statutory and DPS COLA Provisions Do Not Establish a Clear and Unmistakable Intent to Create a COLA Frozen at Retirement .....	20
C. The Legislature’s Repeated Changes to the COLA Benefit for Those Already Retired Exemplifies Its Intent Not to Freeze the COLA at Retirement.....	23
D. Even if the PERA COLA Provisions Could Be Read to Be Ambiguous, Plaintiffs’ Interpretation Necessarily Fails .....	27
E. Plaintiffs’ “Extrinsic Evidence” May Not Be Properly Considered in Determining the Meaning of Statutes .....	29
III. Senate Bill 10-001 Did Not Disrupt the Parties’ Reasonable Expectations and Thus There Was No Substantial Impairment.....	30

IV.	Senate Bill 10-001, Including the COLA Readjustment, Was Reasonable and Necessary to Serve a Significant and Legitimate Public Purpose.....	33
A.	Plaintiffs Acknowledge that Senate Bill 10-001, Including the COLA Change, Addressed a Legitimate Public Purpose .....	33
B.	Summary Judgment Is Appropriate Because All Evidence Relevant to Whether the Legislature’s Passage of Senate Bill 10-001 Was Reasonable and Necessary Is in the Public Record.....	34
C.	Plaintiffs Do Not Contest the Extensive Facts and Alternatives Considered by the Legislature Establishing that Senate Bill 10-001 Was Reasonable and Necessary .....	35
(1)	Plaintiffs Seek Application of Incorrect Legal Standards to the Reasonable and Necessary Examination .....	36
(2)	The Legislature Considered and Rejected Plaintiffs’ Purported Alternatives to a COLA Change .....	43
V.	Plaintiffs’ Rule 56(f) Request Should Be Denied Because All Material Facts Are Contained in the Public Record and Plaintiffs’ Failure to Review Documents Is Not a Legitimate Basis for Relief .....	46
A.	Plaintiffs’ Failure to Gather and Review Documents Does Not Warrant Rule 56(f) Relief .....	47
B.	All Evidence Necessary to Resolve Plaintiffs’ Claims Is Found in the PERA Statute and DPS Plan, Legislative History, and the Extensive Legislative Record for Senate Bill 10-001 .....	49
VI.	Summary Judgment Is Proper on Plaintiffs’ Takings Clause, Substantive Due Process, and § 1983 Claims .....	52
A.	Plaintiffs’ Takings Clause and Substantive Due Process Claims Necessarily Fail Because Plaintiffs’ Contract Clause Claims Fail.....	52
B.	Plaintiffs’ Takings Clause Claim Fails Because a COLA Formula Is Not Property.....	53
C.	Plaintiffs’ Substantive Due Process Claim Fails Because Pension Benefits Are Not Fundamental Rights and the Rational Basis Standard Is Satisfied Here .....	54
D.	Plaintiffs’ § 1983 Claims Fail Because Their Underlying Claims Fail .....	55
	CONCLUSION.....	55

Defendants Public Employees Retirement Association of Colorado, Carole Wright and Maryann Motza (collectively “PERA” or “PERA Defendants”) respectfully submit their Reply in Support of Motion for Summary Judgment.

### **INTRODUCTION**

The General Assembly’s most recent change to the retiree COLA does not alter the fundamental mechanism for payment of pension benefits. It has always been and remains a base benefit set at retirement plus a separately calculated cost of living adjustment that has repeatedly changed during retirement. For 40 years, the Colorado legislature has changed the COLA paid to existing retirees to reflect current economic circumstances, and as previously occurred in 1994, when necessary, to improve the actuarial soundness of the PERA pension fund. Like all prior COLA amendments, the General Assembly in Senate Bill 10-001 did not reduce the pension payment to any retiree. Rather to preserve the very existence of the PERA pension fund, it limited the amount that pension benefits will *increase* in the future.

Plaintiffs Justus, Halaas and Laird ask this Court to grant them a post-retirement entitlement that no other PERA or DPS retiree has ever received. Contrary to PERA and DPS history, Plaintiffs Justus, Halaas and Laird claim that they are entitled for the rest of their lives to the same COLA formula that was in place at the time of their respective retirements. They assert, regardless of whether the PERA pension fund will run out of money, this COLA formula must be frozen not only for the rest of their lives, but also for the rest of their spouses’ lives. Plaintiffs fail to point to any statutory language, much less “unmistakable and clear” language, establishing the legislature’s intent to create a contract right at odds with 40 years of history. As for the DPS plan provisions, Plaintiffs do not mention any DPS plan language in their briefing, much less any language creating a contractual right to a COLA frozen for life. Plaintiffs also

provide no response to the fatal flaw in their Contract Clause claims that the PERA and DPS COLA provisions for those already retired have changed repeatedly over the last 40 years. Such undisputed fact negates any argument that the General Assembly or DPSRS intended to create a contract right to a COLA formula for life without change.

Plaintiffs' sole argument for an unprecedented right to a frozen COLA formula is the mere inclusion of the word "shall" in COLA provisions—despite the fact that *every* COLA formula over the last 40 years contained the word "shall" but was subsequently amended and applied to existing retirees. Plaintiffs also fail to recognize that numerous other provisions in the PERA statute, as well as thousands of other Colorado statutory provisions, use mandatory "shall" language but do not forever prohibit the legislature from amending those provisions. Because Plaintiffs have no right to a COLA formula fixed for life, their Contract Clause claims fail under *DeWitt, McPhail*, and all other Colorado authority.

As for the "substantial impairment" and "reasonable and necessary" elements of Plaintiffs' Contract Clause claims, Plaintiffs' efforts to avoid the three-part, modern Contract Clause test fail. *DeWitt* applies here. The Colorado Supreme Court in its dispositive 2002 decision expressly held that *both* the Colorado and federal Contract Clauses "*are not to be interpreted as absolute*" and adopted and applied the United States Supreme Court's three-part, modern test to the *Colorado* and United States Contract Clauses. *In re Estate of DeWitt*, 54 P.3d 849, 858 (Colo. 2002).<sup>1</sup> *DeWitt* includes no express or implied exception for pension benefit challenges and no court has done what Plaintiffs' request here: exclude public pension legislation from the modern, three-part Contract Clause test first set forth in *U.S. Trust*. Such a rule would illogically elevate public employees' pension benefits above all other public contracts

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<sup>1</sup> Emphasis is added throughout this brief unless otherwise indicated.

without any legal, and particularly constitutional, support. Lacking any hint of such a rule from the United States Supreme Court, every federal court and numerous state courts have correctly applied the three-part, modern Contract Clause test to public pension legislation. There is no reason for this Court to be the first to reject it.

Plaintiffs also mistakenly seek to equate “substantial impairment” with “substantial quantity” (rather than the reasonable expectations of the parties), and urge a legally unsupportable “unprecedented emergency” standard for the reasonable and necessary element. Most significantly, Plaintiffs make no attempt to respond to PERA’s extensive evidence relevant to the third element of the *DeWitt* test demonstrating that Senate Bill 10-001 was reasonable and necessary for the very survival of the PERA pension fund. For example, Plaintiffs do not contest:

- the 2008 economic crisis and the severity of its impact on the PERA pension fund, including the undisputed fact that at the end of 2008 the PERA fund was 53% funded with a \$27.5 billion shortfall;
- the PERA fund would run out of money in less than 30 years, and would fall below a critical 40% funded level in approximately 10 years, without contribution and benefit changes;
- extensive hearing testimony from legislators, PERA, unions, retiree groups, and individual retirees supporting the need for the COLA change;
- testimony and documents submitted by Plaintiff Justus and other individual retirees objecting to the COLA change on the same grounds urged here;
- legislative amendments in 2004 and 2006 raising contributions of current and future employees and employers, while decreasing benefits of current and future employees;
- the General Assembly’s consideration of numerous alternatives, including the precise alternatives that Plaintiffs inexplicably claim that the legislature did “not consider”; and
- the General Assembly’s adoption of two of Plaintiffs’ three proposed alternatives, specifically, decreasing pension benefits to current and future employees.

As for Plaintiffs' glaring failure to acknowledge, much less address, the extensive legislative record discussed in PERA's Opposition and MSJ,<sup>2</sup> the apparent explanation is found in Plaintiffs' counsel's affidavit stating: "Plaintiffs have not yet had an opportunity to properly review over 9,000 pages of documents provided as part of Defendants' mandatory disclosures (which presumably contains the entire legislative record and public documents as determined by the Defendants)." Pls' Resp. at 35 n.6 & Ex. 1 ¶ 10 (Rosenblatt Aff.). This inexcusable failure to review documents in Plaintiffs' counsel's possession since December 2010, as well as Appendix A to PERA's briefing that contains the *entire* legislative record, forms the primary basis of Plaintiffs' Rule 56(f) request.

Plaintiffs' Rule 56(f) request fails because: (1) lack of diligence in reviewing documents in Plaintiffs' possession does not justify a continuance; and (2) all relevant information necessary to resolve Plaintiffs' Contract Clause claims is found in the statutory and DPS plan language, legislative history, and the extensive legislative record for Senate Bill 10-001. There simply is no need for additional discovery where courts around the country hold that whether challenged legislation is "reasonable and necessary" is to be determined from a review of the legislative record. Such rule is particularly appropriate here because there is a robust legislative record in which numerous, competing visions were presented to and debated by the legislature, and the General Assembly's difficult decisions in adopting a mix of contribution and benefit changes necessary to preserve the PERA fund are fully explained.

PERA thus is entitled to summary judgment in its favor on Plaintiffs' Colorado and federal Contract Clause claims for three independent reasons: (1) Plaintiffs have no contractual right to the COLA formula in place at their respective retirements for life without change; (2) the

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<sup>2</sup> Throughout this reply, "Motion for Summary Judgment" is abbreviated as "MSJ" and "Motion to Dismiss" as "MTD."

General Assembly's latest in a long history of modifications to the COLA formula did not impair the parties' reasonable expectations; and (3) the COLA readjustment was reasonable and necessary, and served the legitimate public purpose of preserving the financial viability of the PERA pension fund for this and future generations. Plaintiffs' Takings, Substantive Due Process, and Section 1983 claims fail because Plaintiffs' Contract Clause claims fail and for the additional reasons set forth in PERA's summary judgment motion and further discussed below.

## ARGUMENT

### I. **The Three-Part, Modern Contract Clause Analysis Adopted in *DeWitt* Applies to Both Plaintiffs' Colorado and Federal Contract Clause Claims**

#### A. *DeWitt* Did Not Create or Imply an Exception for Pension Benefit Challenges

The Colorado Supreme Court in *DeWitt* definitively set forth the test for challenges to *both* the Colorado and federal Contract Clauses and Plaintiffs thus must prove all elements of the three-part modern test. PERA extensively discussed *DeWitt*, *McPhail*, and *Bills*, and the reasons for *DeWitt's* application here in its Opposition to Plaintiffs' summary judgment motion. PERA Opp. at 5-7, 27-39. To avoid repeating its arguments and unnecessarily lengthening this brief, PERA incorporates that discussion here and only addresses below Plaintiffs' new assertions raised in its response to PERA's summary judgment motion.<sup>3</sup>

#### B. Plaintiffs' Assertion that Other States Reject Application of the Three-Part, Modern Contract Clause Test in Pension Benefit Cases Is Wrong

Plaintiffs ask this Court to reject application of the *DeWitt* three-part test to pension benefit cases based on their assertion that West Virginia, California, and Florida have adopted

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<sup>3</sup> Plaintiffs claim "amazement" that PERA's motion purportedly "fails to even mention *Bills* and *McPhail*" and does not "even acknowledg[e] *Bills* and *McPhail*." Pls' Resp. at 14, 17. Plaintiffs fail to recognize that PERA referenced the Court to its extensive discussion of *DeWitt*, *McPhail* and *Bills* in its simultaneously filed Opposition to Plaintiffs' summary judgment motion. PERA MSJ at 2-3. Plaintiffs also assert that "Defendants have not provided a statement of facts." Pls' Resp. at 3. On the contrary, PERA's statement of facts also is found in its simultaneously filed Opposition to Plaintiffs' summary judgment motion. PERA MSJ at 1.

the modern Contract Clause test but not applied it to pension benefit cases. Plaintiffs not only mischaracterize the law of those three states but disregard the authority cited in PERA's Motion showing that *all* federal courts and numerous states, including, but not limited to, Rhode Island, New Jersey, Wisconsin, Oklahoma, Michigan, Louisiana, Massachusetts, Ohio, and South Carolina apply the three-part, modern Contract Clause test to pension benefit cases. *See, e.g., Retired Adjunct Professors of the State of R.I. v. Almond*, 690 A.2d 1342, 1345 & n.2 (R.I. 1997) (“Over time, we have adopted the test devised by the United States Supreme Court in scrutinizing alleged contract-clause violations.”); *Wis. Prof'l Police Ass'n v. Lightbourn*, 627 N.W.2d 807, 848 (Wis. 2001) (applying U.S. Supreme Court's “three-step methodology for analyzing impairment-of-contract claims” to state and federal Contract Clause pension claims); *N.J. Educ. Ass'n v. State*, 989 A.2d 282, 290-91 & n.9 (N.J. Super. 2010) (applying modern Contract Clause test to both United States and New Jersey Contract Clause provisions where current and retired public school teachers claimed constitutionally protected contract right to the method adopted by legislature to fund the state teachers' pension); PERA Opp. at 31 n.87.<sup>4</sup>

In addition, as Plaintiffs' counsel is well-aware, Minnesota, New Hampshire, and South Dakota also apply the three-part, modern test to pension benefit challenges. Plaintiffs' Pittsburgh counsel has filed similar lawsuits in those states challenging the constitutionality of legislative modifications to COLA formulas, or other pension benefits, for retirees. In all those cases, Plaintiffs' counsel argues for application of the “modern Contracts Clause analysis” to

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<sup>4</sup> *See also MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1058 (Mass. 2000) (applying federal test to Contract Clause claim concerning termination of retiree's benefits after criminal conviction); *State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E.2d 644, 653 (Ohio 1998) (applying federal test to state and federal claims concerning interest due on refunded employee contributions); *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 661 S.E.2d 73, 77 (S.C. 2008) (applying federal test to Contract Clause claim concerning ending the state's income tax exemption on state pensions).

their pension benefit challenges under *both* the state and federal Contract Clause. In Minnesota, Plaintiffs’ counsel relies on *U.S. Trust* and asserts:

The *modern Contract Clause* analysis involves three components: “(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?” . . . . “If a substantial impairment of a contractual relationship exists, the legislation nonetheless survives a constitutional attack if the ‘impairment is . . . justified as ‘reasonable and necessary to serve an important public purpose.’

Ex. 1 at 32 (citations omitted) (Pls’ Mem. in Supp. of MSJ) (quoting *Parella v. Ret. Bd.*, 173 F.3d 46, 59 (1st Cir. 1999) and citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977)).

In their New Hampshire briefing, Plaintiffs’ counsel likewise seeks application of the three-part, modern Contract Clause test for their pension benefit challenge under the New Hampshire Contract Clause, arguing: “If the legislation substantially impairs the contract, ‘a balancing of the police power and the rights protected by the contract clauses must be performed, and . . . the [law] . . . may pass constitutional muster only if it is *reasonable and necessary to serve an important public purpose.*” Ex. 2 at 11 (Pet’rs.’ Mot. for Partial Summ. J.) (quoting *Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass’n*, 992 A.2d 624, 635 (N.H. 2010); *Opinion of the Justices (Furlough)*, 609 A.2d 1204, 1210 (N.H. 1992)).

In their South Dakota complaint, Plaintiffs’ counsel likewise alleges that the three-part, modern test applies to their state Contract Clause claim. Ex. 3 at ¶ 45 (“Because SB 20 diminishes vested pension benefits and because Defendants’ actions were neither reasonable nor necessary and because alternatives were available to Defendants to increase funding of SDRS without breaching the contractual rights of Plaintiffs and Class Members, Defendants violated the Contract Clause of the South Dakota Constitution.”).

Plaintiffs' counsel ignores PERA's authority and their own contradictory positions in Minnesota, New Hampshire, and South Dakota, and instead argue that this Court should follow three states (West Virginia, California, and Florida) that they assert have rejected the three-part, modern Contract Clause test in "pension reform legislation." Pls' Reply at 11. On the contrary, West Virginia and California courts have applied the three-part, modern test in pension cases and Florida has not fully adopted the three-part, modern test in *any* cases.

West Virginia first adopted the modern, three-part test for state Contract Clause challenges in the non-pension case of *Shell v. Metropolitan Life Ins. Co.*, 380 S.E.2d 183, 187 (W. Va. 1989). The West Virginia Supreme Court then applied the test in two pension cases within three years of the *Shell* decision. See *W. Va. Pub. Empls. Ret. Sys. v. Dodd*, 396 S.E.2d 725, 732-33 (W. Va. 1990) (applying three-part, modern test and citing to *Shell* in Contract Clause challenge to forfeiture of retiree's pension), *rev'd on other grounds by Booth v. Sims*, 456 S.E.2d 167, 170 (W. Va. 1995); *State ex rel. Dadisman v. Caperton*, 413 S.E.2d 684, 690-91 (W. Va. 1991) (applying *Shell* three-part, modern test in Contract Clause challenge to public pension funding). It was not until several years later that the majority in *Booth v. Sims*, to which Plaintiffs cite, reviewed a pension legislation challenge and found it violated the state Contract Clause without applying the previously adopted three-part test. See 456 S.E.2d at 181-82. A dissenting justice in *Booth* sharply criticized the majority's decision specifically because it did *not* follow *Dadisman* and *Shell* and apply the three-part, modern test:

The majority mentions the impairment of contract clause of the West Virginia Constitution in its opinion. However, it neither cites *Shell* nor makes any attempt to discuss the law surrounding the doctrine of impairment of contract. . . . The majority completely avoids any analysis of this doctrine although it states this doctrine controls the constitutionality of the legislative amendments in this case.

*Id.* at 192-93 (Miller, J., dissenting in part and concurring in part) (footnote omitted). Since *Booth*, in another constitutional challenge to pension legislation, the West Virginia Supreme Court again followed its pre-*Booth* precedent and applied the three-part, modern test when analyzing the alleged impairment of contractual pension rights. *State ex rel. W. Va. Reg'l Jail v. W. Va. Inv. Mgmt. Bd.*, 508 S.E.2d 130, 134-35 (W. Va. 1998) (applying *Shell* and *Dadisman* three-part, modern test in Contract Clause challenge to public pension plan's investment decisions).

California courts likewise have adopted and applied, albeit inconsistently, the three-part, modern test since its development by the U.S. Supreme Court in the late 1970s. *Compare Valdes v. Cory*, 189 Cal. Rptr. 212, 224-26 (Cal. App. 1983) (applying three-part modern test to Contract Clause claims challenging suspension of employer contributions), and *United Firefighters of Los Angeles City v. City of Los Angeles*, 259 Cal. Rptr. 65, 71-74 (Cal. App. 1989) (applying three-part modern test to Contract Clause claims challenging pension benefit legislation), with *Olson v. Cory*, 636 P.2d 532, 536 (Cal. 1980) (discussing *Blaisdell* and *Allied Structural Steel* but not applying three-part test), and *Claypool v. Wilson*, 6 Cal. Rptr. 2d 77, 85-93 (Cal. App. 1992) (citing only state law in upholding COLA adjustment).

As for Florida, contrary to Plaintiffs' assertions, it has never fully adopted the three-part, modern Contract Clause test in *any* context and has *not* rejected the modern, three-part test for pension cases. *Compare Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779-80 (Fla. 1980) (allegedly "adopt[ing] an approach to contract clause analysis similar to that of the United States Supreme Court"), with *Lee Cnty. v. Brown*, 929 So. 2d 1202, 1208-09 (Fla. App. 2006) (discussing Florida's use of both a "per se test" in *Department of Revenue v. Florida*

*Home Builders*, 564 So. 2d 173 (Fla. App. 1990) and a “balancing test” in *Pomponio* for contract clause challenges and attempting to “reconcil[e] *Florida Home Builders* and *Pomponio*”).

No state has done what Plaintiffs ask this Court do: apply the modern, three-part test to Contract Clause challenges in all cases *except* challenges involving pension benefits. There is no reason for Colorado to be the first.

C. The Three-Part, Modern Contract Clause Test Developed After *McPhail* and *Bills* Fundamentally Changed the Analysis for Contract Clause Challenges

Seeking to bolster the 1959 and 1961 *McPhail* and *Bills* decisions, Plaintiffs argue that there was little significance to the United States Supreme Court’s development of the modern Contract Clause test in the 1970s *after* *McPhail* and *Bills* were decided. Pls’ Resp. at 20; Pls’ Reply at 6-7. First, Plaintiffs’ counsel’s position here directly conflicts with their Minnesota, New Hampshire, and South Dakota pleadings where they urge application of the “modern Contract Clause analysis” as developed in *U.S. Trust, Allied Structural Steel, and Energy Reserves*. Exs. 1, 2, & 3. Second, courts across the nation recognize that the U.S. Supreme Court cases of the late 1970s and early 1980s represented a significant shift in Contract Clause jurisprudence as the three-part, modern test was created for the first time and set forth the proper analysis of a Contract Clause challenge when a state is a party to the contract. *See, e.g., Md. State Teachers’ Ass’n v. Hughes*, 594 F. Supp. 1353, 1359 (D. Md. 1984) (“In *United States Trust Co.*, the Supreme Court set forth the analysis applicable in cases involving alleged Contract Clause violations when a state is a party to the contract.”) (citation omitted); *Alston v. City of Camden*, 471 S.E.2d 174, 177 (S.C. 1996) (“The United States Supreme Court has formulated a three-step inquiry for analyzing cases under the federal Contract Clause.”) (citing *U.S. Trust*); *Robertson v. Kulongoski*, 359 F. Supp. 2d 1094, 1098 (D. Or. 2004) (“Since *United States Trust*,

courts have developed a three-step scheme for determining whether legislation that involves the contractual obligations of a governmental unit violates the Contract Clause.”).

Based on the false premise that the creation of the three-part, modern Contract Clause test was insignificant, Plaintiffs surmise that because *McPhail* and *Bills* did not discuss *earlier* U.S. Supreme Court authority that spoke generally of a state’s “police power,” it must mean that the Colorado Supreme Court in 1959 and 1961 implicitly adopted an absolute prohibition on any modification to pension benefits for retirees. Pls’ Resp. at 20. Plaintiffs’ leap of logic is unfounded. First, the *McPhail* and *Bills* cases as framed, including their critical lack of economic necessity, simply did not implicate earlier cases involving the Contract Clause. Second, in pre-*U.S. Trust* cases such as *Home Builder & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) and *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878), on which Plaintiffs rely, the U.S. Supreme Court analyzed Contract Clause challenges on a case-by-case basis thus offering little guidance to later courts. Colorado also had not developed a consistent analytical structure for Contract Clause challenges—as illustrated by Plaintiffs’ reliance on cases *not* involving the Contract Clause to support their “police power” argument. *See* Pls’ Resp. at 19 (quoting *Walker v. Bedford*, 93 Colo. 400, 412, 26 P.2d 1051, 1056 (1933) (Butler, J., dissenting) (analyzing whether state could constitutionally enact vehicle registration fees)).

Plaintiffs next attempt to distinguish *DeWitt* on the ground that it is not a pension benefit case. Pls’ Resp. at 21-23. This argument fails because courts from across the country rely on non-pension cases when applying the three-part Contract Clause test in a pension case. As an initial matter, the primary U.S. Supreme Court cases enunciating the three-part, modern test, *U.S. Trust*, *Allied Structural Steel*, and *Energy Reserves*, are all non-public pension cases yet, as

discussed previously, all federal courts and numerous state courts have found those cases apply to public pension cases and none have found that they do not.

In addition, there are multiple examples where a state first applied the three-part, modern test in a non-pension case and then used that same test in a later pension case. *See, e.g., Smith v. Bd. of Trs.*, 851 So. 2d 1100, 1109 (La. 2003) (applying federal test to state and federal contract clause claims concerning working after retirement rules and stating basis for using federal test as two non-pension cases); *Wis. Prof'l Police Ass'n Inc. v. Lightbourn*, 627 N.W.2d 807, 848 (Wis. 2001) (applying federal test to state and federal contract clause claims and stating basis for federal test as non-pension case); *Nonnenmacher v. City of Warwick*, 722 A.2d 1199, 1202-03 (R.I. 1999) (applying federal test and stating basis for federal test as one pension and one non-pension case). In their New Hampshire briefing, Plaintiffs' counsel relies on a non-pension case for the three-part, modern Contract Clause test that it seeks to apply to their state Contract Clause claim. Ex. 2 at 11 (Pet'rs.' Mot. for Partial Summ. J.) (quoting *Tuttle*, 992 A.2d at 635). In Minnesota, Plaintiffs' counsel likewise relies on non-pension cases like *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986), for application of the three-part Contract Clause test in their COLA challenge. Ex. 1 at 33 (Pls' Mem. in Supp. of MSJ) (quoting *Jacobsen*).

D. The Doctrine of Stare Decisis Has No Application Here

Plaintiffs' view that *McPhail* absolutely bars any modification of the COLA paid to existing retirees not only is inaccurate, but if such a rule ever existed, it does not after the development of the modern Contract Clause test in the 1970s and 1980s, and its application to the Colorado Contract Clause in the 2002 *DeWitt* decision. As set forth in PERA's Opposition and ignored by Plaintiffs, even if the Court were to find a conflict between *DeWitt* and *McPhail*, as the more recent case, *DeWitt* would govern over *McPhail*. *See, e.g., Bullock v. Daimler Trucks N. Am., LLC*, No. 08-CV-00491-PAB-MEH, 2010 WL 1286079, at \*2 n.2 (D. Colo. Mar.

29, 2010) (“[i]n Colorado ‘where decisions are conflicting, the latest govern’”) (citation omitted).

As for stare decisis, it “is limited to actual determinations in respect to litigated and necessarily decided questions,” when the prior court “‘carefully considered’ the same question . . . .” *People v. Caro*, 753 P.2d 196, 201 n.7 (Colo. 1988) (citation omitted). “[T]he rule is not inflexible or immutable, because the courts must take into account statutory or case law changes that undermine or contradict the viability of prior precedent.” *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 644 (Colo. 2005). “We ‘must be willing to overrule a prior decision where sound reasons exist and where the general interests will suffer less by such departure than from a strict adherence.’” *Id.* (citation omitted).

Colorado courts, like all courts, continually overrule prior cases which have become outdated, obsolete, or incorrect. In *Ingold v. AIMCO/Bluffs L.L.C. Apartments*, the majority discussed the stare decisis doctrine but overruled Colorado precedent because it had been based on case law which had since been overruled by the U.S. Supreme Court. 159 P.3d 116, 125 (Colo. 2007). In *Friedland*, quoted by Plaintiffs in both their response and reply briefs, the majority again acknowledged stare decisis but overturned precedent in order to follow the majority rule across the United States. 105 P.3d at 645.

Stare decisis has no application here. First, Plaintiffs mischaracterize PERA’s arguments in an effort to raise stare decisis. PERA has *not* argued that *McPhail* and *Bills* must be overruled in order to apply *DeWitt*. Pls’ Resp. at 17-18. As discussed in PERA’s Opposition, under both *DeWitt* and *McPhail*, Plaintiffs must prove that they have a contract right to an unchangeable COLA for their lifetimes. PERA Opp. at 40-47. Plaintiffs’ failure to establish such a contract right defeats their Contract Clause claims under both *McPhail* and *DeWitt*. Second, *DeWitt*,

*McPhail* and *Bills* may be harmonized based on the fundamentally different facts present, particularly the complete lack of economic need for the voter referendum eliminating the escalator clause in *McPhail* and *Bills*. Third, whether the three-part, modern test applies to pension benefit challenges under the Colorado Contract Clause was not before the *Bills* and *McPhail* courts because the federal test would not be developed for another sixteen years in *U.S. Trust*.

Even if *stare decisis* could apply, this is the type of case that warrants departure from prior authority. In the 50 years since *Bills* and *McPhail* were decided, the law and view of pension benefits and the Contract Clause has continued to develop, including the need for legislatures to be able to modify such benefits if the change is “reasonable and appropriately serves a significant and legitimate public purpose.” *DeWitt*, 54 P.3d at 858. There is no reason that only Colorado should remain constrained by 50-year-old decisions when the world, and the law, has moved on—particularly where a retirement system will run out of money in less than 30 years without a readjustment to the COLA paid to existing retirees.

E. Plaintiffs’ Additional Arguments to Avoid *DeWitt* Are Inaccurate

Plaintiffs misquote *DeWitt* to suggest that it did not set forth a “reasonable and necessary” element. Pls’ Resp. at 22. On the contrary, as twice quoted in PERA’s Opposition, the pertinent passage in *DeWitt* is:

[A] finding that a law impairs a contract does not end the inquiry. Notwithstanding such a finding, *a court should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose when considered against the severity of the contractual impairment.*

*DeWitt*, 54 P.3d at 858 (citations omitted) (quoted in PERA Opp. at 5, 29). Plaintiffs next assert that “[s]ince Dewitt [sic], no Colorado appellate court has either utilized or even reaffirmed the three-part test or the ‘reasonable and necessary’ defense in any other case.” Pls’ Resp. at 22. On

the contrary, since *DeWitt*, every Colorado state appellate court faced with a Contract Clause challenge has followed *DeWitt*'s three-part test. See *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 786 (Colo. App. 2002) (citing *DeWitt* and holding: "The Colorado Constitution prohibits laws that impair the obligations of contracts. However, legislation that impairs a contract is not unconstitutional if the challenged statute *reasonably serves a legitimate public concern* when balanced against its impairment of a contract."); *Parker v. City of Golden*, 119 P.3d 557, 564 (Colo. App. 2005) (citing *DeWitt* and setting forth three-part test), *rev'd on other grounds*, 138 P.3d 285 (Colo. 2006); see also *In re Larson*, 260 B.R. 174, 202-03 (Bankr. D. Colo. 2001) (applying three-part, modern test in challenge to legislation under the federal and Colorado Contract Clauses).

In contrast, in the nine years following the 2002 *DeWitt* decision, neither *McPhail* nor *Bills* has been cited by any Colorado state court. Plaintiffs are relegated to suppositions as to the meaning of an unpublished Tenth Circuit opinion and why it did not cite *DeWitt*. Pls' Resp. at 23 (citing *Walker v. Bd. of Trs.*, 69 F. App'x 953, 2003 WL 21690534 (10th Cir. July 21, 2003)). One obvious explanation is that *Walker* did not involve a constitutional challenge, much less a Contract Clause claim. Regardless, in light of *DeWitt*'s explicit adoption of the three-part, modern Contract Clause test, Plaintiffs' reliance on an unpublished, factually off-point Tenth Circuit case to try to limit *DeWitt* is unpersuasive.

Plaintiffs next inaccurately assert that Colorado courts have "reaffirmed" that "reasonable and necessary" defenses are available only as to those not yet vested." Pls' Resp. at 22. On the contrary, every Colorado state case on which Plaintiffs rely for such statement was decided *before DeWitt* and none of those cases discussed, much less rejected, application of the three-part, modern Contract Clause test.

As explained in PERA’s Opposition, Plaintiffs also misconstrue pre-*DeWitt* decisions addressing partially vested retirees where courts recognized that actuarial necessity, or strengthening a pension plan, justifies modification of retiree benefits. PERA Opp. at 34-35 & n.89. Plaintiffs provide no reasoned explanation why ensuring a pension plan’s viability justifies modifications of partially vested benefits but should be absolutely barred from consideration for modification of “fully vested” benefits. In both situations the resulting impact on current and future retirees of a collapse of a pension fund is the same. Plaintiffs assert that PERA has cited no authority to support its position that “[a]fter *DeWitt*, there is no reasoned basis for drawing a bright line between ‘partially’ and ‘fully’ vested benefits and making only partially vested benefits modifiable when actuarial necessity exists.” Pls’ Resp. at 28. On the contrary, PERA cited numerous cases where courts have applied the same three-part, modern Contract Clause test to “fully vested” and “partially vested” benefits. *See, e.g., Maryland Teachers*, 594 F. Supp. at 1362-72; PERA Opp. at 31.

F. Plaintiffs’ Continued Reliance on an Attorney General Opinion Is Misplaced Because the Opinion Does Nothing to Answer the Question of Whether Retirees Possess a Right to a COLA for Life Without Change

Plaintiffs’ continued heavy reliance on a 2004 Attorney General opinion that expresses general views regarding pension benefit rights does nothing to bolster Plaintiffs’ attempt to create a retirement benefit that has never existed—a COLA frozen at retirement. Initially, the General Assembly in Senate Bill 10-001 did not change the fundamental pension benefit structure: a base benefit set at retirement plus a separately calculated cost of living adjustment that has repeatedly changed during retirement.

Next, as discussed in PERA’s Opposition and ignored by Plaintiffs, Attorney General opinions are, at most, afforded “respectful consideration.” *Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988). For several reasons, that opinion should be accorded even less

“consideration.” First, the questions presented in the opinion did not concern retirement benefits, much less whether a COLA formula is unchangeable during decades of retirement. Rather, the two questions were:

Question: What, if any, limitations exist upon the Legislature’s ability to reduce the capacity of current employees to earn additional retirement benefits to assure the long term actuarial soundness of the plan?

Question: What, if any, limitations exist upon the Legislature’s ability to increase the percentage of their wages current employees contribute to PERA in order to assure the long term actuarial soundness of the plan?

Colo. Atty. Gen. Op. No. 04-04 at 1.<sup>5</sup>

Second, neither the author’s comments on retiree benefits in general, nor the *McPhail* and *Bills* opinion, have any relevance to whether the COLA provisions here unmistakably establish the right to a COLA frozen for the lifetime of retirees and their spouses. The opinion did not examine the specific statutes and DPS provisions at issue here nor the 40 years of changes to the COLA for existing retirees. As Plaintiffs recognize through their exclusion of pre-1994 PERA retirees from their proposed class because of language of the pre-1994 COLA provisions, whether various types of retirement benefits rise to the level of a contract right, and the nature of those rights, depends on the intent of the legislature as determined by the language of the statutory provision. The opinion also does not address the present situation where an economic crisis necessitated a readjustment to the COLA for existing retirees to avoid running out of money to pay benefits to all current and future members and retirees.

Third, Plaintiffs again rely on conjecture as to why the author of the opinion failed to cite *DeWitt*, *U.S. Trust*, and nationwide authority addressing pension benefits. Pls’ Resp. at 22. The most likely reason is that the author, like Plaintiffs, either was unaware of *DeWitt* or did not

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<sup>5</sup> Plaintiffs continue to miscite this opinion as No. 05-04 when it is No. 04-04.

recognize the significance of its adoption of the three-part, modern Contract Clause test and its implication on pension benefit analysis.

The Colorado Supreme Court’s adoption of the three-part, modern Contract Clause test applies to all subsequent Contract Clause challenges without any exclusion for pension benefit cases. Plaintiffs seek to avoid the modern *DeWitt* test because even if they could establish a contractual right to a particular COLA formula for the rest of their lives, the General Assembly’s modification of the COLA, in conjunction with the other changes in Senate Bill 10-001, unquestionably was reasonable and necessary, and promoted the legitimate public purpose of preserving the very existence of PERA.

## **II. Plaintiffs’ Contract Clause Claims Fail Because They Have No Right to the COLA Formula in Place at Retirement for Life Without Change**

### **A. The Court Must Presume that the COLA Change in Senate Bill 10-001 Is Constitutional Unless Plaintiffs Prove a “Clear and Unmistakable” Right to a COLA Frozen at Retirement**

“A construction of statutory language that creates doubts as to the constitutional validity of the legislation should be *assiduously avoided* if an alternative construction consistent with legislative intent is available.” *Perry Park Water & Sanitation Dist. v. Cordillera Corp.*, 818 P.2d 728, 732 (Colo. 1991); *see also Catholic Health Initiatives Colo. v. City of Pueblo*, 207 P.3d 812, 822 (Colo. 2009) (adopting “plain language interpretation of the ‘charitable organization’ definition . . . [to] avoid a potential constitutional conflict created by [plaintiff’s] interpretation”). “We presume that a statute is constitutional; unless the conflict between the constitution and the law is *clear and unmistakable*, we will not disturb the statute.” *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004) (citations omitted).

Plaintiffs do not contest that the foregoing standards apply to their constitutional challenges of Senate Bill 10-001. Plaintiffs also recognize that under Colorado law and United

States Supreme Court precedent, statutes do not create contractual rights unless the “statutory language and the surrounding circumstances manifest a legislative intent to create an enforceable contractual right.” Pls’ Resp. at 29; *see also Retired Adjunct Professors*, 690 A.2d at 1346 (“In the determination of whether public-contract rights exist, the most important fact is legislative intent as it is expressed in the language of the statute.”). In the very next sentence of their response, however, Plaintiffs contradict Colorado and United States Supreme Court authority by relying on a *North Carolina* case for the proposition that: (1) a contract may arise “even in the absence of legislative intent to contract”; and (2) PERA’s authority follows a “minority view.” Pls’ Resp. at 29 (quoting *Simpson v. N.C. Local Gov’t Empls.’ Ret. Sys.*, 363 S.E.2d 90, 93 (N.C. App. 1987)).<sup>6</sup>

First, where Plaintiffs concede that Colorado requires a clear intent to create an enforceable contract right, their argument that such position is the “minority view” is irrelevant because it is Colorado’s view. Second, Plaintiffs’ characterization of the “unmistakability” requirement as the “minority” view is incorrect. The unmistakability requirement in Contract Clause challenges derives from U.S. Supreme Court authority and is widely applied by federal and state courts in pension benefit challenges. *See, e.g., Nat’l Educ. Ass’n-R.I. ex rel. Scigulinsky v. Ret. Bd.*, 172 F.3d 22, 27 & n.8 (1st Cir. 1999) (“The clear statement requirement

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<sup>6</sup> Plaintiffs also incorrectly assert that Maine and Rhode Island “have stubbornly rejected the contractual approach.” Pls’ Resp. at 29. Rather, in both states, like many others, public employees attain a contract right in some pension benefits once they have actually retired. *See In re Almeida*, 611 A.2d 1375, 1386 (R.I. 1992) (holding that “a pension comprises elements of both the deferred compensation and contract theories. The right to deferred compensation vests upon meeting the terms of employment . . . .”), *superseded by statute on other grounds as recognized by Smith v. Ret. Bd.*, 656 A.2d 186 (R.I. 1995); *Spiller v. State*, 627 A.2d 513, 517 (Me. 1993) (“Although we reject the Superior Court’s conclusion that the retirement statute creates immutable contractual rights on acceptance of employment that cannot be impaired under the contract clauses of our constitutions, retirement benefits are more than a gratuity to be granted or withheld arbitrarily at the whim of the sovereign state.”).

for ‘legislative’ contracts has been regularly imposed by the Supreme Court and followed by this court.”) (citing, *inter alia*, *U.S. Trust*, 431 U.S. at 17-18; *Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985); *Dodge v. Bd. of Educ.*, 302 U.S. 74, 78-79 (1937)).<sup>7</sup>

B. The Statutory and DPS COLA Provisions Do Not Establish a Clear and Unmistakable Intent to Create a COLA Frozen at Retirement

Plaintiffs do not dispute that the PERA and DPS COLA provisions on which they rely contain no: (1) durational language of any kind, much less language stating that any COLA formula is “for life without change”; (2) language stating that a “contract” has been created; or (3) text prohibiting future amendments in general, or excluding certain groups (i.e., retirees) from future amendments. Had the General Assembly or DPSRS intended to create such a right, it would have been easy to do so. They did not. *See, e.g., In re Certified Question*, 527 N.W.2d 468, 474 (Mich. 1994) (“As a general rule, vested rights are not created by a statute that is later revoked or modified by the Legislature if ‘the Legislature did not covenant not to amend the legislation.’”) (citation omitted); *Nat’l Educ. Ass’n-R.I.*, 172 F.3d at 28 (1st Cir. 1999) (“[I]t is

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<sup>7</sup> *See also Horvath*, 697 N.E.2d at 653 (“In determining whether a contractual relationship exists in the first instance, we are mindful that a state legislative enactment may be deemed a contract for purposes of the Contract Clause only if there is a clear indication that the legislature has intended to bind itself in a contractual manner. Accordingly, we begin with a presumption that, absent a clearly stated intent to do so, statutes do not create contractual rights that bind future legislatures. Courts have coined the phrase ‘*unmistakability doctrine*’ for this legal principle.”); *Robertson*, 359 F. Supp. 2d at 1099 (“[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.’ Put simply, the legislative intent to create a contract must be ‘*clearly and unequivocally expressed*.’”) (citations and internal quotations omitted); *Fed’n of Parole & Prob. Officers v. State*, 928 P.2d 335, 338 (Or. App. 1996) (“[A] contract will not be inferred from any legislation unless that legislation ‘*unambiguously* expresses an intention to create a contract.’”) (citation omitted) (emphasis in original); *In re Certified Question*, 527 N.W.2d 468, 474 (Mich. 1994) (“Courts usually have concluded that a state contractual obligation arises from legislation only if the legislature has *unambiguously expressed* an intention to create the obligation.”) (citation omitted).

easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries (e.g., those who have retired.)” (footnote omitted); *Levine v. State Teachers Ret. Bd.*, No. CV 960562830, 1998 WL 46441, at \*7-8 (Conn. Super. Ct. Jan. 28, 1998) (“There is no clear statement from the legislature that it created a contract with the plaintiffs as to a specific COLA amount.”); rejecting claim to “contractual rights to ‘pension benefits and then-existing COLA’”).<sup>8</sup>

Additionally, Colorado, as opposed to other states, has not enacted constitutional amendments which specifically state that public pensions are contractual relationships which shall not be diminished or impaired. *See, e.g.*, Alaska Const. art. XII, § 7; Haw. Const. art. XVI, § 2; Ill. Const. art. XIII, § 5; La. Const. art X, § 29; Mich. Const. art. IX, § 24; N.Y. Const. art. V, § 7.

The Rhode Island Supreme Court faced a similar argument from retirees claiming that reemployment opportunities in place at retirement became fixed and unchangeable. Examining the statutory provisions on which plaintiffs relied, the court rejected their argument, stating:

[T]he statutes in question contain no language granting or even referring to any contractual or other right of these public pensioners to obtain post-retirement reemployment from the State. And none can be presumed or inferred from the way the statutes are worded. Therefore, we believe that plaintiffs are not entitled to complain when the State decides to change the terms on which it may opt to offer such reemployment opportunities to retired professors like these plaintiffs.

*Retired Adjunct Professors*, 690 A.2d at 1345.

An Oregon court rejected the precise argument made by Plaintiffs here—that the mere use of the term “shall” creates a contract right not subject to modification. The court explained:

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<sup>8</sup> As for PERA’s examples of types of durational language that could have been used, Plaintiffs’ only response is to point out that one of the cases on which PERA relies involves private pension benefits. Pls’ Reply at 21-23. Such fact is immaterial to PERA’s point—those cases illustrate that if the Colorado legislature wished to make the COLA formula unchangeable, it would have been easy for it to include durational language.

“The presence of the phrase ‘shall be’ in the statute does not prohibit amendment or repeal. Nor does that phrase alone suffice to create contractual obligations on behalf of the state.” *Fed’n of Parole & Prob. Officers*, 928 P.2d at 338 (“Where the legislation ‘contain[s] nothing indicative of a legislative commitment not to repeal or amend the statute in the future, a statutory contract probably cannot be found.”) (citation omitted); *see also Alston v. City of Camden*, 471 S.E.2d at 178 (“[M]any statutes and ordinances contain mandatory language; that fact alone is not particularly indicative of an intent to enter into contractual relations with anyone.”; rejecting Contract Clause claim that provision stating that city employees “shall” be entitled to fringe benefit created contract right).

Here, the word “shall” has been used in *every* COLA provision over the past 40 years that has been subsequently changed with the new COLA formula applied to existing retirees. As the repeated amendments illustrate, such “mandatory” language plainly applies to the present year calculation and does not import any particular future duration, much less for the lifetime of a retiree and his or her spouse. Simply because the COLA *payment* is “mandatory” under whatever COLA formula is currently in place does not mean that the COLA *formula* is unalterable in the future.

Plaintiffs’ reliance on the 2007 to 2009 versions of section 24-51-1002(1) further defeats their “shall” argument. Pls’ Resp. at 8. Those COLA provisions state that the 3.5% compounded COLA shall apply to “benefit recipients whose benefits are based on the account of a member who was a *member, inactive member, or retiree* on December 31, 2006 . . . .” Of the three categories listed, Plaintiffs do not contest that two of those groups, members and inactive members, have no right to a fixed COLA. Thus, where the “shall” language does not create a lifetime right to a fixed COLA for a member or inactive member, it cannot reasonably be read to

create such right in a retiree. *See Int’l Union et. al v. Skinner Engine Co.*, 188 F.3d 130, 144 (3rd Cir. 1999) (where same “will continue” language applied to both active employees and retirees, “[t]he only reasonable conclusion—if one begins with the uncontroversial premise that benefits for active employees were not vested—is that benefits for retirees were likewise not vested.”).

Moreover, Colorado courts have previously ruled that provisions relating to public pensions that use “shall” did not confer a vested contract right. In *Spradling v. Colorado Department of Revenue*, for example, the court held that retirees did not have a vested right to the income tax exemption on public pensions in place at their retirement, notwithstanding that the statute included “mandatory” language: “There *shall* be subtracted from federal adjusted gross income . . . amounts received as pensions or annuities from any source, to the extent included in federal adjusted gross income.” 870 P.2d 521, 523 (Colo. App. 1993) (emphasis added and omitted) (quoting C.R.S. § 39-22-110(3) (1989)); *id.* at 524 (holding “there is no contractual right to an income tax exemption for such benefits”).<sup>9</sup>

There is nothing in the text of the PERA or DPS COLA provisions stating, or implying, that the COLA formula may not be amended for those already retired and must, instead, remain frozen for the lifetime of a retiree, plus that of his or her spouse.

C. The Legislature’s Repeated Changes to the COLA Benefit for Those Already Retired Exemplifies Its Intent Not to Freeze the COLA at Retirement

Plaintiffs seek to create a contract right that has never existed—an unchangeable COLA for life triggered (inconsistently) by either the date of their retirement or “full vesting.” PERA, in its Opposition, provided an extensive summary of the COLA changes over the last 40 years for both PERA and DPS retirees. Opp. at 8-17. Plaintiffs do not dispute such historical changes

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<sup>9</sup> *Spradling*’s holding that PERA retirees do not have a contract right to income tax exemptions is in contrast with out-of-state cases Plaintiffs have cited, negating their persuasive value in Colorado. *See Bailey v. State*, 500 S.E.2d 54, 60 (N.C. 1998) (Pls’ Resp. at 33 n.5); *Hughes v. State*, 838 P.2d 1018 (Or. 1992) (Pls’ Resp. at 44).

in the COLA formulas applied to those already retired. Rather, Plaintiffs' *only* response is that "the only COLA provisions that are relevant here are the mandatory COLA provisions in effect . . . [from] 1994 through 2010." Pls' Reply at 4.

On the contrary, "former statutory provisions" are expressly recognized as a proper aide to statutory construction. *Thurman v. Tafoya*, 895 P.2d 1050, 1055 (Colo. 1995) ("[C]ourts may consider prior enactments of the statute as well as the statute's legislative history as indicative of legislative intent."). Plaintiffs also choose to ignore that even within their truncated PERA retiree class of 1994 to 2010, the COLA change in 2001 was applied to *all* retirees, *regardless of when they retired*. Without recognizing that they are defeating their own argument, Plaintiffs state: "In 2000, the Legislature amended Colo. Rev. Stat. § 24-51-1002 *again*, this time replacing the variable COLA adjustment with a guaranteed 3.5% annual increase." Resp. at 7 (emphasis added and deleted).

Plaintiffs continue to labor under a fundamental misconception of the 1994 COLA amendments which Plaintiffs argue created a contract right to a COLA for the first time. Pls' Resp. at 6-7. PERA previously addressed the failing of Plaintiffs' argument and refers the Court to that discussion. PERA Opp. at 45, 51-52. Moreover, if, as Plaintiffs claim, such significant change occurred in 1994 for PERA retirees—from no contract right to any COLA to a lifetime right to the COLA in place at retirement—one would expect to find definitive statutory language establishing the General Assembly's intent to create such contract rights. Not only does no such statutory language exist, but, to improve the actuarial soundness of the PERA pension fund, the 1994 amendments created a less generous and more predictable COLA by limiting the total COLA payment to retirees. *Id.* As illustrated by the 1993 legislative history, no member of the General Assembly expressed any intent to create an unchangeable COLA from that date forward.

*See, e.g.*, App. A-16(a) to PERA’s MSJ (House Finance Committee Hearing on SB 93-1324, 1993 Legis., at 5:6-10 (Colo. Mar. 24, 1993)) (“The single annual increase would provide a better funded plan for long-term protection against inflation. Future benefit recipients, then, would replace the previous pattern of fully matching increase in Consumer Price Index Fund.”) (Rep. Martin, bill sponsor).

As for the DPS COLA provisions, Plaintiffs completely ignore the 40 years of changes to the COLA formula for those already retired and do not contest that for their proposed 1974 to 2010 DPS retiree class the COLA formula for existing retirees changed 12 times. PERA Opp. at 8-17. Rather, Plaintiffs only copy and paste their statement that: “DPSRS has been providing *some form* of guaranteed annual adjustment to member pensions since at least 1981—when DPSRS began increasing pensions annually by 3.0% (non-compounding).” Pls’ MSJ at 9; Resp. at 8. That DPSRS has provided “some form” of a COLA to retirees does nothing to support Plaintiffs’ claim that every DPS retiree from 1974 to 2010 is entitled to the COLA in place at retirement for life, plus the lifetime of his or her spouse.

Moreover, Plaintiff Justus confirmed that the “current” COLA was “subject to change” during retirement. PERA Opp. at 50. Plaintiff Justus signed the DPS form acknowledging that this specific point was discussed. The “subject to change” language was not “buried” (Pls’ Resp. at 30) and was equally as visible as the other retirement matters listed and discussed. The retirement checklists are significant because they are consistent with the DPS plan language, and reflect the intent of the DPSRS and the understanding of DPS retirees that the COLA formula could change during retirement. Plaintiffs’ assertion that such language does not constitute a “disclaimer” misses the point and relies on the false premise that the COLA formula was frozen at retirement. Pls’ Reply at 23-24.

Plaintiffs Halaas, Laird, and Justus attach materially identical affidavits each including the conclusory statement that “[u]pon my retirement, I began receiving . . . pension benefits and expected that my benefits would increase every year . . . [by] the formula in effect at the time I retired.” Pls’ Exs. 2, 3 & 4. Notably, Plaintiff Hopkins provides no affidavit in support of her and the other Plaintiffs’ positions. None of the Plaintiffs explain how they can have a reasonable expectation to an unchangeable COLA formula for life when the COLA formulas have changed repeatedly for retirees over the past 40 years. Halaas’ alleged expectation to the 1999 COLA formula for life—that was changed in 2001 when he was already retired and which he has not received for more than a decade—is even less objectively reasonable.<sup>10</sup> Further, if Plaintiffs are successful, many retirees, like Halaas, will face recoupment for PERA’s overpayments under COLA formulas which were more beneficial than those in place at their retirement dates.

As pertinent here, the Rhode Island Supreme Court explained: “Mere reliance by benefited parties on legislative enactments and their unilateral beliefs concerning what the statute will mean to them in the future, no matter how reasonable they may seem at the time, cannot create a legislative intent to establish enforceable contractual rights that is not otherwise manifest in the words of the legislation.” *Retired Adjunct Professors*, 690 A.2d at 1346. In rejecting a claim for pension benefits “frozen” at retirement, the court concluded:

To be sure, in a universe of inconstancy, in a world where all is unstable, and nought can endure, but is swept onwards at once in the hurrying whirlpool of change, it is only human nature to long for a repose that ever is the same. But it is not to be. Even ships of state from time to time need to reshape or remove the

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<sup>10</sup> Had Halaas become eligible to retire with full benefits in 1999, but not retired until 2002, he would be claiming the impossible—a lifetime contractual right to two fundamentally different COLA formulas. Such situation is undoubtedly present for members of Plaintiffs’ putative class and creates an inherent conflict in Plaintiffs’ requested relief. Had the General Assembly intended to create a contractual right to an unchangeable COLA it would have stated when such right arose and Plaintiffs would not need to take conflicting positions.

policy barnacles encrusted on their hulls. Otherwise, every statute of benefit to some group or individual would remain immutable and forever crystallized in the past as long as one or more beneficiaries could claim reliance thereon. And in this pension context the State would be required to outfit different groups of retirees in a motley garb of sundry reemployment benefits depending on the time and the season of each employee's retirement.

*Id.* at 1346-47 (footnotes and internal quotation marks omitted). Likewise, Plaintiffs here ask this Court to revive decades-old COLA provisions contained in entirely different statutory schemes “to outfit different groups of retirees in a motley garb” of COLA formulas “depending on the time and the season of each employee's retirement.” Nothing in the PERA or DPS COLA provisions over the past 40 years supports Plaintiffs' request.

D. Even if the PERA COLA Provisions Could Be Read to Be Ambiguous, Plaintiffs' Interpretation Necessarily Fails

Colorado follows the rule “when a statute is susceptible to both constitutional and unconstitutional interpretations [courts] *must* adopt the constitutional interpretation of the statute.” *Renteria v. Colo. State Dep't of Personnel*, 911 P.2d 797, 799 (Colo. 1991) (finding statute constitutional); *see also Duprey v. Anderson*, 184 Colo. 70, 77, 518 P.2d 807, 811 (1974) (interpreting statute to require mandatory notice thus defeating any “challenge on the due process ground”). Oregon follows the same rule. In a pension benefit challenge, the Oregon court determined that “[b]ecause both plaintiffs' and the state's interpretations of [the statute] are plausible, the statute does not unambiguously express an intention to create a contract. . . . Consequently, plaintiffs have no statutory contract rights subject to impairment” under Oregon's Contract Clause. *Fed'n of Parole & Prob. Officers*, 928 P.2d at 339.

Here, the PERA and DPS COLA provisions going back 40 years contain no language establishing a lifetime right to a COLA formula at retirement and thus there exists no ambiguity as to legislature's ability to constitutionally modify those provisions for existing retirees. However, even could those provisions be read to be ambiguous, Plaintiffs' interpretation must be

rejected because, at a minimum, PERA's and the State's reading of the COLA provisions to be modifiable during retirement is one reasonable interpretation.

For Plaintiffs to prevail, the Court would need to find that the PERA and DPS COLA provisions dating back to 1969 unambiguously granted a lifetime, unchangeable COLA formula to retirees and thus that each of the ten changes from 1969 to 2010 was unconstitutional. When considering that for 40 years the COLA formulas have been modified for those already retired, there can be no reasonable interpretation that those very COLA provisions actually were intended to be frozen.

Moreover, *McPhail* and *Bills* were decided in 1959 and 1961, respectively, and the first PERA and DPS COLA provisions came into existence approximately 10 years later. The first of numerous amendments applied to existing retirees was in 1974. Under well-established authority, this Court must assume that the General Assembly in 1974, and at the passage of every subsequent COLA amendment, was aware of the Contract Clause and the *McPhail* and *Bills* rulings. *See, e.g., Smith v. Miller*, 153 Colo. 35, 49-50, 384 P.2d 738, 746 (1963) (recognizing as a “well established rule[] of construction” the principle that “it must be assumed that the legislature acted with full knowledge of relevant constitutional provisions . . . and of previous legislation and decisional law on the subject”) (emphasis deleted); *Griego v. People*, 19 P.3d 1, 5 (Colo. 2001) (“We must presume that, when the General Assembly legislates in a certain area of law, it does so with awareness of the judicial precedent in that area.”). Plaintiffs’ interpretation would require the unreasonable conclusion that for 40 years the General Assembly and the DPSRS have repeatedly enacted unconstitutional modifications of the COLA provisions in knowing violation of the Contract Clauses and *McPhail* and *Bills*. Rather, the latest COLA change in Senate Bill 10-001 for existing retirees was no different than the prior, 40 years of

constitutional COLA amendments that changed the COLA for both the better and the worse depending on current economic circumstances, including the health of the PERA pension fund.

E. Plaintiffs’ “Extrinsic Evidence” May Not Be Properly Considered in Determining the Meaning of Statutes

As discussed above, because Plaintiffs are challenging the constitutionality of a statute, if the Court were to find the COLA provisions ambiguous as to whether they created a lifetime right to a particular COLA, Plaintiffs’ interpretation would necessarily fail. Even in a nonconstitutional challenge, in determining the meaning of a statute, courts rely only on “legislative history, the consequences of a given construction, and the end to be achieved by the statute.” *See People v. Disher*, 224 P.3d 254, 256 (Colo. 2010). The permissible extrinsic evidence thus could never include the informal PERA fact sheets and newsletters on which Plaintiffs rely.

Even could such “extrinsic evidence” be considered, it does nothing to establish that whatever COLA formula happened to be in place at retirement was frozen for life. None of the fact sheets or newsletters make any statement as to frozen benefits for retirees or their spouses, and only provide information on the benefits currently in place. Pls’ Exs. 11-13. As discussed in PERA’s Opposition and ignored by Plaintiffs, Plaintiffs’ reliance on informal fact sheets from PERA is particularly misplaced because they caution:

This fact sheet provides general information about Colorado PERA benefits. PERA membership rights, benefits, and obligations are governed by Title 24, Article 51 of the Colorado Revised Statutes, and the Rules of the Colorado Public Employees’ Retirement Association, which *take precedence over any interpretations in this fact sheet.*

Pls’ Ex. 7 to MSJ; Pls’ Ex. 9 to Resp.; *see also* Pls’ Ex. 8 to Resp. (omitting page containing same disclaimer). Plaintiffs also attach a July 1, 2009 DPSRS booklet entitled “Significant Facts” that likewise defeats their view that the DPS COLA is fixed at retirement. Pls’ Ex. 7 to

Resp. The first several pages of that booklet provide a chronology of the numerous DPS plan changes starting in 1945. It shows that the first COLA for retirees was provided in 1965 and was changed for existing retirees in 1974, 1976, 1980, 1981, 1983, 1985, 1986, 1988, 1991, 1995, 1998, 2001, and 2005. *Id.* at 2-11.

Plaintiffs have failed to establish that the Colorado General Assembly and DPSRS created a contract right in retirees and their spouses to an unchangeable COLA formula for life. The General Assembly's latest modification of the retiree COLA formula is consistent with the historical pension benefit structure. It is and has always been a base benefit plus a separately calculated cost of living adjustment that has repeatedly changed during retirement. The latest in the long history of legislative modifications to the COLA formula does not violate the Contract Clause of either the Colorado or United States Constitutions. The Court's analysis need go no further to grant summary judgment in PERA's favor because if this Court finds there is no contract right to a COLA formula frozen at retirement for life, this ends the inquiry and the statute must be found constitutional.

### **III. Senate Bill 10-001 Did Not Disrupt the Parties' Reasonable Expectations and Thus There Was No Substantial Impairment**

*DeWitt* holds that “[t]o prove substantial impairment of a contractual relationship, a party must demonstrate that the law was not foreseeable and thus disrupts the parties’ expectations.” 54 P.3d at 858; *see also* PERA MSJ at 3.<sup>11</sup> Consistent with *DeWitt* and PERA’s position, *Plaintiffs* agree that “the primary consideration in determining whether the impairment is

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<sup>11</sup> Plaintiffs assert that “By failing to address this second part of the tripartite test, Defendants appears [sic] to be conceding that—if Plaintiffs do have a vested right in their COLA benefits—SB 10-001 has substantially impaired such rights.” Pls’ Resp. at 31. As evidenced by PERA’s five-page argument in its summary judgment motion establishing that there has been no substantial impairment, PERA plainly did not concede this element of the three-part test. PERA MSJ at 3-8.

substantial is the extent to which *reasonable expectations* under the contract have been disrupted.” Pls’ Resp. at 31-32 (quoting *Sanitation & Recycling Indus. v. City of New York*, 107 F.3d 985, 993 (2d Cir. 1997) and citing *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983)). Substantial impairment thus is not defined as a certain sum or percentage of money, but requires an inquiry into foreseeability of the COLA readjustment in Senate Bill 10-001.

Where, as here, the purported terms of the “contract” have changed repeatedly, there can be no reasonable expectation that it will suddenly freeze. *See, e.g., Alston*, 471 S.E.2d at 178 (“Even assuming the original employee handbook constituted such a contract, Employees had no reasonable expectation that the terms of the ‘contract’ would remain unchanged. Therefore, there was no substantial impairment of any employment contract that may have existed.”) (footnote omitted). As recognized by the Rhode Island Supreme Court, such situation is particularly true in the heavily regulated pension benefit context: “Public pensions have always been a heavily regulated legal arena. Therefore, individual expectations of immunity from future statutory change would have been unwarranted even if these provisions were contractual in nature.” *Retired Adjunct Professors*, 690 A.2d at 1347; *see also DeWitt*, 54 P.3d at 859 (“[C]ourts should consider whether the statute in question touches on an area that has historically been regulated by the legislature; if so, the statute is less likely to be found to violate the Contract Clause.”) (citing *Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 249 (1978)).

Here, during Plaintiffs’ years of employment the General Assembly repeatedly modified the COLA formula, and other pension benefits, provided to retirees. Plaintiffs could not reasonably expect to be excluded from these historical changes once they retired, or, like Halaas,

to revive a COLA last paid ten years ago, whenever they perceive a COLA change to be detrimental.

PERA, in its summary judgment motion, discussed numerous reasons why the COLA change in Senate Bill 10-001 did not disturb the parties' "reasonable expectations" thus establishing that no substantial impairment has occurred here. PERA MSJ at 7-8. Plaintiffs do not contest any of PERA's six reasons.

Disregarding *DeWitt* and contradicting their own recognition that whether "reasonable expectations" have been disrupted dictates whether a substantial impairment has occurred, Plaintiffs mistakenly equate "substantial impairment" with a quantity of money. Pls' Resp. at 32-33. Plaintiffs focus solely on their faulty assertions that over the next twenty years the COLA change in Senate Bill 10-001 will cost all retirees hundreds of thousands of dollars. Even if Plaintiffs' purported monetary losses were the proper test for substantial impairment, Plaintiffs' projections are unquestionably wrong. All pre-2001 DPS retirees will be *worse off* if forced to return to the COLA formulas in place at their retirement. PERA MSJ at 7; PERA Opp. at 16, 49-51. Likewise, for pre-2001 PERA retirees who retired under variable COLA formulas tied to the *lesser* of inflation or a maximum percentage, Plaintiffs' projected losses are sheer speculation. If the current 2% compounded COLA rate outpaces actual inflation, those PERA retirees will also be worse off if forced to revert to the COLA formulas in place at their retirement. Even for post-2001 retirees, Plaintiffs' loss projections for the next 20 years, and thus the basis of their "substantial impairment" argument, are speculative because the 2% compounded COLA will automatically increase without limit once the PERA fund reaches a 103% funded level.<sup>12</sup>

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<sup>12</sup> Plaintiffs' lengthy footnote attempting to quantify impairment fails for two reasons. See Pls' Resp. at 32-33 n.5. First, many of the cases are from New York and Hawaii, which, unlike Colorado, have constitutional provisions creating express contractual rights to public pensions

In addition, Plaintiffs fail to account for the financial and emotional value to retirees of a sound pension plan that will not run out of money during their retirements. Though Plaintiffs choose to ignore the economic realities after the 2008 crisis, the vast majority of retirees and all union and retiree organizations vocally supported Senate Bill 10-001, including the COLA change. Those retirees and their representatives understood the value of a healthy pension plan that they could count on in their retirement.

**IV. Senate Bill 10-001, Including the COLA Readjustment, Was Reasonable and Necessary to Serve a Significant and Legitimate Public Purpose**

“[A] court should uphold a challenged statute if it is *reasonable and appropriately serves a significant and legitimate public purpose . . .*” *See DeWitt*, 54 P.3d at 858; *see also Sanitation & Recycling Indus.*, 107 F.3d at 993 (“If the legislative purpose is valid, the final inquiry is to determine whether the means chosen to achieve that goal are reasonable.”) (citing *U.S. Trust*, 431 U.S. at 22-23).

A. Plaintiffs Acknowledge that Senate Bill 10-001, Including the COLA Change, Addressed a Legitimate Public Purpose

Though Plaintiffs disagree with the methods chosen by the General Assembly to remedy PERA’s critical underfunding, Plaintiffs acknowledge that a viable PERA pension fund is in the public interest. Specifically, Plaintiffs state: “Plaintiffs agree that PERA’s ability to continue to pay pension benefits is in the public interest.” Pls’ Resp. at 37. Likewise, as discussed in

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thus making an impairment more likely to defeat the reasonable expectations of the parties. *See* Haw. Const. art. XVI, § 2; N.Y. Const., art. V, § 7. Second, Plaintiffs’ heavy reliance on furlough cases is misplaced when the state and local governments in Colorado have repeatedly imposed unpaid furlough days in recent years in order to deal with the current financial crisis, and no reported Contract Clause challenges have been filed. *See, e.g.*, <http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251569924795> (listing four furlough days for state division employees in first five months of 2010 alone); <http://www.coloradoconnection.com/news/story.aspx?id=438151> (listing five furlough days for Denver city employees during 2010).

PERA's Motion, Plaintiffs' most recent complaint also acknowledges that the COLA change in Senate Bill 10-001 was intended to address PERA's underfunding. Sec. Am. Comp. ¶ 45. Plaintiffs, in their Response, can not, and do not, contest PERA's arguments that Senate Bill 10-001 addressed an important public purpose. The only contested question thus is whether the General Assembly's change to the COLA formula was "reasonable and appropriately serves" the public purpose of preserving the long-term viability of the PERA pension system. *DeWitt*, 54 P.3d at 858.

B. Summary Judgment Is Appropriate Because All Evidence Relevant to Whether the Legislature's Passage of Senate Bill 10-001 Was Reasonable and Necessary Is in the Public Record

Plaintiffs concede that numerous courts hold that "summary judgment is a proper mechanism to resolve this [type of] constitutional challenge" (Pls' Resp. at 36) because all relevant evidence is found in the legislative record. Plaintiffs' only response to such authority is to claim that "the 'level of impairment' was much less than in the instant case." Pls' Resp. at 36. Plaintiffs fail to explain why the alleged "level of impairment," which they mistakenly equate with "loss of money," has any relevance to whether the proper examination for the reasonable and necessary element is limited to the legislative record.

Providing no authority from any Contract Clause case (or any constitutional challenge), Plaintiffs instead cite cases involving reasonableness of attorney fees, chiropractic treatment costs, and the use of force, for the obvious point that "reasonableness" can be a question of fact. Pls' Resp. at 34. Whether the General Assembly enacted legislation that is "reasonable and necessary for a legitimate public purpose," has no similarity to determining whether an attorney billed too many hours in a particular case.

As PERA specified in its summary judgment motion, the *entire*, extensive legislative record is attached as Appendix A to PERA's summary judgment motion filed on March 17,

2011. PERA has provided Plaintiffs and the Court with all hearing transcripts, testimony, and documents submitted to the legislature. Plaintiffs agree that “the legislative record and public documents will surely constitute a large part of the relevant document in this case,” but speculate that “there are surely other documents that are material.” Pls’ Resp. at 35.

First, where Plaintiffs concede they have neither reviewed PERA’s disclosures nor the legislative record provided with PERA’s summary judgment briefing, Plaintiffs’ statement is nothing more than unsupported conjecture. Such conjecture not only fails to support their Rule 56(f) request (as discussed below), but it disregards the rule that because the “reasonable and necessary” element of a Contract Clause challenge implicates the actions of legislators, all relevant evidence is found in the legislative record. *See* PERA MSJ at 11-14. Such rule is particularly appropriate here because the legislative record includes numerous hearing transcripts in which many alternatives were vigorously debated and the General Assembly’s reasons for choosing the contribution and benefit changes are available for review.

C. Plaintiffs Do Not Contest the Extensive Facts and Alternatives Considered by the Legislature Establishing that Senate Bill 10-001 Was Reasonable and Necessary

The legislative record for Senate Bill 10-001 illustrates that the General Assembly considered numerous alternatives and arguments in nearly 12 hours of public testimony, six hearings, and a wealth of analysis and documentation, including by Plaintiff Justus and others affiliated with the SavePERACOLA organization. PERA Opp. at 24-25; MSJ at 19-29. PERA also discussed the General Assembly’s amendments in 2004 and 2006 that increased contributions from employees and employers, and cut the pension benefits of current and future PERA employees. PERA Opp. at 17-19; MSJ at 23-24. The legislative record in general, and the cited testimony in particular, establishes that the General Assembly considered readjusting the COLA for retirees the last option and only undertook such action after it became evident that

no other viable contribution and benefit changes could prevent the pension fund from running out of money. Plaintiffs fail to respond to any aspect of the legislative history.<sup>13</sup>

Plaintiffs also have not, and cannot, contest the critical facts establishing the need for Senate Bill 10-001: (1) \$12 billion in investment losses in 2008; (2) a 53% funded level at the end of 2008 with a \$27.5 billion shortfall; and (3) actuarial analysis establishing that the PERA fund would be unable to pay benefits in less than 30 years even if an 8.5% rate of return was achieved every year. Plaintiffs also ignore the unanimous support from unions and retiree organizations, and the overwhelming support of PERA and DPS retirees, employees, and employers which strongly supports the conclusion that Senate Bill 10-001 was reasonable and necessary. The reasonableness and necessity of Senate Bill 10-001, including the COLA changes, also is exemplified by Plaintiff Hopkins' January 2, 2011 e-mail voicing her strong objection to the other Plaintiffs' decision to continue to pursue this lawsuit and their requested relief. Ex. A to State Defs' Mot. to File Under Seal.

(1) Plaintiffs Seek Application of Incorrect Legal Standards to the Reasonable and Necessary Examination

Having no basis to contest the legislative record showing that Senate Bill 10-001 is “reasonable and appropriately serves a significant and legitimate public purpose,” *DeWitt*, 54 P.3d at 853, Plaintiffs seek application of incorrect legal standards for the “reasonable and necessary” element. Plaintiffs assert that: (1) whether legislation is “reasonable and necessary” is an affirmative defense for which defendants have the burden of proof; (2) for legislation

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<sup>13</sup> Contrary to Plaintiffs' assertion, PERA's recommendations were not “wholly adopted by the Legislature.” Pls' Resp. at 40. Rather, as PERA set forth in its Motion, the General Assembly, *inter alia*, reinstated a COLA for 2011 and lowered from 110% to 103% of the funding level necessary to trigger increases to the 2% compounded COLA. See PERA's App. A-12(d) (Sen. Fin. Comm. Hrg. at 7-10) (listing all of the General Assembly's changes to Senate Bill 10-001 as compared to PERA's original proposal).

impairing contracts to be reasonable and necessary an “unprecedented emergency” must exist; (3) statutorily set employer contributions in the 2000s should have been higher; and (4) Colorado’s “general finances,” tax rates, and bond rating govern whether Senate Bill 10-001 is reasonable and necessary. Pls’ Resp. at 31-33, 37-39. Plaintiffs are wrong on all counts.

The First Circuit, in a January 2011 decision, analyzed at length which party bore the burden of proof and squarely held: “where plaintiffs sue a state . . . challenging the state’s impairment of a contract to which it is a party, the plaintiffs bear the burden on the reasonable/necessary prong of the Contract Clause analysis.” *United Auto. Aerospace, Agric. Implement Workers of Am. Int’l Union v. Fortuno*, 633 F.3d 37, 42 (1st Cir. 2011) (“*Fortuno*”). The First Circuit affirmed the trial court’s motion to dismiss, concluding that the plaintiffs “did not plead sufficient facts” to meet their burden of establishing that the government’s impairment of contracts was unreasonable and unnecessary. *Id.*

The *Fortuno* court also noted that the Second Circuit in *Buffalo Teachers* reached a similar conclusion. *Id.* at 44 (discussing *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 265 (2d Cir. 2006) (finding “plaintiffs have the burden of proof [on the reasonable and necessary element] because the record of what and why the state has acted is laid out in committee hearings, public reports, and legislation, making what motivated the state not difficult to discern.”). Were the “reasonable and necessary” element an affirmative defense, as Plaintiffs claim, the plaintiff would have no obligation to plead any facts on such element and it would be impossible for a state defendant to prevail on a motion to dismiss on such ground.

Plaintiffs rely on an Eighth Circuit case and a Minnesota state court decision for a contrary position on the burden of proof. Pls’ Resp. at 37 (citing *White Motor Corp. v. Malone*, 599 F.2d 283, 287 (8th Cir. 1979), and *Jacobsen*, 392 N.W.2d at 872). As noted by the First

Circuit, though some courts “have used language that arguably supports such a conclusion,” “neither this court nor the Supreme Court has ever held that this burden rests with the state, and none of the courts that have placed this imposition onto the state have analyzed the issue in detail.” *Fortuno*, 633 F.3d at 43-44. In contrast to the cursory statements in cases like *White* and *Jacobsen*, the *Fortuno* court conducted a detailed analysis of the burden of the three-part, modern Contract Clause test, including its policy and constitutional underpinnings, before concluding that the burden for the third prong, like the rest of the test, rests with the plaintiffs. Thus, contrary to Plaintiffs’ repeated assertions, whether Senate Bill 10-001 is “reasonable and necessary” is not an “affirmative defense”—it is an element of Plaintiffs’ burden of proof.

Next, Plaintiffs argue that legislation that substantially impairs a contract may only be reasonable and necessary if an “unprecedented emergency” exists. Pls’ Resp. at 37-39. On the contrary, the U.S. Supreme Court has expressly rejected such a standard and no Colorado decision supports Plaintiffs’ view. *See Energy Reserves Grp.*, 459 U.S. at 412 (“[T]he Court has indicated that the public purpose need not be addressed to an emergency or temporary situation.”); *U.S. Trust*, 431 U.S. at 22 n.19 (1977) (“Undoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case.”). Likewise, courts applying *U.S. Trust* and other Supreme Court authority have found legislation to be reasonable and necessary for a legitimate public purpose where no “unprecedented emergency” existed. *See Energy Reserves*, 459 U.S. at 418-19 (finding the statute reasonable and necessary to complete “the regulation of the gas market by imposing gradual mechanisms” and saying nothing about an “unprecedented emergency”); *Maryland Teachers*, 594 F. Supp. at

1370 (holding that “[t]he 1984 Act was a reasonable response to an important public concern” but saying nothing about an “unprecedented emergency”).

Ignoring this wealth of authority, Plaintiffs instead mistakenly rely on an Eighth Circuit decision. Pls’ Resp. at 38 (citing *AFSCME v. City of Benton, Arkansas*, 513 F.3d 874, 882 (8th Cir. 2008)). *AFSCME* incorrectly cites the United States Supreme Court’s *Allied Structural Steel* decision as the basis for this view. 439 U.S. 234 (1978). *Allied Structural Steel* did not require an “unprecedented emergency” for an impairment to be reasonable and necessary, but simply observed that its 1930s era precedent arose from “unprecedented emergencies brought on by the severe economic depression of the early 1930’s.” *Id.* at 242. As the wealth of authority cited above demonstrates, courts relying on *Allied Structural Steel*, *U.S. Trust*, and *Energy Reserves* do not impose any such standard.<sup>14</sup>

Moreover, Plaintiffs’ argument is a distinction without a difference because an “unprecedented emergency” existed here. The General Assembly passed Senate Bill 10-001 and made changes to contribution rates and benefits of current and future employees and retirees, and employers, precisely because there *was* an unprecedented emergency. As PERA explained in detail in its Opposition, for the first time in its 80-year history, the PERA pension fund was projected to run out of money in less than 30 years, and fall below 40% funded in less than 10 years, even if its investments returned 8.5% every year. Plaintiffs have provided nothing to contradict such facts or provide any support for their suggestion that the worldwide 2008 financial crisis and its impact on the PERA fund was not an “unprecedented emergency.”

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<sup>14</sup> Plaintiffs also cite an unpublished federal district court case, *Professional Firefighters Ass’n of Omaha, Local 385 v. City of Omaha*, No. 8:10CV198, 2010 WL 2426466, at \*5 (D. Neb. June 10, 2010), which quoted *AFSCME*’s misstatement of the holding in *Allied Structural Steel*, and rely on *Opinion of Justices (Furlough)*, even though that case says nothing about an “unprecedented emergency” requirement. 609 A.2d at 1204, 1211.

Plaintiffs also assert that the statutorily set employer contribution rates in the 2000s were not high enough to meet “ARC” and that they need to further examine this issue. Pls’ Resp. at 35. First, the rates paid by employers are undisputed facts that PERA set forth in its Opposition. PERA Opp. at 18-19. As PERA explained, but Plaintiffs ignored, in an effort to address underfunding after the 2001 market crash, in 2004 and 2006, the legislature raised employer contribution rates while leaving the retiree COLA undisturbed. Plaintiffs’ “ARC” argument is nothing more than a criticism that the legislature should have raised the employer rate even higher to address a funding shortfall caused, not by employers’ failure to pay higher contributions, but by investment losses in 2000 and 2001. Under Plaintiffs’ view, the only way for employer contributions to meet “ARC” is to place the *entire burden* of remedying underfunding on employers.

Plaintiffs’ apparent view is that the legislature may not modify contracts, no matter how reasonable and necessary, unless prior legislation did nothing to contribute to the problem that is being addressed. There is no such unwritten requirement in Contract Clause challenges and Plaintiffs provide no authority supporting their view. The “reasonable and necessary” test focuses not on the cause of the problem requiring modifications to contracts, but whether the solution is reasonable and necessary.

Moreover, Plaintiffs do nothing to contest the undisputed facts that PERA’s investments decreased in value by \$12 billion in 2008 due to the worldwide economic collapse and that PERA’s funding ratio decreased by 33% in one year to a 53% funded level at the end of 2008. Whether employer contributions could have been raised even higher *before 2008* does nothing to change the analysis as to whether the legislature, faced with the reality of the PERA’s severe underfunding *after 2008*, acted reasonably to address the crisis through Senate Bill 10-001.

Plaintiffs’ “ARC” arguments also are inaccurate for the reasons discussed in PERA’s summary judgment motion and ignored by Plaintiffs. PERA MSJ at 28 n.54.

Disregarding the extensive, undisputed facts set forth in PERA’s summary judgment motion including the \$27.5 billion shortfall at the end of 2008, Plaintiffs also raise irrelevant issues of Colorado’s credit rating and state and local tax rates. Pls’ Resp. at 39. There is no mention in Plaintiffs’ complaint about Colorado’s “general finances,” credit rating, or tax rates because they are not material to any of Plaintiffs’ claims. In contrast, Plaintiffs’ recognition of the relevance of PERA’s underfunding is reflected in Plaintiffs’ complaint where they stress “[i]n 2000, PERA was at 105% of its funding level; by 2008, PERA had dropped to 70% of its funding level by actuarial valuation.” Sec. Am. Comp. ¶ 43. Further, it is not this Court’s job to decide whether the General Assembly should raise or lower taxes or how its bond rating should be weighed against PERA’s critical underfunding. As the Fourth Circuit explained:

It is not enough to reason, as did the district court, that “[t]he City *could have* shifted the burden from another governmental program,” or that “it *could have* raised taxes.” Were these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be.

*Balt. Teachers Union v. Mayor & City Council of Balt.*, 6 F.3d 1012, 1019-20, 1015 (4th Cir. 1993) (emphasis in original) (citations omitted) (“[a]ffording the requisite degree of deference to the City’s legislature, that the impairment was in exercise of the City’s legitimate powers and thus permissible under the Contract Clause.”).

Plaintiffs’ view that Colorado must be on the brink of financial collapse before the General Assembly may modify pension benefits to preserve the very existence of a \$60 billion pension fund defies logic and finds no support in the law. In addressing an analogous argument seeking to limit legislative authority, the *Maryland Teachers* court observed: “Such a

requirement would jeopardize the pension benefits of current and future retirees, would require that the trustees of the Retirement System abdicate their role as fiduciaries, and would impose an *irrational limitation on the legislature's police power.*" *Maryland Teachers*, 594 F. Supp. at 1368. The *Maryland Teachers* court also rejected a similar bond rating argument as that made by Plaintiffs here. Pls' Resp. at 39. In that case, "[t]he plaintiffs consistently argue that the State is not in a financial crises [sic] and that its bond rating is AAA." 594 F. Supp. at 1369. Even where Maryland (as opposed to Colorado) "fund[ed] its pension debt for the most part from the general fund," the court found the COLA change "clearly enhances the State's ability to plan fiscal strategies more accurately by placing some cap on pension costs" and "was a reasonable response to an important public concern." *Id.* at 1369-70.

Finally, Plaintiffs' rosy view of Colorado's finances ignores that Colorado currently has a \$1 billion deficit and in the current state budget being debated could cut up to \$250 million from education. See Todd Engdahl, "Don't Count the Money Yet," *Education News Colorado*, [www.ednewscolorado.org/2011/04/13/17555-dont-count-the-money-yet](http://www.ednewscolorado.org/2011/04/13/17555-dont-count-the-money-yet). Plaintiffs neglect to explain how the State could fund a \$27 billion shortfall in the PERA pension fund.

The reason that there is relatively little authority applying the three-part, modern test to pension benefit legislation affecting those already retired is because, until the 2008 financial collapse, pension funds (like Colorado) have not been faced with the reality of running out of money within decades absent changes to pension benefits of current retirees. The 2008 economic collapse fundamentally changed the landscape and the alternatives that pension funds and legislators need to consider. As evidenced by Plaintiffs' counsel's challenges to COLA changes for retirees in Minnesota and South Dakota, and other changes to retiree benefits they

are challenging in New Hampshire and Massachusetts, Colorado is not alone in making changes to retiree pension benefits in the wake of the 2008 economic crisis.

(2) The Legislature Considered and Rejected Plaintiffs' Purported Alternatives to a COLA Change

Plaintiffs assert that PERA and the State Defendants must prove “that there were no viable alternatives to solve PERA’s funding problems.” Pls’ Resp. at 37. There is no such standard in Colorado or federal authority for determining whether legislation is reasonable and necessary. On the contrary, the Colorado Supreme Court in *DeWitt* simply stated that “a court should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose . . . .” *See DeWitt*, 54 P.3d at 858.

Failing to cite to the legislative record or respond to PERA’s extensive discussion of the alternatives considered by Colorado’s General Assembly, Plaintiffs incorrectly assert that there were three “evident and more moderate’ alternatives” “not considered” by the General Assembly: (1) “reducing new employees’ benefit packages”; (2) “reducing benefits for future retirees”; and (3) “setting a lower goal than 100% funding.” Pls’ Resp. at 40. As extensively discussed by PERA and ignored by Plaintiffs, not only did the General Assembly consider reducing new employee and future retiree benefits, it *did* reduce such benefits in 2004, 2006 and again in Senate Bill 10-001. PERA Opp. at 17-20. The legislature also increased employee and employer contributions in 2004, 2006 and again in Senate Bill 10-001 by raising the AED and SAED such that total contributions will reach 28.15% in 2018 from 20.95% in 2009. *Id.* at 18-19.<sup>15</sup>

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<sup>15</sup> Plaintiffs argue that other states’ contributions are much higher than Colorado, claiming that in 2008, Colorado employers only contributed 10.15%. Pls’ Resp. at 5. As an initial matter, Plaintiffs (and the Wisconsin survey to which they cite) are wrong because PERA employers contributed 11.55% in 2008, as Plaintiffs neglected to include the AED. *See* C.R.S. § 24-51-401-411 (2011). Moreover, Plaintiffs fail to acknowledge that, because of Senate Bill 10-001,

After the 2008 economic crisis, however, the PERA fund was going to run out of money before many of those *future* benefit changes were triggered or generated sufficient savings. PERA Opp. at 21; PERA MSJ at 15-16, 21, 23-24. Plaintiffs do not challenge such facts. The *only* way to preserve the PERA fund so that those future changes could materially improve PERA's funding was to make immediate changes to contribution and benefit payments. PERA MSJ at 21, 23-24. That is the reason the General Assembly, in Senate Bill 10-001, further increased employee and employer contributions, decreased benefits for current and future employees, and readjusted the COLA formula for present retirees. *Id.* at 23-24.

As for Plaintiffs' third alternative, setting a lower funding goal, that proposal also was thoroughly considered but ultimately rejected by the legislature. PERA MSJ at 19-20, 26-28. Plaintiffs disregard that a 100% funding level is mandated by a Colorado law as stated in C.R.S. § 24-51-211(1) (2007), and that since 2007, the GASB rules require "the maximum acceptable amortization period is 30 years." PERA MSJ at 27 (quoting PERA MSJ Ex. 1 at 7). Plaintiffs do not contest either of these facts.

Plaintiffs also mention as part of their proposed "reduction in new employees' benefit packages" that the legislature should have considered a defined contribution plan rather than the current defined benefit plan. Pls' Resp. at 41. Once again, as PERA discussed in its summary judgment motion, the General Assembly thoroughly considered such proposal as reflected in proposed Amendments 14, 15, 63. PERA MSJ at 19-20, 22-29. As explained by and to the legislature, switching new employees to a defined contribution plan would not save the PERA

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PERA employer contributions will be steadily increased to 14.35% in 2015, reaching a total employer and employee contribution of 28.15% in 2018. *See id.* With Senate Bill 10-001's increases, Colorado's employer contribution figure and total contribution figure will be comparable to or above the rates for the states listed by Plaintiffs. *See* Pls' Ex. 6 at 22-23.

fund money and would instead exacerbate the current funding deficiencies because it would lower the inflow of contributions needed to pay retirement benefits. *Id.* at 22.

Plaintiffs also provide no explanation for how their proposed alternatives to the COLA readjustment, which the legislature largely adopted in cutting current and future employee benefits, are viable alternatives to address PERA's severe underfunding. Plaintiffs do nothing to establish that any combination of their alternatives—without also changing the COLA for current retirees—would reach Plaintiffs' proposed 80% funding level, much less the 100% funded level required by Colorado law.

Moreover, even if Plaintiffs' discussion of their proposed alternatives was accurate, Plaintiffs' request that this Court second guess the legislature misconstrues the role of courts in reviewing whether legislation is reasonable and necessary to serve a legitimate public purpose. As explained by the Second Circuit, "*U.S. Trust Co.* does not require courts to reexamine all of the factors underlying the legislation at issue and to make a *de novo* determination whether another alternative would have constituted a better statutory solution to a given problem." *Buffalo Teachers*, 464 F.3d at 370. The Colorado Supreme Court likewise instructs that Colorado courts do not act as a "super legislature" when judging constitutionality:

The General Assembly has broad discretion to fashion a licensing scheme that, in its view, protects the public health, safety, welfare, and morals, and *we do not sit as a 'super legislature' to weigh the propriety of that legislation.* Because we may not substitute our judgment for that of the General Assembly as to the wisdom of the licensing scheme, the plaintiff's disagreement with the soundness of the law has no relevance to its constitutionality, as long as the legislation bears a rational relationship to a legitimate end of government.

*Ficarra v. Dep't. of Regulatory Agencies, Div. of Ins.*, 849 P.2d 6, 22 (Colo. 1993) (quoting *Colo. Soc'y of Cmty. & Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 712 (Colo. 1987)); *see also Maryland Teachers*, 594 F. Supp. at 1371 ("[o]nce the facts are brought to light the court should not act as a super legislature and attempt to second guess which legislative act

would have better solved the perceived problem”); *Baltimore Teachers*, 6 F.3d at 1021-22 (“The Contract Clause, however, does not require the courts—even where public contracts have been impaired—to sit as superlegislatures . . . . Not only are we ill-equipped even to consider the evidence that would be relevant to such conflicting policy alternatives; we have no objective standards against which to assess the merit of the multitude of alternatives.”).

Plaintiffs ignore this well-established rule and ask the Court to do exactly what is prohibited—second guess the legislature’s choices to address PERA’s critical underfunding, reject the complex combination of alternatives it chose, and instead find the impossible—that benefit changes to present and future employees alone could provide the solution to PERA’s severe underfunding. As the undisputed legislative record shows, there simply is no way to effectively address PERA’s underfunding and leave the 3.5% compounding COLA undisturbed.

With the vocal support of retirees and their representatives, the General Assembly carefully and thoroughly addressed the critical funding shortfall facing PERA and made the difficult choice to fix the PERA pension system now rather than leaving the crisis for another day. The Court should reject Plaintiffs’ request to strike down the General Assembly’s reasonable and necessary actions to preserve the financial viability of the PERA pension system.

**V. Plaintiffs’ Rule 56(f) Request Should Be Denied Because All Material Facts Are Contained in the Public Record and Plaintiffs’ Failure to Review Documents Is Not a Legitimate Basis for Relief**

C.R.C.P. 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts *essential to justify its opposition*, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

To warrant a continuance for additional discovery, a Rule 56(f) request must “identify[] the probable facts not available and what steps have been taken to obtain these facts,” “explain[]

how additional time will enable [a party] to rebut movant’s allegations of no genuine issue of material fact,” and make requests that are “specific, not conclusory.” *Bailey v. Airgas-Intermountain, Inc.*, --- P.3d ---, No. 09CA1125, 2010 WL 1913798, at \*4 (Colo. App. May 13, 2010) (internal citations and quotes omitted). “It is not an abuse of discretion to deny a C.R.C.P. 56(f) request if the movant has failed to demonstrate that the proposed additional discovery was necessary and could produce facts that would preclude summary judgment.” *Waskel v. Guar. Nat’l Corp.*, 23 P.3d 1214, 1222 (Colo. App. 2000) (citations omitted).<sup>16</sup>

Here, Plaintiffs appear to make three arguments in support of their Rule 56(f) motion: (1) they have not completed review of the initial disclosures in the case; (2) they need discovery on the “reasonable and necessary” element beyond the legislative record and other publically available information; and (3) if the Court finds the COLA provisions ambiguous, Plaintiffs would need to gather additional, extrinsic evidence consisting of informal communications from PERA. Pls’ Resp. at 35; Pls’ Resp. Ex. 1 at ¶¶ 8, 9. Plaintiffs’ arguments do not satisfy their burden under Rule 56(f) because lack of diligence in reviewing documents within Plaintiffs’ counsel’s possession does not justify relief, and the discovery issues identified are legally and factually irrelevant to Plaintiffs’ Contract Clause claims.

A. Plaintiffs’ Failure to Gather and Review Documents Does Not Warrant Rule 56(f) Relief

Plaintiffs’ counsel surmises that additional relevant documents in Defendants’ possession “surely must exist,” but claim not to know because they “have not yet had an opportunity to properly review 9,000 pages of documents provided as part of Defendants’ mandatory disclosures (which presumably contains the entire legislative record and public documents as

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<sup>16</sup> C.R.C.P. 56(f) is identical to its federal counterpart and Colorado courts thus look to federal precedent in interpreting the rule. *Bailey*, 2010 WL 1913798, at \*4.

determined by the Defendants.)” Pls’ Resp. at 35 n.6; Pls’ Resp. Ex. 1 ¶ 10. First, Plaintiffs’ counsel’s admitted failure to review a relatively small quantity of documents (approximately three banker’s boxes) in their possession since December 17, 2010 renders their claimed need for discovery completely speculative and unsupported. Second, as PERA specified in its summary judgment motion, the *entire*, extensive legislative record is attached as Appendix A to PERA’s summary judgment motion filed on March 17, 2011. PERA compiled and hand-delivered to Plaintiffs’ counsel the publically-available legislative record which PERA gathered from the state archives and includes hearing transcripts that PERA paid to have transcribed. Nothing prevented Plaintiffs from gathering those documents in the 14 months since they filed this case and those records were never “in Defendants’ control.” Pls’ Resp. Ex. 1 ¶ 7. Plaintiffs thus had everything they needed to fully respond to PERA’s summary judgment motion and a continuance under Rule 56(f) for their failure to review documents in their possession is unwarranted.

Moreover, Plaintiffs filed this case more than a year ago, it has been at-issue since October 21, 2010, discovery has been open since December 17, 2010, and it is set for trial in 9 months. As illustrated by Plaintiffs’ counsel’s affidavit making legal arguments as to *McPhail* and *Bills*, Plaintiffs chose not to pursue discovery from PERA or the State Defendants until one week ago, based on their view that *McPhail* and *Bills* renders the three-part, modern Contract Clause test irrelevant. Though Plaintiffs are entitled to pursue whatever litigation strategy they wish, they cannot intentionally fail to pursue discovery on certain claims and then negate PERA’s summary judgment motion by seeking the “opportunity to request and receive from the

Defendants what they believe are the relevant documents.” Pls’ Resp. at 35.<sup>17</sup> Not only did Plaintiffs have such “opportunity,” but their vague request does nothing to justify the specificity requirement for Rule 56(f) relief.

B. All Evidence Necessary to Resolve Plaintiffs’ Claims Is Found in the PERA Statute and DPS Plan, Legislative History, and the Extensive Legislative Record for Senate Bill 10-001

As PERA has established above and in its summary judgment motion, because a Contract Clause challenge is based on an examination of challenged legislation, courts hold that the relevant evidence is that found in the text and history of the legislation, and the public record. PERA MSJ at 11-14. In rejecting Rule 56(f) requests in constitutional challenges, courts hold that where there is a “facial challenge” to the constitutionality of legislation “a court’s analysis ‘is limited to the actual evidence Congress considered.’” *Shelby Cnty., Alabama v. Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) (citation omitted); *see also Gen. Elec. Co. v. Johnson*, 362 F. Supp .2d 327, 337 (D.D.C. 2005) (holding that “a facial challenge to the text of a statute does not typically require discovery for resolution because the challenge focuses on the language of the statute itself”; denying a 56(f) discovery request).

As for the question of whether Plaintiffs possess a contractual right to a COLA fixed for life at retirement, the resolution of that question turns on the statutory and DPS plan language of the last 40 years and legislative history. PERA Opp. at 49-53. Plaintiffs’ proposed need for additional “extrinsic evidence” of PERA’s informal communications fails because such documents are legally irrelevant to the meaning of the COLA provisions. *Id.* at 47-48.

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<sup>17</sup> Plaintiffs misleadingly state that they “have not obtained the *requested* documents from Defendants” but neglect to mention that they had requested *no documents* from Defendants at the time they had filed their Response. Pls’ Resp. at 8. Plaintiffs served their first document requests on Defendants on April 27, 2011.

To address the “reasonable and necessary” element of their Contract Clause claims, Plaintiffs purport to need discovery to explore: (1) whether the State of Colorado was in a fiscal emergency; (2) whether the employer contribution rate should have been higher in the 2000s; and (3) alternatives to those considered and adopted by the legislature in Senate Bill 10-001. First, as discussed above, Plaintiffs’ first two purported grounds are irrelevant to whether the General Assembly’s passage of Senate Bill 10-001 “is reasonable and appropriately serves a significant and legitimate public purpose . . . .” *See DeWitt*, 54 P.3d at 858. As for Plaintiffs’ claim to need for discovery on alternatives to readjusting the COLA, the legislative record establishes that all alternatives proposed by Plaintiffs here (among numerous others) were considered and, in large part, adopted by the legislature. PERA Opp. at 18-20, 23; PERA MSJ at 18-29.

Plaintiffs seek “to take depositions of the Defendants” (Pls’ Resp. at 35) but do not identify which Defendants or what relevant information they hope to obtain. In making such request, Plaintiffs disregard that deposing legislators about what they considered in voting on legislation is barred by the speech-and-debate clause of the Colorado Constitution. *See Colo. Const. art. V, § 16* (“The members of the general assembly . . . for any speech or debate in either house, or any committees thereof, they shall not be questioned in any other place.”); *see also* U.S. Const. art. I § 6, cl. 1 (“for any Speech or Debate in either House, they shall not be questioned in any other Place”). The Colorado Supreme Court explained the clause’s adoption was intended “to ensure that legislators could conduct the business of lawmaking without undue hindrance or fear caused by threatened or pending lawsuits related to their legislative duties.” *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 208 (Colo. 1991). The similar federal clause has been interpreted as “shield[ing] legislators from . . . being compelled to testify or provide

other discovery in lawsuits brought by or against third parties.” *Alliance for Global Justice v. Dist. of Columbia*, 437 F. Supp. 2d 32, 35-36 (D.D.C. 2006); *see id.* at 36 (“A litigant does not have to name members or their staffs as parties to a suit in order to distract from their legislative work. Discovery procedures can prove just as intrusive.”) (citation omitted). Like litigants in all constitutional challenges to legislation, Plaintiffs are bound by legislative record which, in this case, is extensive, detailed, and in Plaintiffs’ possession.<sup>18</sup>

Plaintiffs make no specific mention of a need to depose PERA personnel and any such claimed need would be meritless because Plaintiffs’ challenge is to Senate Bill 10-001, which was proposed, debated, amended, and passed by the General Assembly, not PERA. PERA fulfilled its statutory mandate to develop and provide a proposal to the legislature by November 1, 2009, and that proposal was the 2/2/2 Plus plan. PERA Opp. at 20-22. After that point, PERA personnel participated in the legislative hearings as any other witness called at the pleasure of the General Assembly—no different than pension benefit consultants, union leadership, retiree organizations, and individual retirees, including Plaintiff Justus. PERA Opp. at 19-23; PERA MSJ at 15-28.

Behind all of Plaintiffs’ purported discovery needs is an invitation to the Court to act as a superlegislature and reweigh the testimony and policy decisions made by the General Assembly. As discussed in PERA’s motion for summary judgment and above, courts across the nation have recognized that acting as a superlegislature is not their proper role in reviewing legislation under the Contract Clause. PERA MSJ at 11-13. The doctrine limiting facial constitutional challenges

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<sup>18</sup> Plaintiffs also claim to need discovery to determine whether the General Assembly and PERA in 2000 “could not have known” that the inflation rate would average 2.2% for the next decade and that annual investment returns would be less than the assumed 8.5% annual rate. Pls’ Resp. at 42. Plaintiffs’ claim to need discovery on such self-evident facts is illustrative of the failings of their Rule 56(f) request.

to the legislative record and the idea behind the state and federal constitutions' speech-and-debate clauses similarly reflect a longstanding value within our system of government that legislators cannot be haled into court to answer for legislation. Especially in a case like this where there is a robust legislative record in which competing visions were presented to and debated by the legislature, it is particularly unnecessary and inappropriate to go beyond the legislative record.

## **VI. Summary Judgment Is Proper on Plaintiffs' Takings Clause, Substantive Due Process, and § 1983 Claims**

In responding to PERA's motion for summary judgment on Plaintiffs' takings, substantive due process, and section 1983 claims, Plaintiffs largely copied and pasted arguments they raised in their motion to dismiss briefing. PERA extensively discussed these arguments in prior briefing. PERA MSJ at 33-41; PERA MTD at 17-28 (May 10, 2010); PERA Reply to MTD at 8-23 (June 23, 2010). PERA incorporates those discussions here and only addresses below Plaintiffs' new assertions raised in their response to PERA's summary judgment motion.

### **A. Plaintiffs' Takings Clause and Substantive Due Process Claims Necessarily Fail Because Plaintiffs' Contract Clause Claims Fail**

Plaintiffs do not refute the case law cited by PERA that courts summarily reject takings and substantive due process clause claims where no contract right exists to support a Contract Clause claim (PERA MSJ at 33-34), and affirmatively argue that "the analysis of whether a plaintiff has a requisite property right in his pension is the same under the Contract Clause and the Takings Clause." Pls' Resp. at 45. Plaintiffs thus have conceded that if the Court finds there is no contract right to COLA formulas fixed for life at retirement, all other claims in their complaint necessarily fail.

B. Plaintiffs' Takings Clause Claim Fails Because a COLA Formula Is Not Property

Plaintiffs' generalized statements that property is "as diverse as the human mind can conceive" (Pls' Resp. at 44) does nothing to answer the question here about whether a COLA formula in place at retirement is property for Takings Clause purposes. Plaintiffs' generalized assertions regarding the nature of property are irrelevant because the United States Supreme Court in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and the Federal Circuit in *Branch v. United States*, 69 F.3d 1571, 1574-76 (Fed. Cir. 1995), and *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 32, 41 & n.11, held that government-imposed obligations to pay or redistribute money are not takings as a matter of law. PERA MSJ at 34-35; PERA Reply to MTD at 11-14; PERA MTD at 17-19. Courts also have rejected Plaintiffs' argument (Pls' Resp. at 44) that the Takings Clause covers parties' unilateral expectations. *See N.E.A.-R.I.*, 172 F.3d at 29 ("[T]he Supreme Court has also made clear that the protection under the Takings Clause does not extend to mere 'unilateral expectations' even if they are entirely plausible expectations of economic benefits.") (quoting *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

The two decisions on which Plaintiffs rely to argue that the COLA in place at retirement is a property right protected by the Takings Clause are the narrow exception in which the government has taken a specific fund of private money for general government use. PERA MSJ at 34-36; PERA Reply to MTD at 12-13.<sup>19</sup> Plaintiffs' citation to a recent Supreme Court case about money being fungible is not instructive because the court was conducting statutory interpretation of the Bankruptcy Code to determine whether a debtor "who owns his car outright,

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<sup>19</sup> Plaintiffs overstate the holding in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170-71 (1998), in claiming that the Supreme Court held that the fund was a taking. Pls' Resp. at 46. The majority there simply held that the interest was property and remanded the case to the district court to determine if it was a taking. *See Phillips*, 524 U.S. at 172 (Souter, J., dissenting) (explaining majority's decision).

and so does not make loan or lease payments, may claim an allowance for car-ownership costs.” *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 721 (2011).

Plaintiffs have recycled their argument as to why they believe a Takings Claim should not be resolved in a motion to dismiss and simply substituted in the words “before discovery is completed.” *Compare* Pls’ Resp. MSJ at 45 *with* Pls’ Resp. to MTD at 9; PERA Reply to MTD at 8 (responding to same argument when previously made). PERA has provided multiple examples of courts disposing of similarly groundless takings claims on a motion to dismiss or motion for summary judgment. PERA MTD at 15 n.21, 17-19; PERA Reply to MTD at 8-13; PERA MSJ at 36-37 & n.65. Courts grant such motions after applying the three-factor regulatory taking test. PERA MSJ at 36 n.65. Plaintiffs argue that PERA “simply wants this court to accept their [sic] justification” that Senate Bill 10-001 satisfies the regulatory taking test yet Plaintiffs do not provide a coherent response to the three-factor analysis, resorting instead to more suppositions about potential discovery needed that is irrelevant to the three factors. Pls’ Resp. at 47.

C. Plaintiffs’ Substantive Due Process Claim Fails Because Pension Benefits Are Not Fundamental Rights and the Rational Basis Standard Is Satisfied Here

It is well settled that pension benefits are not fundamental rights under the Due Process Clause, and thus due process challenges are subject to highly deferential review under the rational basis standard. Plaintiffs cannot satisfy such standard because they have repeatedly acknowledged that the “government has an interest in a healthy pension system.” PERA MSJ at 37-41; Pls’ Resp. at 49. That Plaintiffs do not like the means chosen by Colorado to achieve that end does nothing to establish a lack of due process. Plaintiffs’ counsel dropped this identical, meritless claim in its Minnesota pension litigation and should have done the same here.

Plaintiffs have not cited “other courts” (Pls’ Resp. at 48) finding that pension benefits are fundamental rights, but again quote from one unpublished federal district court decision that wrongly confused *procedural* due process and *substantive* due process. PERA Reply to MTD at 17-18 (distinguishing *Mayborg v. City of Bernard*, No. 1:04-CV-00249, 2006 WL 3803393 (S.D. Ohio Nov. 22, 2006)).

D. Plaintiffs’ § 1983 Claims Fail Because Their Underlying Claims Fail

Plaintiffs do not contest that their § 1983 claims fail on summary judgment if the underlying Contract Clause, Takings Clause, and Substantive Due Process claims fail.

**CONCLUSION**

PERA respectfully requests that the Court grant summary judgment in its favor on all Plaintiffs’ claims.

Respectfully submitted this 6<sup>th</sup> day of May, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2011, a true and accurate copy of the foregoing PERA Defendants' Reply in Support of Motion for Summary Judgment was served via Lexis-Nexis File & Serve on the following individuals:

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