

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS, JR. and ROBERT P. LAIRD, JR., on behalf of themselves and those similarly situated,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and, MARYANN MOTZA, in their official capacities only,</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.: 2010-CV-1589</p> <p>Division: 6</p>
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<p>STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT</p>	

Defendants, Governor John Hickenlooper and the State of Colorado (“State Defendants”) file this reply in support of summary judgment and respectfully request that

this Court grant summary judgment in their favor pursuant to C.R.C.P. Rule 56. In support thereof, State Defendants plead as follows:

JOINDER IN PERA DEFENDANTS' REPLY

PERA Defendants filed a comprehensive reply in support of their motion for summary judgment on all of Plaintiffs' claims in this litigation. Instead of providing substantially similar arguments in this reply, and to conserve the scarce judicial and legal resources of this Court, State Defendants respectfully adopt PERA Defendants' reply. State Defendants therefore include below a brief argument related to Attorney General Opinion 04-04, and otherwise respectfully request the Court to consider all of the facts and arguments in PERA's reply brief as though set forth fully herein.

REPLY REGARDING ATTORNEY GENERAL OPINION 04-04

Plaintiffs urge this Court to apply the reasoning and simplified Contracts Clause test of *McPhail* to the facts of this case. Plaintiffs point to Attorney General Opinion No. 04-04 as authority for the proposition that this Court should apply the outdated *McPhail* test in its analysis of the constitutionality of SB 10-001. However, *McPhail*, decided in 1959, is not representative of the modern, three-part Contracts Clause test currently applied by Colorado's Supreme Court, the U.S. Supreme Court and a majority of Courts across the United States in Contracts Clause disputes. As discussed at length by PERA Defendants in their Opposition to Plaintiffs' Motion for Partial Summary Judgment, the modern Contracts Clause test, developed in 1977 by the U.S. Supreme Court in *U.S. Trust*, was first applied in Colorado in 2002 in the *DeWitt* case. Accordingly, under the facts of this case, and in interpreting a Contracts Clause claim directed at a statute passed by Colorado's legislature, it is clear that *DeWitt* controls.

Colorado's judiciary is the final arbiter of what the State's laws and constitutions provide. *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1379 (Colo. 1985) (noting that "interpretation of the constitution [is] a function at the very core of the judicial role"); see *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (invalidating a statute that "attempt[ed] a substantive change in constitutional protections"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). Colorado courts are sensitive to and typically note when an Attorney General Opinion directly answers a question that is relevant to the facts of a case before the Court. *Ceja .v Lemire*, 147 P.3d 1095, 1096 (Colo. App. 2006) (Attorney General Opinion directly on point considered persuasive authority). Likewise, when the question asked in an Attorney General Opinion is not the same as the one being considered by the Court, the Opinion and its reasoning are unlikely to be applied. *Fidelity Castle Pines, Ltd v. State*, 948 P.2d 26, 31 (Colo. App. 1997) (declining to apply Attorney General Opinion reasoning when statute at issue in the case was subtly different from the one analyzed by the Attorney General). In rare cases, when a court determines that an Opinion of the Colorado Attorney General is not legally correct, courts have considered but not applied the reasoning

of the Opinion. *Leddy v. Cornell*, 120 P. 153, 155-56 (Colo. 1912) (Attorney General Opinion is persuasive authority, but where opinion does not enjoy legal support, it need not be followed).

In 2004, regarding the pension program administered by PERA, the Attorney General was asked, “[w]hat, 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?” See Attorney General Opinion 04-04, 1st page, 2nd ¶. The question presented in Attorney General Opinion 04-04 specifically implicated *current* employees, and the Attorney General opined that pension benefits for *current* employees “may qualify as partially vested pension rights” which may be changed if (1) there is a corresponding beneficial change in favor of the employee, (2) the change is actuarially necessary, or (3) if the change strengthens or improves the pension plan. See Attorney General Opinion 04-04, 1st page, 3rd ¶.

Opinion 04-04 goes on to answer an unasked question, stating that for *retirees*, “fully vested” pension rights cannot be reduced by the General Assembly. *Id.* Opinion 04-04 references a number of pre-2002 Colorado State court opinions, including *McPhail*, to support its analysis of that unasked question. *Id.*, p.2-3. A review of pre-2002 Colorado cases involving the Contracts Clause and pension-related benefits indicates that Colorado courts were struggling with the ideas of legislative modification to pension contracts, and were focused not on the *existence* of a contract, but on the concepts of “fully-vested” and “partially-vested” rights. Opinion 04-04 reflects that struggle. *Id.*, p.3, final ¶ and p.4 (“Even if certain pension benefits are *contractual rights* protected by the Colorado Constitution, and even if such pension rights are *partially vested pension rights*, the Colorado courts have consistently allowed changes under certain conditions.” (emphasis added)).

In 2002, however, the Supreme Court erased any distinction between the treatment of “vested” and “partially vested” contract rights when it unmistakably stated that *vested* rights in a contract are not inviolate, but are instead subject to legislative change. *In re DeWitt*, 54 P.3d at 858 (the Colorado and U.S. Constitution’s Contracts Clauses are not absolute, and must be read to permit certain legislative changes to vested contract rights).¹

¹ Although *DeWitt*, like its predecessor cases, references “vested” contract rights, the court focused on the *existence* of a contract (of any type) and the rights under that contract rather than the way the contract came to be formed or whether there were more or additional rights under the contract that might accrue to the person in the future. *DeWitt*, 54 P.3d 849, 858 (a party must first demonstrate that the contract gave him a vested right). Accordingly, *DeWitt* seems to use the term “vested” in the sense “existing” and therefore more aptly draws a distinction between a valid contract and a contract that does not exist, rather than a distinction between types of contract rights (i.e. vested or partially vested). As PERA Defendants point out in their Reply, despite the continued use of the terms, the description of

For reasons that are not clear, Attorney General Opinion 04-04 did not identify or include the *DeWitt* case in its analysis of the unasked question regarding “vested” pension rights for retirees. This is true despite the fact that *DeWitt* specifically referenced *McPhail* for the proposition that the first prong of any Contracts Clause analysis is to determine if there is a valid contract right that is potentially impaired by legislation. *In re DeWitt*, 54 P.3d 849, 858 (Colo. 2002) (Contracts Clause analysis requires consideration of three factors, the first of which is the existence of a contractual relationship) *citing Police Pension & Relief Bd. v. McPhail*, 338 P.2d 694, 697 (Colo. 1959).²

Regardless, in Opinion 04-04, the Attorney General was specifically asked about *current* State employees who had not retired and were *partially vested* in their pension benefits. Opinion 04-04 accurately states that such benefits can be modified. Opinion 04-04 is certainly persuasive authority for this Court to consider on that particular question. Regarding Opinion 04-04’s statement about the rights of *retirees*, it is clear that the question was not asked, but was instead answered unnecessarily, and it is likewise clear that the analysis of that unasked question was not complete. As discussed above, “vested” contract rights are subject to modification by legislative act if they satisfy the modern, three part Contracts Clause test.

Accordingly, to the extent this Court considers Opinion 04-04 persuasive authority, it should do so only as it relates to what are commonly referred to as “partially vested” contract rights, which can be modified by legislative act. The Court, however, should decline to consider Opinion 04-04 as persuasive authority on the topic of “vested” contract rights because the question presented in the Opinion did not implicate retirees or “vested” contract rights, and the Opinion is therefore not on point, see *Fidelity Castle Pines, Ltd*, 948 P.2d at 31, and because the Opinion does not address *DeWitt* and its analysis is therefore not complete on that topic. *Leddy*, 120 P. 153, 155.

rights as vested or partially vested appears to have little bearing or meaning in a Contracts Clause analysis as courts now focus more on whether a contract existed or not.

² *DeWitt* goes on to set out the remaining two prongs of the modern Contracts Clause analysis, clearly placing Colorado on the long list of Courts in the United States that follow the *U.S. Trust* line of cases when analyzing challenges to legislation such as S.B. 10-001. *Id.*

CONCLUSION

For the foregoing reasons, and those stated in the parties' motion for summary judgment, State Defendants join the PERA Defendants in requesting judgment in their favor pursuant to C.R.C.P. Rule 56, and for such other relief as the Court deems appropriate.

Respectfully submitted this 13th day of May, 2011.

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In accordance with Colo.R.Civ.P. 121 § 1-26(7), a printed or printable copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** upon all parties herein by e-filing this 13th day of May, 2011 addressed as follows:

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