COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202 Telephone: (303) 861-1111	
Appeal from the District Court, CITY AND COUNTY OF DENVER, COLORADO, Case No. 2010CV1589 Honorable Judge Robert S. Hyatt	▲ **COURT USE ONLY** ▲
Plaintiff(s)-Appellant(s): GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and ROBERT P. LAIRD, JR., on behalf of themselves and those similarly situated, v. **Defendant(s)-Appellee(s):** STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARY ANN MOTZA, in their official capacities only.	Case Number: 11CA1507
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APPELLANTS' OPENING BRIEF

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<hr>Plaintiff(s)-Appellant(s):
GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS, JR and ROBERT P. LAIRD, JR, on behalf of themselves and those similarly situated,

v.

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The brief complies with C.A.R. 28(g).

Choose one:

☒ It contains 9,370 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/Richard Rosenblatt

Richard Rosenblatt

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STATEMENT OF THE ISSUE

Whether the Denver District Court erred as matter of law in concluding that the proposed plaintiff class of Colorado public sector employees ("Retirees") have no contract right or other right to any cost-of-living adjustment, entirely disregarding the Colorado Supreme Court's on-point decisions in Police Pension and Relief Board of the City and County of Denver v. McPhail, 139 Colo. 330 (1959), and Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383 (1961), and as a result wrongly denied the Retirees' motion for partial summary judgment and wrongly entered summary judgment for the State of Colorado and other Defendants ("Colorado Defendants").

STATEMENT OF THE CASE

Plaintiffs Gary R. Justus, Kathleen Hopkins, Eugene Halaas, Jr., and Robert Laird, Jr., on behalf of themselves and those similarly situated (collectively, "Retirees"), commenced this action in the District Court for Denver County on February 26, 2010. Complaint, Bookmark ID #27944505, CD page 2. The proposed class of Retirees includes approximately 50,000 Colorado public sector employees who have retired. All Retirees are members of the Public Employees Retirement Association of Colorado ("PERA"), which includes former public school teachers who taught millions of Colorado's children; retired state judges

who enforced the state's laws; retired police officers who put themselves in harms way to protect Colorado's citizens; and other retired state, county and local government workers who were employed in the various sectors of Colorado government.

Retirees alleged that in exchange for their service, they were promised certain specified pension benefits, including an annual cost-of-living adjustment ("COLA"). Retirees further alleged that they held up their end of the bargain by rendering years of service, often at a lower wage than they could have earned in the private sector. Further, throughout their working lives, Retirees made contributions to Colorado's Retirement Systems, as required by state law. Having done so, they reasonably expected that they would receive the promised pension benefits that would sustain them throughout retirement.

In 2010, the Colorado Legislature enacted Senate Bill 10-001 ("2010 Pension Legislation"), which reduced the pension benefits promised to Retirees by eliminating the COLA entirely for 2010 and by scaling back the annual COLA thereafter. Retirees allege that under well-established Colorado case law, they acquired rights to fully vested pension benefits, including the annual COLA in effect under the law when they became eligible to retire, and that the 2010 Pension Legislation violated those rights.

Retirees commenced their District Court action with a Complaint filed February 26, 2010, naming as Defendants the State Of Colorado, the Public Employees' Retirement Association of Colorado ("PERA"), and the then Governor and two former PERA officials, in their official capacities only; the individual defendants have since been replaced with the appropriate current officials. Retirees filed a First Amended Complaint on March 18, 2010. First Amended Complaint, Bookmark ID #28459106, CD page 13. Retirees sought a judicial declaration finding Sections 19 and 20 of Senate Bill 10-001 in violation of the Contract clause of the Colorado Constitution (Count I);[1] and the Contract (Count III), Takings (Count IV), and Substantive Due Process (Count V) Clauses of the United States Constitution. Retirees also sought relief pursuant to 42 U.S.C. § 1983 against the individual defendants in their official capacities for violations of the Contract (Count VI), Takings (Count VII) and Substantive Due Process (Count VIII) Clauses of the United States Constitution.

The parties filed cross motions for summary judgment. Plaintiffs' summary judgment Motion, Bookmark ID #34753454, CD page 521; PERA Defendants' summary judgment motion, Bookmark ID #37730166, CD page 924. Retirees

[1] Count II had alleged a violation of Article V, § 48 of the Colorado Constitution, but Plaintiffs agreed this claim could be dismissed on September 14, 2010.

relied extensively on Police Pension and Relief Board of the City and County of Denver v. McPhail, 139 Colo. 330 (1959), and Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383 (1961). Plaintiffs' summary judgment Motion, Bookmark ID #34753454, CD page 522-23, 532-537; see also Plaintiffs' Reply Brief in Support of Summary Judgment Motion, Bookmark ID #38028147, CD pages 1053-56, 1058-63, 1066-68, 1070, 1072 (extensively discussing McPhail and Bills); see also Second Amended Class Action Complaint, Bookmark ID #37056989, CD page 664 (addressing McPhail and Bills in four paragraphs). Defendants also extensively briefed the significance of McPhail and Bills. PERA Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, Bookmark ID #37720186. CD pages 822-824, 849-857, 870.

By Order dated June 20, 2011, Denver District Court Judge Robert S. Hyatt denied Retirees' Motion for Partial Summary Judgment. Order, Bookmark ID #40216707, CD page 1586. Without explaining the basis for this conclusion, the District Court simply stated that Retirees had not met their summary judgment burden. Id. at CD page 1591. By Order dated June 29, 2011, the District Court granted the Colorado Defendants' Motion for Summary Judgment, dismissing all of Retirees' claims. Order, Bookmark ID #40496384, CD page 1600. The court concluded that "based on numerous and steady changes in the PERA COLA

formula for retirees, Plaintiffs could not have had a reasonable expectation that the COLA formula that happened to be in place at the date of their retirement would be unchangeable for the rest of their lives." Id. at CD page 1607. Neither of the District Court's summary judgment orders even cited, let alone discussed, McPhail or Bills. See id.

Retirees appeal from both of the District Court's summary judgment orders. Notice of Appeal, Bookmark ID #41257540, CD page 1612. The Court of Appeals has jurisdiction to hear this matter pursuant to Section 13-4-102(1), C.R.S. (2006), and C.A.R. 4(a).

STATEMENT OF THE FACTS

A. The Named Plaintiffs And PERA

Named Plaintiff Gary Justus is a Colorado resident who worked for more than 29 years for the Denver Public Schools ("DPS") before retiring in 2003, when he began receiving DPS pension benefits. Affidavit of Gary Justus, Bookmark ID #38369859, CD page 1219-20. Plaintiff Eugene Halaas, Jr. is a California resident who worked for more than 27 years as a judge for the State of Colorado before retiring in 1999 and beginning to receive pension benefits under PERA. Affidavit of Eugene Halass, Jr., Bookmark ID #38369859, CD page 1222-23. Plaintiff Robert Laird, Jr. is a Colorado resident who worked for the Pikes Peak Community

College for over 32 years, making contributions to PERA throughout his employment. Affidavit of Robert Laird, Bookmark ID #38369859, CD page 1225. Plaintiff Kathleen Hopkins is a Colorado resident who worked approximately 15 years for the State of Colorado before retiring in July 2001. First Amended Complaint, Bookmark ID #28459106, CD page 14. Ms. Hopkins currently receives pension benefits from PERA. Id.

Defendant PERA "provides retirement and other benefits to the employees of more than 400 government agencies and public entities in the state of Colorado. PERA is the 21st largest public pension plan in the United States." PERA Website, http://www.copera.org/pera/about/overview.htm (last visited 10/22/10) (cited in Plaintiffs' Motion for Partial Summary Judgment, Bookmark ID #34753454, CD page 525). "Its membership includes employees of the Colorado state government, public school teachers in the state, many university and college employees, judges, many employees of cities and towns, state troopers, and the employees of a number of other public entities." Id. Further, "PERA is a substitute for Social Security for most of these public employees. Benefits are pre-funded, which means while a member is working, he or she is required to contribute a fixed percentage of their [*sic*] salary to the retirement trust funds." Id.

In addition to the members' contributions, PERA employers are required to make contributions to PERA. However, the Legislature has continually kept contribution rates below the annual required contribution as determined by PERA's actuaries. In a March 2010 Report, the PEW Center on the States reported that Colorado contributed only 68.3% of its full actuarial required contribution over the past 10 years, and flagged it as one of ten "lagging" states. PEW Report, Bookmark ID #3839946, CD page 1264.

B. Promises To Retirees

For many years, the State of Colorado promised Retirees that they would receive post-retirement annual adjustments to their pensions.

1. Non-DPS Retirees

With respect to non-DPS (Denver Public Schools) Retirees, prior to March 1, 1994, the state law that governed PERA provided that "[c]ost of living increases in retirement benefits and survivor benefits shall be made only upon approval by the general assembly." Colo. Rev. Stat. § 24-51-1001 (1992). In 1993, the Legislature amended this provision to make annual COLA increases granted on or after March 1, 1994 **automatic** and no longer dependent each year on approval by the legislature. H.B. 93-1324, § 7 (1993). Under the new law:

> (1) Annual increases in retirement benefits and survivor benefits **shall** occur on March 1 if said benefits have been paid for at least three

> months preceding March 1. Such increases in benefits shall be calculated in accordance with the provisions of sections 24-52-1002 and 24-51-1003 and shall be paid from the division trust funds.

Colo. Rev. Stat. § 24-51-1001 (1994) (emphasis added).

In Colo. Rev. Stat. § 24-51-1002—the part of the statute that made annual COLA increases automatic—the Legislature utilized language ("shall") that plainly showed that these yearly adjustments were mandatory:

> (1) The cumulative increase applied to benefits paid **shall** be recalculated annually as of March 1 and **shall** be the lesser of:
>
> (a) The total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1, 1993; and
>
> (b) The percent increase in the consumer price index from 1992, or the year prior to the year in which the benefit becomes effective, whichever is later, to the year preceding March 1.

Colo. Rev. Stat. § 24-51-1002 (1994) (emphasis added). As a consequence of this amendment, from 1994 through 2000, pension benefits of PERA retirees were automatically and mandatorily increased under specific formulae.

In 2000, the Legislature amended Colo. Rev. Stat. § 24-51-1002 again, this time replacing the annual variable COLA adjustment with **a guaranteed 3.5%** annual increase effective March 1, 2001. Laws 2000, Ch. 186, § 7. As amended, the statute provided:

> The cumulative increase applied to benefits paid **shall** be recalculated annually as of March 1 and shall be the total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1, 2000.

Colo. Rev. Stat. § 24-51-1002 (2002) (emphasis added).

In 2004, the Legislature amended Colo. Rev. Stat. § 24-51-1002 *for future PERA members only*, effectively grandfathering past members at the 3.5 percent level. Thus, the 2005 legislation provided that the annual increase for persons who became members on or after July 1, 2005 shall be the lesser of 3% or the actual increase of the consumer price index ("CPI"). Laws 2004, Ch. 214, § 9 (codified at Colo. Rev. Stat. § 24-51-1002(a.5)(I) (2005)). Two years later, the Legislature included individuals who were PERA members as of June 30, 2005, but who were not members as of December 30, 2006, among those PERA members who would receive a COLA of CPI up to 3%. Laws 2006, Ch. 308, § 40 (codified at Colo. Rev. Stat. § 24-51-1002(3)(a) (2007)). After the 2006 amendment and until the effective date of the 2010 Pension Legislation, the following language governed annual increases for Class members:

> (1) For benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December 31, 2006, the cumulative increase applied to benefits paid shall be recalculated annually as of March 1 and shall be the total percent derived by multiplying three and one-half percent, compounded

> annually, times the number of years such benefit has been effective after March 1, 2000. . . .

Colo. Rev. Stat. § 24-51-1002(1) (2007).

2. DPS Members

Until it merged with PERA, the Denver Public Schools Retirement System ("DPSRS") had 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). See July 1, 2009 DPSRS booklet entitled "Significant Facts", Bookmark ID #38370051, CD Page 1346. In 1986, DPSRS raised the yearly adjustment to 3.25% (non-compounding); and in 2000, DPSRS began to compound interest. Id. at CD Page 1346-47.

When DPSRS became a part of PERA on January 1, 2010, PERA assumed DPSRS' obligation for the guaranteed 3.25% (compounded) annual increase for DPS Subclass Members. Colo. Rev. Stat. § 24-51-1732 (effective January 1, 2010).

C. Extrinsic Evidence Is Consistent With Retirees' Interpretation of The COLA Statutes.

PERA regularly assured Retirees that they could count on continuing to receive their promised postretirement adjustments throughout retirement. For example, an October 2000 PERA booklet described the COLA change as follows:

> **PERA will increase your benefit each year by 3.5 percent compounded annually from the date of your initial benefit.** This increase is recalculated on the last workday of each March and is based on your total benefit. Your first increase will be prorated for the number of months you have been retired.

"Your PERA Benefits", Bookmark ID #38370051, CD page 1355 (emphasis added).

In other communications with its members, PERA plainly informed Retirees that they will "[r]eceive an annual automatic increase of 3.5 percent in your monthly retirement benefit to help keep up with the cost of living." "Benefits at a Glance" (Revised July 2004), Bookmark ID #38370051, CD page 1357. Similarly, in a September 2004 "Member Report," PERA explained how a "PERA account will grow from the 'magic of interest compounding'" and stated that if a member chooses to receive a lifetime monthly benefit, he "will receive a benefit increase that is indexed for inflation at 3.5 percent." Member Report, Bookmark ID #38370051, CD page 1359; see also PERA Website – "Annual Benefit Increases" (accessed on Nov. 11, 2009), Bookmark ID #38370051, CD page 1362 ("If you begin PERA membership on or before June 30, 2005, you will receive an annual increase of 3.5 percent.").

Moreover, Colorado Attorney General Ken Salazar issued a formal opinion that discussed PERA members who had fulfilled all of the requirements for

pensions and concluded: "Once a PERA member fulfills all the statutory requirements for a pension benefit, retires and begins receiving a pension, **the member's fully vested pension right cannot be reduced by the General Assembly."** Attorney General Formal Opinion No. 05-04, Bookmark ID #38371770, CD page 1413 (emphasis added). Attorney General Salazar explained that as to those already vested in their benefits: "Some vested pension rights cannot be eliminated. When a PERA member retires from active service and begins receiving a pension, the member's pension becomes a vested contractual obligation of the pension program that is not subject to unilateral change **of any type** by the General Assembly." Id. at CD page 1414-15 (citing Bills and McPhail; emphasis added).

PERA Executive Director Meredith Williams endorsed this analysis as recently as December 2008 in an issue of the PERA publication "Retiree Update":

> PERA continues efforts to work with other large pension plans and others to ensure that our members' and retirees' retirements are protected and to find a resolution to the current market turmoil. A Colorado Attorney General's (AG) Formal Opinion concerns constitutional limits to the ability of the state General Assembly to alter retirement benefits for public employees under the pension program administered by PERA. The AG's opinion states that when a PERA member retires and begins receiving pension benefits, **such member's pension rights have fully vested and such pension benefits may not be reduced**. Current members [i.e., those not yet retired] may also have certain pension benefit rights protected under the Constitution, although the General Assembly may make changes

> to such benefits if the changes are balanced by corresponding changes of a beneficial nature or are actuarially necessary.

Retiree Update, Bookmark ID #38376075, CD page 1420 (emphasis added).

The named plaintiffs each took government positions and stayed in them, not only to engage in public service, but also because the pensions available to them were sufficiently attractive to warrant the lesser salaries and other encumbrances that came with a government position. Justus Affidavit, Bookmark ID #38369859, CD page 1219-20; Halaas Affidavit Bookmark ID #38369859, CD page 1222; Laird Affidavit Bookmark ID #38369859, CD page 1225. Each of them believed that they would be permanently entitled to the pension formula in effect at the time that they left their paying jobs; they each retired and applied for their pension benefits; and each of them experienced a reduction in their postretirement adjustments as a result of the retroactive application of the Pension Legislation. Justus Affidavit, CD page 1219-20; Halaas Affidavit, CD page 1222-23; Laird Affidavit CD page 1225-26. They all believed that upon becoming eligible to retire or upon retirement they were entitled to the same formula for the postretirement adjustments (or an equivalent formula) throughout their lifetimes and those of any designated survivors. Id. These beliefs were based on the law and various types of communications from the plans themselves. Id.

D. Senate Bill 10-001

After the Legislature passed SB 10-001, Governor Ritter signed it into law on February 23, 2010. SB 10-001, hereinafter referred to as the 2010 Pension Legislation, modified PERA in several respects. Among other things, it increased employer and employee contributions; it raised service eligibility requirements for PERA members hired after January 1, 2011; and it changed the formula for calculating the Highest Average Salary for PERA members not eligible to retire as of January 1, 2011.

Most important for purposes of this lawsuit, the 2010 Pension Legislation eliminated the guaranteed automatic 3.5% annual COLA increase for PERA public employee retirees and the 3.25% annual COLA increase for DPS retirees. Under the 2010 Pension Legislation, the yearly COLA is no longer guaranteed at a specified percentage increase. Instead, the act established a new formula based on the Consumer Price Index ("CPI"), capped at 2%, that could—and in 2010 did—yield a **0% increase**. In its current form, Colo. Rev. Stat. § 24-51-1002 in pertinent part reads:

> (1) For benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December 31, 2006, or for benefit recipients whose benefits are based on the account of a DPS member or DPS retiree, **the increase applied to**

benefits for the year 2010 shall be the lesser of two percent or the average of the annual increases determined for each month, to the nearest one-tenth of a percent, as calculated by the United States department of labor, in the national consumer price index for urban wage earners and clerical workers for each of the months in the 2009 calendar year.

(2) **Beginning in the year 2011**, subject to the provisions of section 24-51-1009.5, for benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December 31, 2006, or for benefit recipients whose benefits are based on the account of a DPS member or DPS retiree, **the increase applied to benefits paid shall be the lesser of two percent or the average of the annual increases determined for each month, to the nearest one-tenth of a percent, as calculated by the United States department of labor, in the national consumer price index for urban wage earners and clerical workers during the calendar year preceding the increase in the benefit.** Notwithstanding the provisions of this subsection (2), the increase shall be the maximum permitted under this subsection (2) and section 24-51-1009.5 unless the association's annual audited return on investments is negative for the preceding calendar year, at which point the annual increase for the subsequent three years shall be the lesser of two percent or the average of the annual increases determined for each month, to the nearest one-tenth of a percent, as calculated by the United States department of labor, in the national consumer price index for urban wage earners and clerical workers during the calendar year preceding the increase in the benefit. The increase applied to such benefits shall be recalculated annually as of July 1, and shall be the compounded annual percentage of the annual increases applied to such benefits. In the first year that the benefit recipient is eligible to receive an annual increase pursuant to section 24-51-10001, the annual increase shall be prorated.

Laws 2010, Ch. 2, § 29; Colo. Rev. Stat. § 24-51-1002 (2010) (emphasis added).

The 2010 Pension Legislation also provides a 0.25% increase to the 2.0% cap if the actuarial value of PERA's assets exceeds an actuarial funding ratio of 103% and a 0.25% decrease if the asset value subsequently falls below 99%. Laws 2010, Ch. 2, § 23; Colo. Rev. Stat. § 24-51-1009.5 (2010). In addition, the legislation changes the traditional date for implementing annual COLA increases, moving it back by three months, from March to July. Colo. Rev. Stat. § 24-51-1001 (2010).

The 2010 Pension Legislation substantially reduced the pension benefits of class members. For example, a retiree with the average annual benefit in 2008 of $33,264 will lose more than $165,000 over the next twenty years.[2] Second Amended Complaint, Bookmark ID #34657720, CD page 510-11.

SUMMARY OF ARGUMENT

The District Court erred as a matter of law in entering summary judgment for the Colorado Defendants and against Retirees. Under the Colorado Supreme

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[2] This is also shown by using the "COLA Comparison Calculator" on the PERA website. See http://www.copera.org/pera/about/cola.htm (cited in Plaintiffs' Response in Opposition to Defendants' Summary Judgment Motion, Bookmark ID #38369695, CD page 1169). The instructions for use of the calculator provide: "To see what impact a 2 percent COLA will have on your PERA benefit, enter your prior month's gross benefit amount into the spreadsheet, which will calculate the annual dollar difference between a 3.5 percent COLA and a 2 percent COLA." Id.

Court's decisions in McPhail and Bills, public pension benefits may not be reduced for any reason once a Colorado employee attains eligibility for his or her pension or retires. In upholding the 2010 Pension Legislation which took away Retirees' earned rights to a particular COLA, the District Court ignored these controlling rulings.

ARGUMENT

A. Standard Of Review And Preservation Of The Issue.

An appellate court reviews a trial court's order granting summary judgment de novo. In re Marriage of Tognoni, ___ P.3d ___, 2011 WL 5436480, *1 (Colo. App. Nov. 10, 2011). Pursuant to C.R.C.P. 56(c), a party is entitled to summary judgment when based upon the pleadings, admissions, depositions, answers to interrogatories, and affidavits, "there is no disputed issue of material fact and the moving party is entitled to judgment as a matter of law." BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 71 (Colo. 2004). The moving party has the burden of establishing the non-existence of a genuine issue of material fact. Continental Airlines, Inc. v. Keenan, 731 P.2d 708, 712 (Colo. 1987). However, summary judgment is "a drastic remedy," and "should be granted only when these requirements are clearly met." Tognoni, ___P.3d ___, 2011 WL 5436480, *1

(citing AviComm, Inc. v. Colo. Pub. Utils. Comm'n, 955 P.2d 1023, 1029 (Colo. 1998)).

The issue raised by Retirees' complaint and in the parties' cross-motions for summary judgment is the issue on appeal, whether the 2010 Pension Legislation violated Retirees' contract right or other right to a COLA. Retirees extensively argued this point below, through discussion of the Colorado Supreme Court's decisions in McPhail, 139 Colo. 330, and Bills, 148 Colo. 383. See, e.g., Plaintiffs' summary judgment motion, Bookmark ID #34753454, CD pages 522-23, 532-537; Plaintiffs' Reply Brief in Support of Summary Judgment Motion, Bookmark ID #38028147, CD pages 1053-56, 1058-63, 1066-68, 1070, 1072. The two challenged orders of the District Court concluded that Retirees have no right to any COLA, without any discussion of McPhail or Bills. Order, Bookmark ID #40216707, CD page 1586 et seq.; Order, Bookmark ID #40496384, CD page 1600 et seq.

B. Under The Colorado Supreme Court's Rulings In Bills And McPhail, Which in Turn Were Based on Established Jurisprudence Relating To Public Employee Pensions, The District Court Decision Must Be Reversed.

The Colorado Constitution protects contracts by and between the government and its citizens. The "Contract Clause," Article II, Section 11 of the Colorado Constitution instructs: "No *ex post facto* law, nor law impairing the

obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly."

"Although statutes and ordinances are not presumed to create private contractual rights, they may constitute a contract, subject to the protection of the contract clause, if the statutory language and the surrounding circumstances manifest a legislative intent to create an enforceable contractual right." Spradling v. Colo. Dep't of Revenue, 870 P.2d 521, 523 (Colo. Ct. App. 1993) (citing Colorado Springs Fire Fighters Ass'n, Local 5 v. City of Colorado Springs, 784 P.2d 766, 770 (Colo. 1989); U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 17 n.14 (1977))

A "large number of states [including Colorado] have construed public pension plans as giving rise to contractual rights – even in the absence of legislative intent to contract." Simpson v. North Carolina Local Government Employees' Retirement System, 363 S.E.2d 90, 93 (N.C.App. 1987) (citation omitted); see also Fisk v. Police Jury of Jefferson, 116 U.S. 131, 133-34 (1885) (implied contract theory protects reliance interest of public officer who performs services on the basis of a promise of a salary level embodied in legislation).

As noted, Colorado follows the majority view that pension plans give rise to contractual rights. The Colorado Supreme Court has consistently found that "rights which accrue under a pension plan are contractual obligations which are protected under article II, section 11, of the Colorado Constitution ..." Colorado Springs Fire Fighters Ass'n, Local 5 v. City of Colorado Springs, 784 P.2d 766, 770 (Colo. 1989) (en banc) (citing McPhail); see also Bills, supra.

In McPhail, an *en banc* court considered whether Denver's repeal of a particular type of COLA – granted through an "escalator clause" in a city charter and ordinance which promised **post-retirement increases** equal to one-half of any future wage increases -- violated the state Contract Clause. The language of this particular COLA clause in McPhail was the following:

> In the event that salaries in the Denver police department shall be raised after the effective date of this amendment those [retired] members who are receiving a pension **shall be entitled** to an increase in the amount of their pension equal to one-half of the raise in pay granted in the rank said member held at the time he was retired

McPhail, 139 Colo. at 334 (emphasis added).

Finding that the repeal of the "escalator clause" did indeed contravene the Contract Clause, the Court held that contributory pensions were not gratuities, but were contractual in nature. McPhail, 139 Colo. at 340-42. A unanimous Court held:

> "Retirement pay is defined as 'adjusted compensation' presently earned, which, with contributions from employees, is payable in the future. The compensation is earned in the present, payable in the future to an employee, provided he possesses the qualifications required by the act, and complies with the terms, conditions, and regulations imposed on the receipt of retirement pay.
>
> Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; **but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation."**

Id. at 342 (emphasis added) (quoting Retirement Board of Allegheny County v. McGovern, 174 A. 400 (Pa. 1934)).

The McPhail Court then went on to find that the mandatory language and the fact that defendants contributed to the pension led to the "only reasonable conclusion" that a **contract** was formed between Denver and the retirees. Id. at 344. It further found that the escalator clause in the Charter and Ordinance of the City and County of Denver:

> specifically provided that if plaintiffs fulfilled all conditions they would receive a pension which would be subject to increase or decrease based upon the salary of the rank which they occupied as of the date of retirement. It would be unjust and contrary to our basic notions concerning the validity of contracts to hold that this provision could be changed by the lawmakers.

Id. at 344. McPhail thus holds that public pension benefits may *not be reduced for any reason* once a Colorado employee attains eligibility for their pension or retire.

Similarly, in Bills, the Colorado Supreme Court cited McPhail and held: "retirement rights [upon retiring or becoming eligible to retire] thereupon become a vested contractual obligation, **not subject to a unilateral change of any type whatsoever**. Accordingly, that portion of the 1956 charter amendment which in so many words purports to deny to those who had *already* retired from the police department the increase in pension which would otherwise result from the increase in pay granted by another provision of this same 1956 charter amendment was held unconstitutional, **being in violation of Article II, section 11 of the Colorado Constitution in that it impaired the obligation of a contract**." 148 Colo. 383, 389 (bold added; italics in original). See also City of Aurora v. Ackman, 738 P.2d 796, 800 (Colo. Ct. App. 1987) (citing McPhail) ("substantial adverse change cannot be made in the 'vested' pension rights of an employee who has already met the eligibility requirements of such a program."); McInerney v. Public Employees' Retirement Ass'n, 976 P.2d 348, 352 (Colo. Ct. App. 1998) (citing Bills) ("Retirement pay becomes a vested right when an employee has complied with the conditions imposed entitling the employee to the receipt of retirement benefits").

Defendants have acknowledged the applicable COLA statutes governing PERA and the DPS Plan also used **mandatory** language ("shall") that requires the payment of COLAs. PERA Def SJ Opp, Bookmark ID #37720186, at CD page

863, 866. Again, this "shall" language is the same exact language used by the court in McPhail to find the escalator clause to constitute a vested contractual right. See McPhail, 139 Colo. at 334.

It is also significant that in passing the 2010 Pension Legislation, the Legislature was aware that in 2005 Colorado's Treasurer had requested a formal opinion from the state Attorney General to the following 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?" First addressing the rights of those who had *yet to qualify* for retirement and whose benefits were therefore "*partially vested*" (none of whom are members of the proposed class in this lawsuit), then Attorney General Ken Salazar responded:

> The rate and amount of retirement benefits may qualify as a partially vested pension right protected by the contract clause of the constitution. An adverse change to a partially vested pension right is lawful only if it is balanced by a corresponding change of a beneficial nature, a change that is actuarially necessary, or a change that strengthens or improves the pension plan.

Attorney General Formal Opinion No. 05-04, Bookmark ID #34753564, CD page 579. As for PERA members who had *fulfilled all of the requirements for the*

pension (as have members of the proposed class in this lawsuit), the Attorney General concluded:

> Once a PERA member fulfills all the statutory requirements for a pension benefit, retires and begins receiving a pension, **the member's fully vested pension right cannot be reduced by the General Assembly.**

Id. at CD page 583 (emphasis added). In the "Discussion" section, the Attorney General explained his answer as to those already vested in their benefits:

> Some vested pension rights cannot be eliminated. When a PERA member retires from active service and begins receiving a pension, the member's pension becomes a vested contractual obligation of the pension program that is not subject to unilateral change **of any type** by the General Assembly. Police Pension & Relief Board of City and County of Denver v. Bills,148 Colo. 383, 366 P.2d 581, 584 (1961) (citing Police Pension & Relief Board of the City and County of Denver v. McPhail, 139 Colo. 330, 338 P.2d 694, 700 (1959)).**When an employee retires and begins receiving a pension, trustees may not adopt an amendment that reduces an employee's vested pension under the plan.** Walker v. Board of Trustees of Regional Transportation District Pension Plan, 69 Fed. Appx. 953, 2003 WL 21690534 (10th Cir. Colo.) (impairment of vested pension rights is arbitrary and capricious, a breach of contract, and a breach of its fiduciary duties) (citing Police Pension & Relief Board of City and County of Denver v. Bills*)*…

Id. (emphasis added). Thus, Colorado's Attorney General relied on Bills and McPhail to conclude that once a PERA member is eligible for a pension, retires, and begins receiving a pension, the member's fully vested pension right cannot be reduced.

The District Court entirely ignored McPhail and Bills – again, the two cases that should control the outcome of this case. Moreover, the Court ignored the Salazar opinion that had relief upon McPhail and Bills.

C. The District Court Erred In Concluding That The History Of COLA Changes Rendered The Benefits Of Retirees Here Unprotected By The State's Contract Clause.

Without citing McPhail or Bills, the District Court concluded that Retirees have no contract right to any particular COLA for life without change, and that the COLA modifications in the 2010 Pension Legislation (and by this reasoning, total and permanent elimination of COLA) did not violate the Colorado or United States Contract Clauses. Id. In support of its conclusion that Retirees had no contract right to a particular COLA, the District Court relied on the fact that the COLA had changed over the years:

> What Plaintiffs are unable to explain is how one can have a reasonable expectation to an unchangeable COLA formula when the COLA formula changes repeatedly for retires over the course of 40 years.

CD page 1609.

Retirees set forth those changes in great detail *supra* at 5-11. However, even the District Court's own recitation of the COLA's history does not support the court's conclusion. Retirees refer the Court to the entirety of the District Court's

analysis, but as summarized by that court, the Annual Retirement Allowance Adjustment ("ARAA") for the COLA only **increased** over the years:

1% noncompounded (1965-1973)
2% noncompounded (1974-1980)
3% noncompounded (1981-1984)
3.25% noncompounded (1985-2000)
3.25% compounded (2001-2009)

The court also referenced specific adjustments in four calendar years, a resetting of the base benefit based on inflation in two years, and a capping of the COLA at 3.5%.

Most of this historical time frame is wholly irrelevant, because whatever happened before March 1, 1994, simply does not matter: Retirees are not including anyone retiring before that date in their proposed class. Retirees defined their class this way because, as discussed above, state law before that date stated that the COLA was discretionary and had to be approved regularly by the legislature. It was only in late 1993 that the Legislature amended the law to make annual COLA increases granted on or after March 1, 1994 **automatic** and no longer dependent each year on approval by the legislature.

Moreover, none of the ***post***-March 1, 1994 history is inconsistent with Retirees having a contractual right to a COLA of 3.5%, compounded.[3] The fact that the State **increased** the base COLA over these years does not negate Retirees' contractual interest in that COLA. By the logic of the District Court, if Colorado were to regularly **increase** Retirees' base pension benefits, this would have the effect of eliminating Retirees' rights to their pensions.

The Colorado Supreme Court addressed this concept in Bills – which, again, the District Court ignored. The Supreme Court held that "prior to eligibility for retirement changes may properly be made in a pension plan **if these changes strengthen or better it**, or if they are actuarially necessary." 366 P.2d at 584

[3] Even if the Legislature had reduced benefits after March 1994, this would not have changed the vested nature of the benefit. In Cole v. ArvinMeritor, Inc., 516 F.Supp.2d 850 (E.D.Mich. 2005), the defendant similarly argued that the unchallenged imposition of changes to the health insurance benefit over the course of many years placed retirees on notice that the defendant had repudiated retirees' right to vested benefits. But the court held that changes to a health insurance benefit which did not fundamentally alter the benefits (including changes in benefits agreed to by the UAW that adversely affected employees who were retired) were *de minimis* and, thus, did not alter the company's unambiguous promise in the contract for lifetime health care benefits. Id. at 873, affirmed at Cole v. ArvinMeritor, Inc., 549 F.3d 1064 (6th Cir. 2006). *See also*, Moore v. Rohm & Haas, Case No. 5:03-CV-1342, 2008 WL 4449407 at *11, n. 35 (N.D. Ohio Sep. 30, 2008); Hinckley v. Kelsey-Hayes Co., 866 F.Supp. 1034, 1042 (E.D. Mich. 1994); Reese v. CNH Global N.V., 2007 WL 2484989, *6 (E.D. Mich. Aug. 29, 2007); Helwig v. Kelsey-Hayes Co., 857 F.Supp. 1168, 1174 n.2 (E.D. Mich. 1994); Schalk v. Teledyne, Inc., 751 F.Supp. 1261, 1266-67 (W.D. Mich. 1990)), aff'd, 948 F.2d 1290 (6th Cir. 1991).

(emphasis added). Even though the escalator clause at issue in Bills and McPhail was only in place for a short period at the end of the police officers' careers, the benefit was still protected by the Contracts Clause. See Bills, 148 Colo. at 387; McPhail, 139 Colo. at 344. What mattered to the Colorado Supreme Court was the level of the benefit in place when the police officer retired (McPhail) or was eligible to retire (Bills).

The Colorado Supreme Court's view that the law in effect at the time of an employee's retirement governs the level of public sector pension benefits due is consistent with other state courts. See, e.g., Arena v. City of Providence, 919 A.2d 379, 395 (R.I. 2007) ("court must look a retirement plan's provisions at the time an employee retires to ascertain whether he or she is entitled to a benefit); Gulbrandson v. Carey, 901 P.2d 573, 578 (Mont. 1995) ("The terms of [public employee's] retirement benefit contract are determined pursuant to the statutes in effect at the time of his retirement . . ."). Further, state appellate courts which have reviewed the question have found that the cost-of-living adjustment in effect at retirement is part and parcel of a retiree's overall pension benefit and therefore, protected under the Contract Clause. Booth v. Sims, 456 S.E.2d 167 (W. Va. 1995) (pension cost of living adjustment is a vested right); United Firefighters of Los Angeles City v. City of Los Angeles, 210 Cal.App.3d 1095, 1108 (1989)

(same); Pasadena Police Officers Association v. City of Pasadena, 147 Cal.App.3d 695, 702 (1984) (same); Arena v. City of Providence, 919 A.2d 379 (R.I. 2007) (same).

Accordingly, consistent with McPhail and Bills, Retirees have a vested contract right in the cost-of-living formula in effect when they became eligible to retire or did retire, and the Court's conclusion that there was no contract right (simply because of a history of changes) is erroneous.[4]

D. Forms Or Checklists Given To Retirees (Saying Benefits May Change) Cannot Alter Vested Contract Rights

The District Court also cited the fact that there were some forms or "checklists" given to people like Plaintiff Justus individually at the time of retirement that support Defendants' position: The evidence shows that buried within these forms was a notation that the COLA amount was "subject to change." CD page 867.

However, extrinsic evidence may not be utilized to vary the meaning of an ambiguous statute. See People v. Owens 228 P.3d 969, 972 (Colo. 2010) (citing Holcomb v. Jan-Pro Cleaning Sys. of Colo., 172 P.3d 888, 890 (Colo. 2007) for the proposition that "A court's objective in interpreting statutes must be to determine

[4] To the extent that the COLA formula became more generous after an employee retired, Retirees do not claim a right in the modified COLA.

the intent of the legislature, as expressed in the language of the statute itself.") In any event, Retirees have pointed to compelling "extrinsic evidence" of their own showing that Defendants represented to PERA members that COLA formulas were guaranteed. Moreover, even if there were disclaimers in certain literature, such disclaimers cannot undermine an earned contract right. Cf., Cattin v. General Motors, 955 F.2d 416, 429-31 (6th Cir. 1992) (defendants' attempt to insert previously undisclosed release clause requiring plaintiffs to relinquish all claims against defendants relating to employment transfer, including benefit claims, in order to participate in stock incentive plan was an invalid attempt to require plaintiffs to pay additional consideration when none was due; plaintiffs had already accepted offer to participate in stock incentive plan). In order to prevail, Defendants would have to point to disclaimers in the **statutory language itself**, and there are none. Moreover, if extrinsic evidence (on both sides) were to be considered, this should have resulted in a denial of summary judgment as there were material facts in dispute.

E. Retirees' Vested Right To A COLA At The Minimum Level In Effect At The Time Of Their Eligibility To Retire Or Retirement Has Been Substantially Impaired.

Once a contractual right is established, the next step in the Contracts Clause analysis is to determine whether SB 10-001 substantially impairs Retirees'

contractual pension rights. By failing to address this second part of the tripartite test, Defendants appeared to be conceding that—if Retirees do have a vested right in their COLA benefits—SB 10-001 has substantially impaired such rights. However, to the extent that this issue has not been conceded by Defendants, Retirees will now address the "substantial impairment" part of the test.

"The Supreme Court . . . has provided little specific guidance as to what constitutes a `substantial' contract impairment." Baltimore Teachers Union, AFT v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1018 (4th Cir. 1993). "Technical impairments, for example do not necessarily rise to the level of constitutional violations." Id. (citation omitted). On the other hand, "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400, at 411 (1983). "[T]he primary consideration in determining whether the impairment is substantial is the extent to which reasonable expectations under the contract have been disrupted." Sanitation and Recycling Indus. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997) (citing Energy Reserves, 459 U.S. at 411). As the Supreme Court has stated:

> [T]he severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs.... Once arranged, those rights

> and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, at 245 (1978).

The promise to pay a certain sum of money is the "most important element[] of a contract," and "the central provision upon which it can be said [the employees] reasonably rely." Buffalo Teachers Federation v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006) (failure to pay a 2% raise was a substantial impairment). Here, by passing SB 10-001, the Legislature decreased pension benefits earned through years of employment.

Courts have consistently found substantial impairments when retirees' pension cost-of-living adjustments are decreased.[5] In United Firefighters of Los

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[5] Smaller reductions also have been found to be substantial impairments. Notably, courts have found a substantial impairment when public employees were involuntarily furloughed for a week or less, because the loss of the expected pay "would likely wreak havoc on the finances of many of the affected workers and can only be considered substantial." Opinion of Justices (Furlough), 609 A.2d 1204, 1210 (N.H. 1992); Massachusetts Community College Council v. Commonwealth, 649 N.E.2d 708, 712 (Mass. 1995) (mandatory furloughs substantially impaired rights of state employees). A substantial impairment was found under New York's "payroll lag" law that allowed the withholding of two weeks of employees' pay until after they ended employment. Ass'n of Surrogates & Supreme Court Reporters v. State of New York, 940 F.2d 766, 772 (2d Cir. 1991); see also Univ. of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096 (9th Cir. 1999) (payroll lag law); Donohue v. Paterson, 2010 WL 2178749 (N.D. N.Y. May 12, 2010) (temporary withholding of 4% salary increase that would later be reimbursed was held to be a substantial contractual impairment.);

Angeles City, 210 Cal.App.3d 1095 (Cal. Ct. App. 1989), the court held that imposition of a 3% cap on pension cost-of-living adjustments for firefighters hired during a period with no caps constituted an impairment of a vested contractual right. Id. at 1108. In Booth, the State of West Virginia reduced the pension cost-of-living adjustments from 3.75% to 2% for active State Troopers who were eligible for retirement, and argued that the adjustment was necessary to preserve the solvency of the pension fund. 456 S.E.2d at 187. The Supreme Court of West Virginia held that the reduction in the cost-of-living adjustments was an unconstitutional impairment, and that the state retained the burden of ensuring the solvency of the fund. Id. ("Requiring the petitioners to protect the future solvency of the pension system is an unconstitutional shifting of the state's own burden."). See also Pasadena Police Officers Association, 147 Cal.App.3d 707 (Cal. Ct. App. 1983) (cost-of-living adjustments benefits could not be capped on retired police officers who opted post-retirement for pensions with uncapped cost-of-living adjustments in lieu of a fixed pension).

Bailey v. State, 500 S.E.2d 54 (N.C. 1998) (statute that placed cap on tax exemption on employees' retirement benefits was a substantial contractual impairment); State ex rel. Cannon v. Moran, 331 N.W.2d 369 (Wis. 1983) (salary setoff that reduced judges' salaries by the amount of pension benefits they received from prior judicial service). Cf. Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 n. 9 (1969) ("For a poor man to lose part of his salary often means his family will go without the essentials." (quotations omitted)).

Similarly here, the Court should find as a matter of law that Defendants' retroactive application of SB 10-001 to Retirees' COLA benefits resulted in a substantial impairment of their contractual rights to have the formula applied that was in force when they retired.

F. This Court Should Find That The "Reasonable And Necessary" Defense (Or "Actuarial Necessity" Defense) -- Which The District Court Did Not Reach – Does Not Apply To Contract Clause Cases Involving Public Employees Who Have *Already* Retired Or Are Eligible To Retire

As noted in the discussion of Bills, McPhail, and the 2005 Salazar opinion above, these authorities made a stark distinction between the rights of those who had *yet to qualify* for retirement and whose benefits were therefore "*partially vested*" (none of whom are members of the proposed class in this lawsuit), and those who had *fulfilled all of the requirements for the pension* (as have members of the proposed class in this lawsuit). As to the former, "an adverse change" is permitted if it is proven to be "actuarially necessary." Attorney General Formal Opinion No. 05-04, Bookmark ID #34753564, CD page 579. But as to the latter, benefits simply "cannot be reduced by the General Assembly." Id.

Indeed, no Colorado court decision dealing with the Colorado or the United States Constitution's Contract Clauses has allowed a defendant public employer to utilize an "actual necessity" or any other "reasonable and necessary" defense in

determining whether a public entity may abridge the pension rights *of Colorado public employees who were fully vested in their pensions*. On the contrary, since U.S. Trust in 1977, Colorado's appellate courts and the Tenth Circuit have reaffirmed the point of law that a public pension plan cannot be changed for those already fully vested, and "reasonable and necessary" defenses are available only as to those *not yet vested*. For example, in Peterson v. Fire and Police Pension Ass'n, 759 P.2d 720 (Colo. 1988), the Colorado Supreme Court held that *"[u]ntil survivor benefits fully vest,* a pension plan can be changed; however, any adverse change must be balanced by a corresponding change of a beneficial nature, *a change that is actuarially necessary*, or a change that strengthens or improves the pension plan." Id. at 725 (citing McPhail and Bills; emphasis added); Knuckey v. Public Employees' Retirement Ass'n, 851 P.2d 178, 180 (Colo. App. 1992) (citing Peterson); McInerney, 976 P.2d at 352 (citing Knuckey and Bills) (same); Walker v. Board of Trustees, 69 Fed.Appx. 953, 959, 2003 WL 21690534 (10th Cir. 2003) (unpublished) (citing Bills and McPhail: "Once an employee retires, a trustee may not adopt an amendment that impairs an employee's vested rights under the plan").

Accordingly, while the Court below did not reach the "reasonable and necessary" or "actuarial necessity" defense, this Court – based on Bills and McPhail – should declare that the defense is not available here.

G. There Are Genuine Issues Of Fact In Dispute That Precluded Summary Judgment On Retirees' Takings Clause Claim.

1. Determining whether an Unconstitutional Taking has occurred involves an "ad hoc, factual" analysis.

The Fifth Amendment of the United States Constitution provides: "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. "This provision is made applicable to the states under the Fourteenth Amendment to the United States Constitution." Kirk v. Denver Pub. Co., 818 P.2d 262, 267 (Colo. 1991) (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 122 (1978)).

The Takings Clause is addressed to "every sort of interest the citizen may possess." United States v. General Motors Corp., 323 U.S. 373, 378, (1945); see Florida Rock Industries v. United States, 18 F.3d 1560, 1572 n. 32 (Fed.Cir. 1994) (property interests "are about as diverse as the human mind can conceive"). Here, Retirees had a legitimate expectation that they would receive annual pension increases at the levels specified under the law when they retired. In a seminal law

review article written over four decades ago,[6] former Yale Professor Charles Reich described the role of pensions in a public employee's life:

> No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient.... No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual.

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 769 (1964).

Indeed, the Colorado Supreme Court has repeatedly found that the promise of postretirement monetary benefits is a term of the employment contract between a public employee and his or her government employer that is constitutionally protected once the employee vests in the benefits. McPhail, supra; Bills, supra; Spralding, supra. Although these cases arose under the Contract Clause, 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. Parella v. Retirement Bd. of Rhode Island Employees' Retirement System, 173 F.3d 46, 58-59 (1st Cir. 1999) ("The facts here require us to consider whether plaintiffs had the requisite

[6] In 1996, this article was found to be the fourth most-cited article among all law review articles ever published. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHICAGO-KENT L.R. 751, 760 (1996).

property right to support a Takings Clause claim by analyzing their claim under the Contract Clause.").

Claims under the Takings Clause are particularly unsuited for resolution before discovery is completed. As the Colorado Supreme Court explained in State Department of Highways v. Interstate-Denver West, 791 P.2d 1119, 1120 (Colo. 1990), "[t]o distinguish between permitted regulation, when no compensation is required, and a taking which requires compensation [raises] conceptual, theoretical, and practical issues...which are difficult to resolve." The Colorado Supreme Court further elaborated in Kirk:

> Resolving the question of "what constitutes a taking" is a problem of considerable difficulty, and courts have been unable "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."…The determination of whether a "taking" has occurred by reason of a governmental regulation interfering with or impairing the interest of a private property owner involves essentially an "ad hoc, factual" analysis. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

Id. at 267-68 (some citations omitted).

2. Plaintiffs' vested benefits are protected under the Takings Clause.

Defendants argued below that the alleged taking here is not actionable under the Takings Clause. First, as explained above, the taking here is not just the taking of Retirees' funds but also the impairment of contractual rights to a government

pension, which unquestionably is constitutionally protected, see Bills, 148 Colo. at 38.

In other circumstances, courts have found that a taking of money can constitute a taking if the funds are protected by a property right, such as in Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998), in which the State of Texas kept the interest earned on lawyer trust accounts (IOLTA), and in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), where state law permitted the clerk of each county court to take money deposited by litigants with the court (e.g., in interpleader cases), invest them in interest-bearing accounts and keep the interest earned. Defendants attempted to distinguish these cases and subsequent cases on the grounds that the money seized by the government was for its general use. PERA Def SJ Brief at 34-35. However, the large sums of dollars that will not be paid out in COLA benefits saves the State of Colorado or other PERA employers from making additional contributions into PERA in the future. Thus, because "money is fungible," the benefit to the government is the same here as in Phillips and Webb. See Ransom v. FIA Card Services, N.A., ___ U.S. __, 131 S.Ct. 716, 729-730 (2011) ("Money is fungible: The $14,000 that Ransom spent to purchase his Camry outright was money he did not devote to paying down his credit card debt.").

3. The "justice and fairness of the government action" should not be determined before Retirees have had an opportunity to complete discovery.

Defendants also argued that "[i]n resolving a taking issue, the Court must evaluate the justice and fairness of the governmental action." PERA Def SJ Brief at 36 (citing Lake Durando Water Co. v. Pub. Utils Comm'n, 67 P.3d 12, 19 (Colo. 2003). Instead of weighing the three factors identified in Connolly v. Pension Benefit Guar. Corp, 475 U.S. 211 (1986), Defendants simply urged acceptance of their justification for abridgement of Retirees' rights.

For example, Defendants stated that Retirees' "purported belief" regarding the amount of their COLA to be paid throughout retirement was "not reasonable." Retirees' affidavits as well as PERA's own documents describing the COLA put the issue of "reasonableness" in dispute. Retirees should be provided the opportunity to review the characterization of the COLA in PERA's documents and take depositions of PERA officials to test Defendants' claim that Retirees' belief is "unreasonable" as a matter of law.

Finally, Defendants also argued that a nullification of a contractual right does not constitute a taking, citing Buffalo Teachers for support. PERA Def SJ Brief at 37. Buffalo Teachers is distinguishable from the instant case. The first Connolly factor to be weighed is "the economic impact of the regulation on the

claimant." Connolly, 475 U.S. at 225. In Buffalo Teachers, the employees had their wages *temporarily* frozen while the class members here will be losing tens of thousands of dollars over their course of their retirements due to the *permanent* reduction of the COLA formula.

CONCLUSION

For these reasons, Retirees respectfully ask that the District Court's summary judgment rulings be reversed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of December, 2011, a true and correct copy of **APPELLANTS' OPENING BRIEF** was e-filed via LexisNexis™ File & Serve that will electronically notify and serve all registered, interested parties to the case including those listed below.

Pursuant to C.A.R. 28, Counsel will forward one original signed copy of Appellants' Opening Brief, along with a CD containing the electronic brief that exactly duplicates the paper form in text searchable Portable Document Format (PDF), to the Clerk of the Court of Appeals within seven (7) days.

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