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Appeal from the District Court, CITY AND COUNTY OF DENVER, COLORADO, Case No. 2010CV1589
Honorable Judge Robert S. Hyatt

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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' REPLY BRIEF

COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202 Tel: 303-861-1111 Appeal from the District Court, CITY AND COUNTY OF DENVER, COLORADO, Case No. 2010CV1589 Honorable Judge Robert S. Hyatt **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. **Defendant(s)/Appellee(s):** STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only.	**▲ COURT USE ONLY ▲** Court of Appeals Case Number: 11CA1507

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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☒ It contains 3,824 words.

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/s/Richard Rosenblatt
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I. INTRODUCTION

This appeal boils down to a single question: has the Colorado Supreme Court overruled its 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)? If McPhail and Bills are controlling, the proposed plaintiff class of Colorado public sector employees ("Retirees") has a contractual right to the cost-of-living adjustment ("COLA") at issue in this case and the Denver District Court erred as matter of law in entering judgment for Appellees, the "Colorado Defendants," on the ground that they have no such right.

In their briefing, the Colorado Defendants make much of a Colorado Supreme Court case issued after McPhail and Bills, In re Estate of DeWitt, 54 P.3d 849 (Colo. 2002). DeWitt concerned an ex-wife's collection under a life insurance policy and has no bearing whatsoever on the public pension issue here, whether Retirees have a vested right to the subject COLA. Colorado's Attorney General, as well as the United States Court of Appeals for the Tenth Circuit, concluded **after** DeWitt was issued that McPhail and Bills remain the law. No other authority is to the contrary. As Retirees explain in their opening brief and further address below,

McPhail and Bills entirely undermine the lower court's ruling that Retirees do not enjoyed a vested right to the subject COLA.

In their briefing, the Colorado Defendants go on at great length about various points related to funding. See PERA Brief at 8-13, 35-36. The fact that there may be underfunding has nothing whatsoever to do with the only question under McPhail and Bills – are Retirees' vested in their COLA. As Judge Posner has said in the context of an employer's obligation to keep its promise to pay retiree medical benefits, "[c]ourts do not sit to relieve contract parties of their improvident commitments, except within the limited dispensation conferred by the doctrine of impossibility, not here invoked." Bidlack v. Wheelabrator Corp., 993 F.2d 603, 609 (7th Cir. 1993). Under the controlling rulings of the Colorado Supreme Court, the State of Colorado is obliged to keep its public pension commitments, regardless of whether they may at this time appear improvident."

II. DISCUSSION

A. McPhail And Bills Have Not Been Overruled

In their opening brief, Retirees clearly framed the issue in this case: Did the Denver District Court err as matter of law in concluding that Retirees have no contract right to any cost-of-living adjustment, disregarding the Colorado Supreme Court's on-point decisions in McPhail, 139 Colo. 330, and Bills, 148 Colo. 383?

See Retirees' December 20, 2011 Brief ("Retirees' Brief"), Statement of the Issue, at 1. The Denver District Court failed to even **cite** these cases, which interpreted the "Contract Clause," Article II, Section 11 of the Colorado Constitution, in the context of whether public employees enjoyed a vested contract right to particular COLAs.[1]

The *en banc* Colorado Supreme Court in McPhail concluded that the city of Denver violated the Contract Clause by repealing a type of COLA which promised retiree police officers pension increases equal to one-half of any future wage increases for active employees. The subject provision stated:

> 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). Here, the controlling statutory provision with respect to PERA members used the same mandatory word "shall" as the statutory provision found in McPhail to create vested rights:

> For benefit recipients whose benefits are based on the account of a member who was a member, inactive member, or retiree on December

[1] The Contract Clause provides: "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."

> 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) (emphasis added).

In ruling against Denver with respect to police officers who already had retired, the Supreme Court reasoned:

> 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 unanimous court in McPhail held that mandatory language in the clause itself and the fact that the 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 (emphasis added).

The State Defendants assert that in McPhail, the court "actually recognized that retirement benefits could "increase *or decrease.*" State Defendants' Brief at 11 (citing McPhail, 33 P.2d at 701) (emphasis in Defendants' Brief). This was so, the State Defendants reason, because "retirees were not guaranteed a fixed escalation in benefits after retirement but rather retirees' *entire benefit payment* was variable and tied to the salaries of the current employees." Id. The State Defendants fail to point out that this was the very nature of the benefit at issue in McPhail – as promised, the pensions of retired police officers was tied to the salaries of current employees. The Court in McPhail was simply enforcing the contract that was entered into; it did not "recognize" as a general proposition that vested retirement benefits may be decreased. Here, the subject COLA was of very

a different sort; it was not tied to the salaries of active employees, but was a fixed percentage.

The Supreme Court's ruling in Bills also interpreted the Denver police escalator clause, this time with respect to police officers who were *eligible* for immediate retirement at the time of the challenged alterations but had not yet retired. In addition, the court considered application of the changes to certain categories of police officers who were *not* yet eligible to retire. The court first held that those plaintiffs who were eligible to retire but had elected not to retire, "are clearly unaffected by the attempted repeal of the escalator clause." 366 P.2d at 389. Citing McPhail, the court 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. at 389 (bold added; italics in original).

The court went on to hold that those officers not yet eligible to retire enjoyed "a limited vesting," and that "although prior to their eligibility to retire the pension plan could be changed, it could not be abolished nor could there be a substantial

change of an adverse nature, without a corresponding change of a beneficial nature." Id. at 390. Addressing this second category of officers who were not eligible to retire at the time of challenged action, the court explained:

> These particular plaintiffs had every right to expect that upon retirement their pension would reflect subsequent increases in pay granted to those in active service. The charter amendment with which we are here concerned constituted an adverse change in the overall pension plan which deprived plaintiffs of a very substantial right, was unaccompanied by a corresponding change of a beneficial nature, was not shown to be actuarially necessary, nor that it in anywise strengthened or bettered the pension plan.

Id. at 390-91.

The PERA Defendants misconstrue this holding. They argue that because, in Bills, voters had approved increases in the salaries of current police officers at the same time they eliminated the tying of retiree benefits to current employee pay, the court "reasonably concluded that the change to retiree benefits 'was unaccompanied by a corresponding change of a beneficial nature, was not shown to be actuarially necessary, nor that it in anywise strengthened or bettered the pension plan.'" PERA Brief at 39 (quoting Bills, 366 P.2d at 585). The Colorado Defendants fail to point out that the court cited actuarial necessity and strengthening of the pension plan *solely* in connection with the benefits of employees who were not eligible to retire at the time of the challenged changes. Here, none of the Retirees fall into that category; instead, they all fall into the

category of plaintiffs as to which Bills held that "actuarial necessity" and the like is *not* a defense: Retiree-plaintiffs here were all retired or eligible for immediate retirement at the time that the Colorado legislature enacted Senate Bill 10-001 ("2010 Pension Legislation").

While Defendants' actuarial necessity argument is a nonstarter, Bills is significant here in part because it shows that the Colorado Supreme Court considered application of an actuarial necessity test and concluded that it applied **only** with respect to employees who not only had not yet retired but were not even eligible to retire at the time of the benefit alterations.

The Colorado Defendants do not – and cannot – argue that the Colorado Supreme Court has ever renounced its plain holdings in McPhail or Bills. Instead, the PERA Defendants first criticize "Plaintiffs' reliance on cases decided five decades ago." PERA Brief at 14. Unlike Defendants, the Colorado courts have not hesitated to apply McPhail and Bills. See, e.g., 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"); Spradling v. Colorado Dept. of Revenue, 870 P.2d 521, 523 (Colo.App. 1993) (quoting McPhail for the proposition "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"); Peterson v. Fire and Police Pension Ass'n, 759 P.2d 720, 725 (Colo. 1988) (citing McPhail and Bills and holding"[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."); City of Aurora v. Ackman, 738 P.2d 796, 800 (Colo. Ct. App. 1987) (citing McPhail and holding: "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."); see also Walker v. Board of Trustees, 69 Fed.Appx. 953, 959, 2003 WL 21690534 (10th Cir. 2003) (unpublished) (citing Bills and McPhail and reiterating in connection with Colorado law: "Once an employee retires, a trustee may not adopt an amendment that impairs an employee's vested rights under the plan").

The PERA Defendants also argue that "there was no reason" for the District Court to address Bills or McPhail because it concluded that Retirees failed to establish that they enjoyed a vested contract right. PERA Brief at 17-18. This

makes no sense. As shown in Retirees' opening brief and herein, it is precisely on the basis of the Colorado Supreme Court's holdings in Bills and McPhail that Retirees **did** have a vested contract right to the subject COLA. How could the District Court determine the question of vesting without reference to the controlling decisional law?

DeWitt, which has nothing whatsoever to do with public pensions or government contracts of any sort, does not overrule McPhail or Bills either expressly or by implication. DeWitt addressed whether the Colorado Contract Clause precluded application of a new Uniform Probate Code provision to decide whether an insured's former wife was a beneficiary of his life insurance policy. Thus, DeWitt did not involve impairment of any contract entered into by a government entity, a point that the Colorado Supreme Court found to be significant. The court explained: "**When the state is not a party to the contract**, a court should defer to the legislature's judgment regarding the necessity and reasonableness of the statute, notwithstanding that the statute may impose a financial hardship on the contracting parties." 54 P.3d at 859.

This point is important, as the Colorado Supreme Court again emphasized in a subsequent ruling that did involve a government entity as a party to the contract. In City of Golden v. Parker, 138 P.3d 285 (Colo. 2006), the Colorado Supreme

Court addressed an amendment to the City of Golden's charter that affected the rights of real estate developers under economic incentive agreements they had entered into with Golden. Thus, unlike DeWitt, Golden involved the impairment of a **government** contract. Echoing the United States Supreme Court, the Colorado Supreme Court observed on this point:

> **The fact that the contractual obligations of the government, rather than a private party, are at issue is significant**. The Supreme Court has noted that under the federal Contracts Clause **"impairments of a State's own contracts would face more stringent examination ... than would laws regulating contractual relationships between private parties."** Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 n.15, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978).

138 P.3d at 293 n.3 (emphasis added). As it explained in Spannaus, the case cited by the Colorado Supreme Court, the United States Supreme Court "evaluates with particular scrutiny a modification of a contract to which the State itself was a party…" 438 U.S. at 244. This is so because "the State's self-interest is at stake." United States Trust Co. of New York. v. New Jersey, 431 U.S. 1, 26 (1977). The Court explained:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id. Further, "'There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.'" Id. (quoting Perry v. United States, 294 U.S. 330, 350-351 (1935)).

With this fundamental distinction between private contracts and government contracts in mind, the Colorado Supreme Court in Golden analyzed the "public interest" in applying the Charter Amendment retroactively. The court balanced the public's interest in the economic incentive agreements, which advanced business development, versus "the voters' interest in limiting public expenditures, which likely motivated the passage of the Charter Amendment." Id. at 293. The court concluded:

> While prospective application of the Charter Amendment promotes the public interest of limiting future public expenditures, retroactive application to the Agreements serves only to relieve the City Council of the duty of exercising its discretion in fulfillment of its contractual obligations.
>
> The Agreements contemplate reimbursement for development costs subject to the discretion of the City Council, not the voters. Because Golden entered into the Agreements for the advancement of the public interest and because the public interest is best served by honoring the city's contractual commitments, we find that the public interest would

> be retarded by retroactive application of the Charter Amendment to the Agreements.

Id. at 293-94. The court also concluded that the Charter Amendment defeated the expectations of both parties and surprised the developers due to their reliance on contrary law. Id. at 294.

Golden does not concern public pension rights, and accordingly, like DeWitt, it cannot and does not overrule any part of McPhail or Bills, including the conclusion that while actuarial necessity is a pertinent consideration as to persons not yet eligible to retire when changes go into effect and who hence enjoy only partial vesting, it is immaterial for persons already retired or eligible to retire at the time of the benefit alteration, whose benefits are fully vested. However, between Golden, which at least involved a contracting governmental entity, and DeWitt, which did not, Golden is most pertinent here. Under Golden (which, as here, concerned a government entity's own contracts) and the United States Supreme Court authority, "impairments of a State's own contracts … face[s] more stringent examination."

Here, given the clear public pension holdings in McPhail and Bills that have never been overruled, the DeWitt factors relating to a "reasonable and necessary" defense do not apply: that defense does not apply where changes are made to pensions of those already retired or eligible for immediate retirement. As Retirees

explained in their opening brief, Colorado's Attorney General so concluded in 2004, **after** DeWitt was decided in 2002. In this Formal Opinion, the Attorney General found to be controlling the Bills distinction between public employees who already had retired or were eligible to retire and those were not yet eligible to retire. While the latter category enjoyed only "a partially vested pension right" subject to considerations of actuarial necessity, PERA members like Retirees here who had fulfilled all of the requirements for the pension have a "fully vested pension right" that "cannot be reduced by the General Assembly." Attorney General Formal Opinion No. 05-04, Bookmark ID #38371770, CD page 1413. In 2004, Colorado's Attorney General expressly relied on the 1959 and 1961 public pension cases McPhail and Bills (id.), not the 2002 non-pension authority in DeWitt that the Colorado Defendants contend trumps the earlier rulings.

The Colorado Defendants do not grapple with the Attorney General's analysis. See PERA Brief at 40; State Defendants' Brief at 12-13. If the Colorado Defendants were able to cite any case law dismissing or limiting McPhail and Bills, their argument would be more compelling. In fact, no court before or after DeWitt has questioned the continuing viability of McPhail and Bills in the public pension context. Post-DeWitt, the United States Court of Appeals for the Tenth Circuit in an unpublished opinion cited McPhail and Bills for the proposition that

"[u]nder Colorado law," the board of trustees of a regional transportation district's pension plan "is not authorized to pass an amendment that impairs a vested pension benefit." Walker v. Board of Trustees, 69 Fed.Appx. 953, 961, 2003 WL 21690534 (10th Cir. 2003).

McPhail and Bills remain the law in Colorado unless and until the Colorado Supreme Court declares otherwise. Accordingly, the various matters addressed in the PERA Brief with regard to the "DeWitt factors" have no bearing here. Details of PERA's underfunding, the Colorado General Assembly's enactment of Senate Bill 10-001, the views of various groups with regard to Senate Bill 10-001, and the like are immaterial to the question before this Court: under McPhail and Bills, do Retirees enjoy a vested right to the subject COLA?

Finally, PERA Defendants point to decisions from other states. PERA Brief at 20-26. Retirees cited contrary authority in their opening brief, Retiree Brief at 28-29. But this is all beside the point in light of McPhail and Bills, which are what matter in Colorado.

B. Changes To COLA

Also irrelevant is the PERA Defendants' argument that the General Assembly has "continuously changed" the COLA (PERA Brief at 4). First, any COLA **improvements** obviously do not serve to establish that pension benefits

may be decreased. As described in the Retirees' opening brief, most pre-2010 changes to the COLA may be characterized as improvements. The PERA Defendants focus on two changes. Between 1980 and 1992, they explain, Retirees received every two years a catch-up COLA supplement tied to inflation. PERA Brief at 4-5. From 1994 to 2000, the legislature provided that retirees would receive either a COLA tied to inflation or a COLA of 3.5% compounded. Id. at 5. In 2002, the legislature set the COLA at 3.5% compounded annually. Id. Thus, Retirees' saw their COLA alter from one tied to inflation to a 3.5% annual increase. According to the PERA Defendants, "[f]rom 2000 to 2009, due to low inflation, the compounded 3.5% COLA resulted in retirees' pension benefits growing far faster than inflation…" Id. at 6.

Thus, based on Defendants' own characterization, Retirees saw only an **improvement** in their benefits. Because they never suffered any loss, they had no obligation to study the subject legislation to determine whether there was a theoretical possibility that they could be shortchanged in the future.

In any event, even if the COLA were to have fluctuated down as well as up, this would not be pertinent under McPhail and Bills to whether Retirees benefits are fully vested. The PERA Defendants argue that "SB10-1's changes to the COLA formula were foreseeable based on the 40-year history of prior COLA

changes and are consistent with the parties' reasonable expectations." The parties' "reasonable expectations" would go to the second element of the DeWitt test, which, as shown, does not apply to public pension matters.

CONCLUSION

For these reasons, and for the further reasons set forth in their opening brief, the Retirees respectfully submit that the Court should reverse the Colorado District Court's summary judgment rulings.

Dated: June 15, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of June, 2012, a true and correct copy of **APPELLANTS' REPLY 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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