Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Appeal from Court of Appeals, 2011CA1507 *Opinion Issued by Judge Jones (Graham and Terry, JJ., Concurring)* *District Court, City and County of Denver, 2010CV 1589* *Hon. Robert S. Hyatt, District Court Judge*	
Petitioners/Cross-Respondents: Gary R. Justus, Kathleen Hopkins, Eugene Halaas, Jr., and Robert P. Laird, Jr. v. **Respondents/Cross-Petitioners:** The State of Colorado; Governor John Hickenlooper, in his official capacity; Colorado Public Employees' Retirement Association; Carole Wright, in her official capacity; and Maryann Motza, in her official capacity.	Supreme Court Case No. 2012SC906
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PERA DEFENDANTS' OPENING-ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening-Answer 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 Opening-Answer Brief complies with C.A.R. 28(g). It contains 8,688 words.

The Opening-Answer Brief also complies with all other requirements of C.A.R. 28(k). 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.

s/ Eric Fisher
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REFERENCES TO RECORD IN BRIEF

The court of appeals and district court opinions were attached as exhibits to Defendants' November 21, 2012 Petition for Certiorari; they are referred to herein as "Ex. A" and "Ex. B" respectively. All citations to the Colorado Revised Statutes are to the current version unless otherwise indicated.

A portion of the appellate record was separately transmitted from the rest of the record because it was not filed in Lexis and was inadvertently omitted from the original record transmission. For that portion of the record, PERA had filed with the trial court electronic copies of three attachments containing: (A) the legislative history of Senate Bill 10-001; (B) the relevant statutory history of PERA since 1970; and (C) the relevant pension plan language for the Denver Public Schools Retirement System since 1974. Because those three attachments did not contain Lexis filing numbers, they were cited in the Court of Appeals' briefing as "App. __."

In addition, the Lexis-filed record transmitted by Plaintiffs for this appeal contains incorrect Lexis filing numbers as the titles for all the documents. PERA has cited all these documents by the correct Lexis filing number contained on the top of the first page of the document.

STATEMENT OF ISSUES

- Whether the contracts clause framework articulated in *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), applies to all contract clause claims under the Colorado Constitution.
- Whether the Colorado Public Employees' Retirement Association members have contractual rights to the cost-of-living adjustment formulas in place at their respective retirements for life without change.
- Whether SB 10-1, which adjusted cost-of-living adjustments to their current level of two percent compounded annually, was constitutional because it (a) did not substantially impair contractual expectations and was reasonable and necessary to ensure the pension funds' long-term viability, and (b) was not a regulatory taking.

STATEMENT OF THE CASE

In 2010, the General Assembly enacted a bipartisan bill, Senate Bill 10-001 ("SB 10-1"), addressing the multibillion dollar shortfall in public pension funds managed by the Colorado Public Employees' Retirement Association ("PERA"). Ch. 2, secs. 1-36, §§ 24-51-101 *et seq*, 2010 Colo. Sess. Laws 4-32. Dramatic measures were necessary, as the financial crisis had caused PERA $12 billion of investment losses in 2008, leaving it only 52% funded and with a $27.5 billion shortfall; even with annual 8.5% investment returns, PERA would have run out of money within 25 years. SB 10-1 required shared sacrifices by all PERA stakeholders to ensure the pension fund's long-term viability.

A. PERA and Plaintiffs

PERA provides retirement and other benefits to public employees. It has five divisions: state, school, local government, judicial, and (since 2010) Denver Public Schools ("DPS").

The four Plaintiffs, who retired or were eligible to retire with full benefits before SB 10-1's enactment, receive monthly PERA pensions. They are a state judge who retired in 1999 (Plaintiff Halaas), a state employee who retired in 2001 (Plaintiff Hopkins), another who became eligible to retire with full benefits in 2007 and retired in July 2010 (Plaintiff Laird), and a DPS employee who retired in 2003 and received a pension from the DPS retirement system until being brought into PERA in 2010 (Plaintiff Justus).

B. Plaintiffs' Constitutional Challenges to SB 10-1

Plaintiffs challenged the constitutionality of SB 10-1's readjustment to the then-existing formula for annual cost of living adjustments ("COLAs") to monthly pensions. *See* Ch. 2, secs. 19-20, §§ 24-51-1001, 1002, 2010 Colo. Sess. Laws 19-20. They claimed entitlements, protected by the Contract Clauses of the State and Federal Constitutions, to the COLA formulas in place when they retired (or became eligible to retire) for life without change. They also alleged that SB 10-1 violated substantive due process and was an unconstitutional taking.

Plaintiffs' Contract Clause claims were based on two half-century old cases: *Police Pension & Relief Board v. Bills*, 366 P.2d 581 (Colo. 1961), and *Police Pension & Relief Board v. McPhail*, 338 P.2d 694 (Colo. 1959). Plaintiffs maintained their claims were exempt from the modern Contract Clause analysis of *In re Estate of DeWitt*, 54 P.3d 849 (Co. 2002).

C. District Court Ruling

The district court granted Defendants summary judgment on all claims. It ruled that the "COLA provisions themselves establish that Plaintiffs have no contract right to a COLA frozen at retirement." Ex. B at 4. The court detailed the many changes in the statutory COLA rates, as well as to DPS's COLAs, throughout the years. *Id*. at 5-7.

Looking to statutory text, the court determined that the "COLA provisions . . . have never included durational language." *Id*. at 4. And, in practice, "[f]or four decades the COLA formulas as applied to retirees have repeatedly changed and have never been frozen at the date of retirement." *Id*. Similarly, "not a single DPS retiree has received the 'contractual' benefit on which, for example, Plaintiff Justus bases his Contract Clause claims, a frozen cost of living adjustment based on the date of retirement (or full vesting)." *Id*. at 7.

The court held that "[w]hile Plaintiffs unarguably have a contractual right to their PERA pension itself, they do not have a contractual right to the specific COLA formula in place at their respective retirement, for life without change." *Id.* at 4. It accordingly rejected Plaintiffs' constitutional challenges. *Id.*

D. Court of Appeals Opinion

The court of appeals reversed and remanded. It held that Plaintiffs had a constitutionally protected "contractual right to have their retirement benefits calculated using the COLA in effect when their rights vested, before the effective date of Senate Bill 10-001." Ex. A ¶ 26. According to the court, rights vest on the date of retirement eligibility. *See id.* ¶ 34 (citing *Bills*, 366 P.2d at 584). The parties agreed that all four Plaintiffs (and all members of the putative class) had retired or become eligible for full retirement before SB 10-1's effective date.[1]

[1] The court of appeals misread Plaintiffs' allegation (with which Defendants concur) that Plaintiff Laird was eligible to retire with full benefits when SB 10-1 was signed into law (February 23, 2010). Misconstruing paragraph 4 of the Second Amended Complaint (which alleged that Laird was "eligible to receive a full service pension benefit" "as of February 28, 2010"), the court wrote he became retirement eligible "on" that date. Ex. A ¶ 48. February 28, 2010 was Plaintiffs' proposed end date for their putative class (SAC ¶ 12)—not Laird's date of full eligibility, which was reached in 2007. This led the court on an unnecessary detour regarding the "'limited' vested right" of one not yet eligible to retire. But the parties agreed, and the district court found, that "Plaintiff Laird became eligible for retirement with full benefits in 2007." Ex. B at 8.

The opinion recognized that to "overcome the presumption" that statutes do not create contracts, there must be "a clear indication that the legislature intended to bind itself contractually." *Id*. ¶ 31 (citing cases). It also recognized that "[a] court ordinarily ascertains whether the legislature so intended by examining whether the language of the statute and the circumstances surrounding its enactment or amendment manifest an intent to create an enforceable contractual right." *Id*. (citing cases).

The court of appeals nonetheless did not accord significance to the statutory language and the numerous COLA changes, including changes during Plaintiffs' retirements. *Id*. ¶ 39. Rather, it "consider[ed] *McPhail* and *Bills* dispositive of whether plaintiffs here have a contractual right to a particular COLA." *Id*. ¶ 35.

The court explained that under *DeWitt*, this does not end the constitutional analysis. *Id*. ¶¶ 26-29, 49-53. It recognized that courts must then determine if the contractual "impairment is substantial" (which turns on whether the "change was foreseeable") and, if so, whether it "was reasonable and necessary to serve a significant and legitimate public purpose (i.e., actuarial and funding considerations)." *Id*. ¶¶ 49-53. It remanded the case to the district court for this further analysis. *Id.* ¶ 55. The court also reversed and remanded the district court's ruling rejecting Plaintiffs' Takings Clause challenge. *Id*. ¶ 54.

STATEMENT OF FACTS

PERA, with more than 500,000 current members and retirees, is funded by member contributions and contributions from the more than 500 participating public employers. PERA pays more than $3 billion in annual benefits to retirees.

When a PERA member retires, PERA pays the member (and designated co-beneficiary) a monthly pension benefit, the amount of which is based on the member's retirement age, years of service, and "Highest Average Salary." §§ 24-51-602, 603, C.R.S. SB 10-1 did not change this monthly benefit calculation for current PERA retirees nor did its adjustment to future COLA rates to existing retirees alter the fundamental mechanism for payment of pension benefits, which remains a monthly pension benefit set at retirement plus a separately calculated cost of living adjustment that has repeatedly changed during retirement.

A. The History of COLAs

The district court detailed how "for the past forty years the General Assembly has repeatedly modified the COLA formula for existing retirees." Ex. B at 5-6. The court of appeals also detailed the statutory history, *see* Ex. A ¶¶ 8-17, though it confused some key history and terminology.

PERA was established in 1931 and began paying benefits in 1936, but the first COLA was not statutorily authorized until 1969 and paid in 1970. Ch. 157,

secs. 1-22, §§ 111-1-1 *et seq.*, 1931 Colo. Sess. Laws 742-52; ch. 253, sec. 6, § 111-1-35, 1969 Colo. Sess. Laws 896-97; ch. 256, sec. 1, § 111-1-35, 1969 Colo. Sess. Laws 904. Judicial retirees received no COLA until 1974 and then received lower rates than others until 1988. Ch. 323, sec. 6, § 111-6-14, 1973 Colo. Sess. Laws 1130-31; ch. 186, sec. 9, § 24-51-1002, 1988 Colo. Sess. Laws 971.

The statutes continuously provided for one type of COLA and intermittently provided a second. First, from 1969 through the 2000, the varying base COLAs were the lesser of actual inflation or a fixed percentage.[2] Second, in some prior years, there were supplemental COLAs: one-time annual increases from 1975-78, and one-time biannual increases from 1980-92 under the Cost of Living Stabilization fund.[3] The court of appeals recognized these "two types of COLAs"

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[2] Ch. 253, sec. 6, § 111-1-35, 1969 Colo. Sess. Laws 896-97; ch. 316, sec. 9, § 111-1-36, 1973 Colo. Sess. Laws 1102-03; ch. 175, sec. 7, § 24-51-1002, 1992 Colo. Sess. Laws 1136; ch. 138, sec. 7, § 24-51-1002, 1993 Colo. Sess. Laws 478.

[3] Ch. 222, sec. 1, § 24-51-35, 1975 Colo. Sess. Laws 839; ch. 335, sec. 1, § 24-51-136, 1977 Colo. Sess. Laws 1234-35; ch. 118, sec. 3, § 24-51-136, 1980 Colo. Sess. Laws 604-05; ch. 102, sec. 1, § 24-51-136, 1982 Colo. Sess. Laws 390-91; ch. 195, sec. 1, § 24-51-136, 1984 Colo. Sess. Laws 715-16; ch. 185, sec. 1, § 24-51-136, 1986 Colo. Sess. Laws 955-56; ch. 187, sec. 1, §24-51-1006, 1988 Colo. Sess. Laws 973-74; ch. 182, sec. 1, §24-51-1006, 1990 Colo. Sess. Laws 1254-55; ch. 175, sec. 10, § 24-51-1006, 1992 Colo. Sess. Laws 1137-38.

but confusingly inverted their names, describing the base COLAs paid since 1970 as "supplemental" and the intermittent increases as "base." Ex. A ¶¶ 10-17.

From 1969 until 1994, the *non-compounded* base COLA was the *lesser* of the prior year's actual inflation or a capped percentage, which varied from 1.5% to 4%. *See supra* note 2. The base COLA provisions also included a "banking" component that offered protection against high inflation. *See id.*[4] From 1975 to 1978, the legislature enacted four one-time supplemental COLAs called "catch-up cost of living supplements." *See supra* note 3.

On top of the base COLA, from 1980 to 1992, retirees received biannual catch-up supplemental COLAs from the Cost of Living Stabilization Fund ("CLSF") tied to actual inflation. *See id*. A 1987 repeal and reenactment of the PERA statutes subjecting all COLA changes to legislative approval applied only to "[c]ost of living increases in retirements" (*i.e.*, to CLSF increases); contrary to the court of appeals' suggestion (Ex. A ¶14), it had been in place since 1980. Its 1993 abolition signified nothing other than that the CLSF then was eliminated.

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[4] Under the banking component, for a year of sub-3% inflation, the difference between the actual COLA paid and 3% was "banked" and applied in a later year with high inflation to increase the COLA above 3%. The court of appeals incorrectly stated that banking began in 1987, Ex. A ¶ 13, when it actually began in 1970 when the base COLA was first instituted.

In 1993, to reduce COLA's cost and increase PERA's actuarial soundness, the General Assembly eliminated the uncapped, supplemental COLA tied to actual inflation. Ch. 138, secs. 6-7, §§ 24-51-1001, -1002, -1006, 1993 Colo. Sess. Laws 478-80. That year, the General Assembly substituted a single COLA of the *lesser* of 3.5% *compounded* or the prior year's inflation. It also reset the "banking" provision, eliminating any previously banked amounts.

Seven years later, in 2000, the General Assembly again changed the COLA formula for retirees. Ch. 186, sec. 7, § 24-51-1002, 2000 Colo. Sess. Laws 782. This time, it set the COLA at 3.5% compounded annually, thus eliminating for the first time the COLA's tie to actual inflation. It also eliminated the banking provision in place since 1970, negating up to 6.93% in banked inflation protection that retirees had accumulated since 1994.

From 2000-09, the compounded 3.5% COLAs resulted in pensions growing faster than average annual inflation of 2.2%. *See* http://www.bls.gov/cpi/. In 2008 and 2009, despite recessionary *deflation* of negative 1.2%, retirees received compounded increases of 7%. *See id.*

In addition to the constant COLA percentage changes, the General Assembly repeatedly changed the COLA effective dates. From 1970-86, COLAs became effective on May 1, ch. 253, sec. 6, §111-1-35, 1969 Colo. Sess. Laws 896-97;

from 1987-94, they became effective on May 1 or November 1, ch. 196, sec. 8, § 24-51-1001(1.5), 1987 Colo. Sess. Laws 1098-99; from 1995-2009, they became effective on March 1, ch. 138, sec. 6, § 24-51-1001, 1993 Colo. Sess. Laws 478; and since SB 10-1, COLAs take effect on July 1. Ch. 2, sec. 20, § 24-51-1002, 2010 Colo. Sess. Laws 20-21.

The court of appeals recognized that, like the oft-changing PERA COLA formulas, "the DPSRS COLA formula changed several times over the past few decades." Ex. A ¶ 18. DPS retirees' one percent non-compounded annual COLAs from 1965-73 were raised to two percent non-compounded in 1974, to three percent non-compounded in 1981, to three and one-quarter percent non-compounded in 1986, and finally became compounded at that last rate in 2001. *Id.* Additional changes to the DPS' COLA formula were made in 1976, 1980, 1983, 1988, 1995, 1998, and 2000. *See* Ex. B at 7.

B. SB 10-1

During the 2008 recession, PERA suffered losses totaling $11.8 billion, and its funding ratio fell to 52% (with $29.5 billion assets but $57 billion accrued liability). Assuming an annual 8.5% return, the state division would run out of money in 21 years, and the school division would run out in 25 years. In addition, PERA's assets were projected to decrease to less than 40% of its liabilities in as

little as seven years: a critical threshold because PERA would be forced to sell long-term investments to meet short-term obligations, thus accelerating the decline to insolvency.

The General Assembly, after extensive actuarial studies and input from retirees, retiree organizations, and other stakeholders, responded with SB10-1, which took effect on February 23, 2010. It made "modifications to the public employees' retirement association necessary to reach a one hundred percent funded ratio within the next thirty years." Ch. 2, pmbl., 2010 Sess. Laws 4.

SB 10-1 substantially increased both employer and employee contributions to the PERA funds. Current and future employees will pay the highest contribution rates in PERA's history (while working up to a decade longer before retirement) and then receive a lower COLA in retirement than current retirees. After extensive actuarial modeling, however, it became clear that even more was required to make PERA sustainable: retiree COLAs would once again require readjustment. Without that readjustment, PERA could not right the ship.

SB10-1 did not reduce any monthly pension nor did it abolish annual COLAs. With unanimous support of union groups and retiree organizations representing more than 200,000 PERA retirees and members, the legislature modified the then-existing COLA formula by readjusting it from 3.5%

compounded to 2% compounded. § 24-51-1002, C.R.S. For 2010 only, the COLA was the lesser of 2% compounded or actual inflation, *id*., which resulted in no increase for that negative inflation year. The court of appeals was incorrect that the post-2010 COLA formula is the same as the 2010 formula (Ex. A ¶ 22); actually, it is 2% compounded, and the 2%-or-actual inflation formula will apply in a future year only if PERA experiences negative returns. § 24-51-1002, C.R.S. The compounded 2% rate will increase annually by 0.25% without limit when PERA returns to financial soundness with a 103% funding ratio. *Id*. If PERA's funding ratio later falls below 90% (not 99% as asserted by Plaintiffs (O-Br. 18)), the COLA would decrease by 0.25% each year it is below that ratio, but would not decrease below 2%. § 24-51-1009.5, C.R.S.

SUMMARY OF ARGUMENT

SB 10-1 is constitutional. The Colorado and Federal Contract Clauses "are not to be interpreted as absolute," and the United States Supreme Court's tripartite balancing test applies to a constitutional challenge under both the Colorado and federal Contract Clauses. *DeWitt*, 54 P.3d at 858. The *DeWitt* framework, which adopted the federal constitutional test, applies to *all* Contract Clause claims in Colorado, including pension-related ones. There is no "exception" for pensions

under the federal Contract Clause and no basis for creating one under the identically-worded Colorado Constitution. The old *McPhail* and *Bills* cases did not create a pension "exception" to the Colorado Constitution's Contract Clause. Modern state supreme court cases from across the nation have applied the federal framework in Contract Clause challenges to public pensions and COLAs.

Applying the *DeWitt* test, no contract entitles PERA or DPS retirees to the statutory COLA formula in place at their retirements for life without change. Laws do not create contracts absent clear contrary language and circumstances. Here, neither the statutes (which lacked durational language) nor surrounding circumstances (where COLA formulas changed repeatedly) entitled retirees to COLAs frozen for life under the formula in effect for any particular year. In contrast, the city charter in *McPhail* and *Bills* contained express language of entitlement and were unchanged for decades. More apposite recent cases outside Colorado reject retirees' claims to lifetime entitlements to a fixed COLA formula.

SB 10-1 is also constitutional under *DeWitt*'s second and third prongs. The law did not substantially impair any contractual expectations because it was foreseeable given past changes to COLA formulas. SB 10-1 was reasonable and necessary to ensure the pension funds' long-term viability. Plaintiffs' Takings Clause claim necessarily fails because their Contract Clause claim fails.

STANDARD OF REVIEW

The three issues upon which this Court granted review were fully briefed on summary judgment and on appeal. The court of appeals ruled (1) *DeWitt*'s modern Contract Clause framework applied, Ex. A ¶¶ 26-29, 49-53, and (2) Plaintiffs had individualized "contractual right[s] to the COLA in effect when" they became eligible to retire. *Id*. ¶ 35. Though the court did not address SB 10-1's ultimate constitutionality, the Court's grant of certiorari properly included that issue. *See Anaya v. Indus. Comm'n*, 512 P.2d 625, 627 (Colo. 1973) (where "record is complete as to the constitutional question presented," supreme "court should not refuse to pass upon constitutional questions simply because it might constitute the first ruling in the case in this respect").

This Court will "review the constitutionality of statutes de novo." *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007). But it will "presume the challenged statutory scheme is constitutional unless [the challenger] establishes otherwise beyond a reasonable doubt." *Qwest Corp. v. Colo. Div. of Property Taxation*, 304 P.3d 217, 223 (Colo. 2013). This "high burden acknowledges that declaring a statute . . . unconstitutional is one of the gravest duties impressed upon the courts." *Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011).

ARGUMENT

I. The *DeWitt* Framework (Adopting the Federal Constitutional Test) Applies to All Contract Clause Claims, Including Pension-Related Ones.

DeWitt construed the State and Federal Constitutions' Contract Clauses identically in holding that they "are not to be interpreted as absolute." 54 P.3d at 858. Since 2002, *every* Colorado appellate case involving the Contract Clause has applied *DeWitt*. *See Raptor Educ. Found., Inc. v. State*, 296 P.3d 352, 356-58 (Colo. App. 2012); *Parker v. City of Golden*, 119 P.3d 557, 564 (Colo. App. 2005), *rev'd on other grounds*, 138 P.3d 285 (Colo. 2006); *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 786 (Colo. App. 2002).

DeWitt cited pension cases in explaining that the "[f]irst" issue is "whether there is a contractual relationship," which requires a party to "demonstrate that the contract gave him a vested right." 54 P.3d at 858 (citing *Dodge v. Bd. of Educ.*, 302 U.S. 74, 77-78 (1937), and *McPhail*). This does not end the *DeWitt* inquiry, as the party next must "prove substantial impairment of a contractual relationship," by "demonstrat[ing] that the law was not foreseeable and thus disrupts the parties' expectations." *Id*. Finally, "[b]ecause the contract clause is not an absolute bar to legislative regulation of contracts," a substantial impairment is constitutional if it meets the standards of "necessity and reasonableness." *Id*. at 858-59.

A. There Is No Public Pension "Exception" Under the Federal Constitution and No Basis for Creating One Under the Identically-Worded Colorado Constitution.

Plaintiffs concede that under the modern framework adopted in *DeWitt*, the Contract Clauses are "no longer absolute." O-Br. 21. Plaintiffs do not and could not dispute that this modern framework governs their Contract Clause claim under the Federal Constitution. But they ask this Court to construe the Colorado Constitution differently than the Federal Constitution; according to Plaintiffs, this Court should "carv[e] out an exception when it comes to pension legislation." *Id.* at 24.

This modern framework applies to all types of contracts. The amount of judicial deference to legislative determinations of reasonableness and necessity can vary depending on whether the contract is public or private. *See DeWitt*, 54 P.3d at 859. While "complete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's self-interest is at stake," the inquiry remains the same because "[t]he Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25-26 (1977); *see id.* at 25 ("As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.").

There is no federal "exception" for public pensions. O-Br. 24. The Federal Contract Clause is not an absolute bar to public pension modifications, which federal courts uniformly review under the framework adopted in *DeWitt*. *See Parker v. Wakelin*, 123 F.3d 1, 4-5 (1st Cir. 1997); *Taylor v. City of Gadsen*, ___ F. Supp. 2d ___, No. 4:11-cv-3336-VEH, 2013 WL 3929957, at **26-27 (N.D. Ala. July 29, 2013); *Me. Ass'n of Retirees v. Bd. of Trs. of Me. Pub. Emps. Ret. Sys.*, ___ F. Supp. 2d ___, No. 1:12-cv-59-GZS, 2013 WL 3212360, at *8 (D. Me. June 24, 2013); *Md. State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1359-60 (D. Md. 1984). Plaintiffs have conceded since filing their complaint that the three-part test applies to their federal claim. *See* Sec. Am. Compl. ¶ 70 (alleging in claim for relief of violation of Federal Contract Clause that "Defendants' actions were neither reasonable nor necessary").

Plaintiffs offer no textual basis for construing Colorado's Constitution to contain some pension "exception" not found in the U.S. Constitution. The respective Contract Clauses are substantively identical, as both cover any "law impairing the obligation of contracts." *See* Colo. Const. art. II, § 11 (providing that "[n]o" such law "shall be passed by the general assembly"); U.S. Const. art. I, § 10 (providing that "[n]o state shall … pass any" such law).

This Court has "generally declined to construe the state constitution as imposing such greater restrictions in the absence of textual differences or some local circumstance or historical justification for doing so." *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009). Those cases construing the Colorado Constitution more broadly cite textual or other distinctions other than "[s]imply disagreeing with the United States Supreme Court." *Id.*; *e.g.*, *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (citing "differences between the language of the First Amendment" and Colorado Bill of Rights, and Colorado's "extensive history of affording broader protection" of "expressive rights"). The interest in aligning constitutional law is so strong as to justify overruling Colorado rulings broader than the Supreme Court's construction of a similar federal constitutional provision. *See*, *e.g.*, *People v. Dunaway*, 88 P.3d 619, 630-31 (Colo. 2004).

Plaintiffs offer policy reasons for creating a public pension "exception." *See* O-Br. 25 (arguing that those retired or eligible to retire are "elderly" and "more vulnerable"). But departing from an identical federal constitutional provision based on policy disagreements would "risk[] undermining confidence in the judicial process and the objective interpretation of constitutional and legislative enactments." *Curious Theatre*, 220 P.3d at 551.

Plaintiffs' policy arguments are flawed in any event. Their subjective view that all public retirees are "elderly" and "vulnerable" is overbroad: Hopkins purchased nine years of service credit and retired the next day at age 55; Laird became eligible to retire with full benefits at age 54 and retired at age 57; and Justus retired at age 56. More importantly, absent the SB 10-1 reforms, all individuals in the system would have been "vulnerable" as the system was due to become bankrupt in less than three decades. This Court should eschew a shortsighted approach that could cause Colorado to suffer the public pension problems that have beset other jurisdictions. *See, e.g.*, *In re City of Detroit, Mich.*, ___ Bank. R. ___, 2013 WL 6331931 (E.D. Mich. Dec. 5, 2013).

It would be bad constitutional policy to go beyond the Federal Constitution by imposing an absolute restriction on the General Assembly's ability to respond to economic crises affecting public pensions. Applying the *DeWitt* factors to public pensions, as they are applied to all other public contracts, fully accommodates all the respective interests. Where a legislative impairment of pension rights is insubstantial, or where it is reasonable and necessary to serve an important public purpose, it should satisfy the Colorado Constitution just as it does the Federal Constitution.

B. *McPhail* and *Bills* Did Not Create a Public Pension "Exception" to the Colorado Constitution's Contract Clause.

There is no basis for exempting public pensions from modern Contract Clause analysis. If *McPhail* and *Bills* were irreconcilable with *DeWitt*, those dated decisions rather than *DeWitt* would need to give way. But there is no such conflict.

DeWitt recognized that *McPhail* addressed the "[f]irst" inquiry of "whether there is a contractual relationship," which requires "the contract [provide] a vested right." 54 P.3d at 858 (citing U.S. Supreme Court case and *McPhail*, 338 P.2d at 697). That was the "only question" decided in *McPhail*. 338 P.2d at 697. There, retired police officers argued that their pension was "a promise," but the City invoked "the gift or gratuity concept of pensions." *Id*. In ruling for the retirees, the Court held that a "contributory [pension] system . . . cannot be correctly described as a gift." *Id*. at 701. *Bills* followed up on *McPhail* by resolving the narrow issue of when the rights "become a vested contractual obligation." 366 P.2d at 583-84. It ruled that those "eligible to retire" at the time of the change were "clearly" covered, and it also recognized "limited vesting" rights prior to retirement eligibility. *Id*. at 584-85.

Having rejected "gratuity" arguments and recognized vested contract rights, neither *McPhail* nor *Bills* had any need to address the rest of the modern framework later adopted in *DeWitt*. The City never argued the changes, to a

previously unmodified provision with "a long history" dating back decades, *see McPhail*, 338 P.2d at 696, were foreseeable and thus not a substantial impairment. *DeWitt*, 54 P.3d at 858. Nor did the City cite economic exigencies that could have met modern standards of "necessity and reasonableness." *Id*. at 859.

McPhail and *Bills* could not have rejected the modern constitutional test later adopted in *DeWitt* because the U.S. Supreme Court first clearly articulated it in 1977. *See U.S. Trust*, 431 U.S. at 21-26. Plaintiffs suggest that Depression-era decisions that economic necessity may justify impairing contracts "foreshadow" *DeWitt*. O-Br. 20, 26 (citing cases such as *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)). But the City raised no such justification in *McPhail* and *Bills*, and the records there reveal no economic necessity that could have justified impairing those contractual entitlements. Because the issue was not raised or presented, any language regarding whether or when vested contract rights might be "subject to a unilateral change," *e.g.*, *Bills*, 366 P.2d at 583-84, are dicta and not binding in later cases. *United States v. Jesse*, 744 P.2d 491, 502-03 (Colo. 1987).

In trying to show that *McPhail* and *Bills* somehow exempted pensions from the later *DeWitt* test, Plaintiffs rely heavily on the 2004 advice in AG Opinion 04-04. O-Br. 12-15, 23 (incorrectly citing this as a 2005 opinion). Plaintiffs emphasize the former Attorney General's language that a PERA "member's fully

vested pension right cannot be reduced by the General Assembly." *Id*. at 13. At most, an Attorney General's opinion is due "respectful consideration." *Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988). As discussed in the State Defendants' opening-answer brief, because Opinion 04-04 did not involve COLA issues and because it relied on *McPhail* and *Bills* without addressing *DeWitt*, the opinion sheds little light on the constitutional issues here.

C. Modern State Supreme Court Cases Have Applied the Federal Framework in Contract Clause Challenges to Pensions and COLAs.

Almost all modern state court cases considering Contract Clause challenges to public pension changes have applied the Supreme Court's framework. Most recently, the Florida Supreme Court rejected state Contract Clause challenges to a law permanently eliminating COLAs for active employees. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013). All justices agreed the modern framework applied. *See id.* at 385-86 (quoting *U.S. Trust*, 431 U.S. at 25-26, 30-31); *id*. at 391 (Pariente, J., concurring) (applying three-part test); *id*. at 400-01 (Perry, J., dissenting) (same).

Other state supreme courts, including those once using a more truncated approach, have adopted the Supreme Court's modern framework to resolve state Contract Clause challenges to pension modifications. The Rhode Island Supreme Court thus explained that "[o]ver time, we have adopted the test devised by the United States Supreme Court in scrutinizing alleged contract-clause violations."

Retired Adjunct Professors of the State of R.I. v. Almond, 690 A.2d 1342, 1345 n.2 (R.I. 1997). At least eight other state supreme courts use the U.S. Supreme Court's modern framework to resolve state Contract Clause challenges to laws modifying public pensions or otherwise affecting those retirees.[5]

The modern Contract Clause framework is now so ingrained into state constitutional fabrics that Plaintiffs' lead counsel here acknowledged it applied when they brought unsuccessful recent challenges to Minnesota and South Dakota laws modifying public retiree COLAs. In Minnesota, they argued for "modern Contract Clause analysis" under both state and federal constitutions. Tr.#37453807, PERA Reply Ex. 1 at 32. In South Dakota, they conceded a state "ha[s] the right to reduce the benefits of retirees who are fully vested in their pensions . . . *if* the modification is justified as reasonable and necessary to serve an important public purpose." PERA C.A. Br. Ex. C. at 14 (internal punctuation omitted).

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[5] *See Cloutier v. State*, 42 A.3d 816, 822 (N.H. 2012); *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 661 S.E.2d 73, 77 (S.C. 2008); *Smith v. Bd. of Trustees*, 851 So. 2d 1100, 1109 (La. 2003); *Wis. Prof'l Police Ass'n v. Lightbourn*, 627 N.W.2d 807, 848 (Wis. 2001); *MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1058 (Mass. 2000); *State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E.2d 644, 653 (Ohio 1998); *Gulbrandson v. Carey*, 901 P.2d 573, 578 (Mont. 1995); *Taylor v. State & Educ. Empls. Grp. Ins. Program*, 897 P.2d 275, 279 (Okla. 1995).

Plaintiffs contend that "the Washington Supreme Court has utilized the traditional three-part Contract Clause test to review the constitutionality of most legislation," but "as recently as three [*sic*] years ago, the court continued to use a unique test to review pension legislation" in *McAllister v. City of Bellevue Firemen's Pension Bd.*, 210 P.3d 1002 (Wash. 2009). O-Br. 24-25. That takes *McAllister* out of context, as the case addressed a purely "statutory" claim and "*not* . . . a constitutional challenge." 210 P.3d at 1005 & n.1 (emphasis added).

II. There is No Contract Entitling PERA Retirees to the Statutory COLA Formula in Place at Their Retirements for Life Without Change.

A. Laws Do Not Create Contract Rights Absent Clear Intent to Do So in the Statutory Language and Surrounding Circumstances.

Under both the Colorado and U.S. Constitutions, "[i]t is presumed that a law 'is not intended to create private contractual vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Colo. Springs Fire Fighters Ass'n, Local 5 v. City of Colo. Springs*, 784 P.2d 766, 773 (Colo. 1989) (quoting *Dodge*, 302 U.S. at 79). This "well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws . . . ." *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe. Ry. Co.*, 470 U.S. 451, 466 (1985) (citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-05 (1938)).

A statute will create a contract "only when its language and surrounding circumstances manifest a legislative intent to create private contractual rights enforceable against the state or municipality." *Colo. Springs Fire Fighters*, 784 P.2d at 773 (citing *Brand*, 303 U.S. at 100); *accord U.S. Trust*, 431 U.S. at 17 n.14. As the First Circuit explained in a pension case, "where a public contract allegedly arises out of statutory language, the hurdle . . . [of] proving that a contractual relationship exists . . . is necessarily [a] high[]" one. *Parella v. Ret. Bd. of the R.I. Emps.' Ret. Sys.*, 173 F.3d 46, 60 (1st Cir. 1999). To overcome the presumption that laws do not create contracts, there must be "'some clear indication that the legislature intend[ed] to bind itself contractually . . . .'" *Id.* (quoting *Nat'l R.R.*, 470 U.S. at 465-66).

B. Neither the Statutory Language Nor Surrounding Circumstances Entitled Retirees to COLAs Frozen for Life Under the Formula in Effect for Any Particular Year.

1. The Statutes Lacked Durational Language, and COLA Formulas Changed Repeatedly.

Plaintiffs cannot dispute the district court's point that the statutes "never included durational language stating or suggesting that a particular COLA provision formula (and there have been many) was for life without changes." Ex. B at 4. Nor did the court of appeals dispute it. The court accepted the "presumption" that laws do not create contract rights, Ex. A ¶ 30, and recognized

that courts "ordinarily" examine the language and surrounding circumstances to determine whether a party has "overcome the presumption." *Id.* ¶ 31. The court, however, did not effectuate that presumption or closely scrutinize the language and circumstances because it wrongly "consider[ed] *McPhail* and *Bills* dispositive of whether plaintiffs have a contractual right to a particular COLA." *Id.* ¶ 35.

The lack of durational language enshrining specific COLA formulas distinguishes them from monthly pension benefits, which the district court properly held to be contractually protected. *See* Ex. B at 3-4. The PERA statute makes clear that members are entitled to monthly retirement benefits for life. It defines "[v]ested benefit" as "an *entitlement* to a future monthly *benefit* which is earned upon completion of five years of service credit." § 24-51-101(51), C.R.S. (emphasis added). A "[b]enefit," in turn, means "the monthly payment for service retirement, disability retirement, or survivor benefits." § 24-51-101(7), C.R.S.[6]

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[6] Terms within the definition of "benefit" do not include the COLA provisions found in part 10 of the PERA statute: "'Retirement benefit' means the *monthly service retirement benefit* or the disability retirement benefit provided for in this article."; "'Retirement' means the time when the retiree is receiving *retirement benefits pursuant to part 6 or 7 of this article*."; "'Survivor benefits' means the *monthly benefit payable pursuant to part 9* of this article upon the death of a member or inactive member prior to retirement . . . ."; "'Retiree' means a person who is receiving a *service* or disability retirement *benefit* from the association pursuant to *part 6 or 7 of this article*." §§ 24-51-101(41), (40), (39), (48), C.R.S. (emphases added).

The PERA statute contains durational language making clear that the monthly retirement benefit is "payable for the life of the retiree" and any properly designated co-beneficiary. § 24-51-801(1), C.R.S. A retiring member has the right to elect one of three options—all "payable for the life of the retiree." *Id*. The first option makes the benefit payable only for the retiree's lifetime, and the benefit "ends" upon the retiree's death. *Id*. (1)(a). The second and third options allow "[a] joint life benefit" payable to both the retiree and a "cobeneficiary of said retiree for life." *See id*. (1)(b) (Option 2); *id*. (1)(C) (Option 3).

Plaintiffs are reduced to arguing that the various statutes "used mandatory language ('shall') that requires the payment of COLAs." O-Br. 27 (emphasis omitted). This "mandatory" language bound the PERA administrator in the given year—not the General Assembly in future years. Simply because the COLA *payment* is mandated administratively under the then-existing COLA formula does not make that specific COLA *formula* legislatively unalterable in the future. That "shall" language not only was necessary (stating that COLAs "may" be paid would leave discretion not to pay them in a given year) but also parallels other language held *not* to create contractual entitlements. *E.g.*, *Colo. Springs Fire Fighters*, 784 P.2d at 768 & n.2 (municipal ordinance providing City "will pay the entire monthly premium cost for those former employees" was not contractual

entitlement preventing change); *Spradling v. Colo. Dep't of Revenue*, 870 P.2d 521, 523 (Colo. App. 1993) (statute providing public pension benefits "shall be subtracted from" gross income was not contractual entitlement).

The surrounding circumstances also preclude any lifetime contractual entitlement to the COLA formula that happened to be in effect upon an individual's retirement. As shown above, the statutory COLA formulas changed—not always for the better—at least ten times for both PERA and DPS retirees from 1969 to 2010. Plaintiffs cannot dispute the district court's point that "[f]or four decades the COLA formulas as applied to retirees have repeatedly changed and have never been frozen at the date of retirement." Ex. B at 4. Nor can they dispute that "[n]ot a single DPS retiree has received the 'contractual' benefit on which, for example, Plaintiff Justus bases his Contract Clause claims, a frozen cost of living adjustment based on the date of retirement (or full vesting)." *Id*. at 7.

Plaintiffs quote old PERA informational booklets and statements, O-Br. 11-12, but none promised retirees that the COLA formula in effect on their particular retirement date would never change. Those informational documents also advised that the PERA statutes "*take precedence over any interpretation in this fact sheet*." Tr.#34521555, Pls.' MSJ Ex. 7 (emphasis added). The court of appeals properly rejected any reliance on these documents by citing case law that "pension plan

handbooks, communications, and policies were irrelevant to the issue of whether the legislature had created a statutory contract." Ex. A ¶ 36 (citing *Strunk v. Pub. Emps. Ret. Bd.*, 108 P.3d 1058, 1078 (Or. 2005)).

Finally, it is important to underscore that this case is not about the right to COLAs. The General Assembly has preserved the cost-of-living protections for current and future retirees. What it did in 2010 was what it had done repeatedly over four decades: change the specific COLA formula in effect for a given year. Contrary to the court of appeals' conclusion, the Constitution did not restrict the legislature's right to change the COLA formula.

2. In Contrast, the City Charter in *McPhail* and *Bills* Contained Express Language of "Entitlement" and Had Been Unchanged for Decades.

The language and surrounding circumstances in *McPhail* and *Bills* differ markedly from those here. There, the Denver Charter provided that a police or fire department retiree "during his life-time" would receive a pension and "*shall be entitled* to an increase in the amount of the [] pension equal to one-half of the raise in pay granted in the rank said member held at the time he was retired." *McPhail*, 338 P.2d at 696 (emphasis added). This provision, moreover, had "a long history" without change, dating back some 37 years before it was repealed. *Id*. The *McPhail* court further noted that the "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." 338 P.2d at 701 (emphasis added). As opposed to the statutorily separate monthly pension benefit and variable COLA payments here, the escalator clause in those cases tied a retiree's entire pension to the salary of current employees and thus its elimination changed the entire pension benefit structure.

Plaintiffs erroneously contend that the PERA statutory "'shall' language is the exact same language used by the court in *McPhail* to find . . . a vested contractual right." O-Br. 27. The charter in *McPhail*, however, provided that retirees "shall be entitled" to the increases. 338 P.2d at 696. This additional language of entitlement, absent here, was critical, as the ultimate question is whether Plaintiffs have a "legitimate claim of entitlement" to the claimed benefit. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005); *Hillside Cmty. Church v. Olson*, 58 P.3d 1021, 1025 (Colo. 2002).

The surrounding circumstances here, with COLAs repeatedly being changed over four decades also differ markedly from *McPhail*, where the retiree provision remained essentially unchanged for four decades. 338 P.2d at 696. Plaintiffs can show only that for decades PERA and DSP "had been providing some form" of a COLA. O-Br. 11. That is correct, but "some form" of a COLA is not the *same form* for life—which is what Plaintiffs claim to be their contract right here.

C. Courts in Other Jurisdictions Have Rejected Similar Retiree Claims.

The federal court in *Maine Ass'n, supra,* 2013 WL 3212360, recently upheld a statute that, like SB10-1, readjusted state retirees' COLAs. The court examined the text and history of the Maine statutes in ruling that, unlike other components of retiree benefits, there was no contractual right to an unchanged COLA. *Id.* at *10. In rejecting claims that temporarily readjusting the COLA to 0% improperly reduced retiree pension benefits, the court wrote that "withholding an increase is not within the standard definition of 'reduction.'" *Id.* at *11.

Similar Contract Clause challenges to statutory reductions of public retiree COLAs have been rejected in Minnesota and South Dakota decisions in cases brought by Plaintiffs' current lead counsel. The first decision ruled that "no plain and unambiguous language shows the [Minnesota] Legislature intended to confer contract rights to a particular adjustment formula." *Swanson v. State*, No. 62-CV-10-05285, at 16 (Minn. Dist. Ct. June 29, 2011) (PERA C.A. Br. Ex. A). The second case ruled that the South Dakota statutes did "not contain any language or any clear intention that would entitle Plaintiff to a private contractual right to a 'forever 3.1% COLA.'" *Tice v. State*, Civil No. 10-225 (S.D. Dist. Ct. Apr. 11, 2012) (PERA C.A. Br. Ex. B).

Plaintiffs seek support from cases in four other states. O-Br. 27-28. The Rhode Island case involved an ordinance whose "plain language"—"negotiated during the collective bargaining process"—"clearly establish[ed] plaintiffs' vested interest in a lifetime 5 percent compounded COLA." *Arena v. City of Providence*, 919 A.2d 379, 394 (R.I. 2007). The Montana case involved a base pension benefit, not a COLA, yet still rejected a Contract Clause challenge. *Gulbrandson*, 901 P.2d at 577-78. The West Virginia case offered no analysis of statutory language or surrounding circumstances. *Booth v. Sims*, 456 S.E.2d 167, 187-88 (W. Va. 1995). The two California cases are distinguishable. *United Firefighters of Los Angeles City v. City of Los Angeles*, 259 Cal. Rptr. 65, 74 (Cal. App. 1989) (COLA modification not reasonable or necessary because savings were diverted to "other items or added it to the city's general reserve fund" and "in no manner enhance[d] the integrity or soundness of the funds"); *Pasadena Police Officers Ass'n v. City of Pasadena*, 195 Cal. Rptr. 339, 345-46 (Cal. App. 1983) (decision focused on active employees and the only retirees had signed a contract "electing to be governed by the 1969 amendments" and thus their rights were "based on a different contract" than the city code at issue).

III. SB 10-1 Also Satisfies the Second and Third Prongs of the Modern Contract Clause Framework, and It Is Not an Unconstitutional Taking.

A. The Law Did Not Substantially Impair Any Contractual Expectations Because It Was Foreseeable Given Past Changes to COLA Formulas.

To "prove substantial impairment of a contractual relationship," a plaintiff "must demonstrate that the law was not foreseeable and thus disrupts the parties' expectations." *DeWitt*, 54 P.3d at 858. This examines "whether the statute in question touches on an area that has historically been regulated by the legislature; if so, the statute is less likely to be found to violate the contract clause." 54 P.3d at 859. Because "[p]ublic pensions have always been a heavily regulated legal arena[,] . . . individual expectations of immunity from future statutory change would have been unwarranted even if these provisions were contractual in nature." *Ret. Adjunct Profs. of the State of R.I. v. Almond*, 690 A.2d 1342, 1347 (R.I. 1997).

Even Plaintiffs acknowledge that "[t]he primary consideration in determining whether the impairment is substantial is the extent to which *reasonable expectations* under the contract have been disrupted." O-Br. 30 (quotations of federal cases omitted; emphasis added). Inconsistently, however, they then go on to ask the Court to evaluate substantiality by how much the benefits are "worth." *Id*. at 31-33. That argument misplaces reliance on cases involving "the terms of [a] collective bargaining agreement," *e.g.*, *Opinion of*

Justices (Furlough), 609 A.2d 1204, 1208 (N.H. 1992), or state constitutional provisions that, unlike the Colorado Contract Clause, create express contractual rights to public pensions. Haw. Const. art. XVI, § 2; N.Y. Const. art. V, § 7.

Here, during Plaintiffs' working years, the legislature repeatedly changed the COLA formulas provided to existing retirees, thus precluding Plaintiffs from having any reasonable expectation that those ever-changing formulas would freeze when they retired. During Plaintiff Halaas' nearly 27 years as a PERA member, the General Assembly changed the COLA provisions for judicial retirees six times and judicial retirees did not receive any COLA at all when Halaas began working in 1972. Nonetheless, Plaintiff Halaas, who personally experienced a material change to the COLA formula *during his retirement*, seeks to revive the COLA in effect at the time of his retirement in 1998. He, and others who retired prior to the 2001 change to a 3.5% compounded COLA, have no colorable claim that the latest COLA formula changes were unforeseeable. Similarly, a 1970 PERA or DPS retiree (or his or her spouse) will have received ten different COLAs during his or her retirement, prior to SB 10-1. *See, e.g.*, *AFSCME Councils v. Sundquist*, 338 N.W.2d 560, 569 (Minn. 1983) (where contribution levels had "been modified on a number of occasions in the past decade . . . an expectation that contribution rates would remain fixed is patently unreasonable").

The district court applied the proper test. It found 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." Ex. B at 8.

Even if this *DeWitt* prong somehow focused not on the foreseeability of change but on the amount of money at stake, Plaintiffs' financial projections are unquestionably wrong. Pre-2001 DPS retirees likely would be *worse off* if forced to return to the COLA formulas in place at their retirement because those formulas were *non-compounding* at rates between 1% and 3.25%. *See* Ex. A ¶ 18; Ex. B at 7. For pre-2001 PERA retirees, Plaintiffs' projected losses are speculative because they retired under variable COLA formulas tied to the *lesser* of inflation or a fixed percentage which was non-compounding prior to 1994. *See id*. Plaintiffs' projections of future payments based on a 3.5% compounding COLA also fail to recognize that without the COLA changes there may be no payments at all.

B. SB 10-1 Was Reasonable and Necessary to Ensure the Pension Funds' Long-Term Viability.

Under *DeWitt*, even substantial impairment of a contract right is constitutional where "it is reasonable and appropriately serves a significant and legitimate public purpose." 54 P.3d at 858. As the trial court noted, "Plaintiffs

themselves concede in their complaint that Senate Bill 10-001 bears a rational relationship to the General Assembly's legitimate objective of remedying PERA's unfunded liabilities that threaten its future viability . . . ." Ex. B at 11 (citing Sec. Am. Compl. ¶¶ 43-45).

The 2008 economic crisis indisputably caused the PERA pension funds to lose nearly $12 billion in 2008 alone and to fall to 52% funded at the end of 2008. The legislative record demonstrates that, to address this crisis, the General Assembly considered numerous alternatives and arguments in nearly twelve hours of public testimony, six hearings, and voluminous analysis and documentation, including by Plaintiff Justus and others affiliated with his SavePERACOLA group. The General Assembly considered readjusting the COLA for retirees as the last option, only after it became evident that no other viable contribution and benefit changes could prevent the pension fund from running out of money.

Plaintiffs make no attempt to contest that SB 10-1 was reasonable and necessary to address the legitimate public purpose of ensuring the viability of a multi-billion public pension fund. As shown in the State Defendants' Opening-Answer Brief, SB 10-1 was based on an extensive legislative record, and it received unanimous support from unions and retiree organizations and overwhelming approval of PERA and DPS retirees, employees, and employers.

Plaintiffs' only passing mention of the "reasonable and necessary" prong is to claim in their "Suggested Answer" to issue one that pension "cuts are *per se* not 'reasonable and necessary to serve a significant and legitimate public purpose.'" O-Br. 1. Plaintiffs' suggestion is wrong because the modern, multi-part test applies equally to pension benefits.

C. Plaintiffs' Takings Claim Necessarily Fails Because Plaintiffs' Contract Clause Claims Fail.

A holding that Plaintiffs had no entitlement protected by the Contract Clause necessarily would defeat Plaintiffs' Takings Clause claim. Courts summarily reject takings claims where no constitutionally protected contract right exists. *See R.I. Laborers' Dist. Council v. Rhode Island*, 145 F.3d 42, 44 n.1 (1st Cir. 1998). The court of appeals was able to resurrect the takings claim only by erroneously accepting the Contract Clause claim. *See* Ex. A ¶ 54.

Plaintiffs' generalized assertions regarding the nature of property are irrelevant because the U.S. Supreme Court in *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), and the Federal Circuit in *Branch v. United States*, 69 F.3d 1571, 1574-76 (Fed. Cir. 1995), held that government-imposed obligations to pay or redistribute money are not takings as a matter of law. Courts also have rejected Plaintiffs' argument that the Takings Clause covers parties' unilateral expectations. *See Nat'l Educ. Ass'n-R.I. v. Ret. Bd*, 172 F.3d 22, 29 (1st Cir. 1999).

Plaintiffs conceded a three-part test applies to regulatory takings claims. *See Lake Durango Water Co. v. PUC*, 67 P.3d 12, 19 (Colo. 2003) (considering "character of the governmental action," "its economic impact," and "its interference with reasonable economic expectations of the property owner"). The same reasons that SB10-1 meets the *DeWitt* test also defeat any regulatory takings claim.

Here, the nature of the state's action is not akin to a regulatory taking. First, the COLA modification is a negative restriction rather than an affirmative taking: it simply slows the pension increase by prospectively changing the statutory formula for future COLAs. *See Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 375 (2d Cir. 2006) (rejecting Takings challenge to wage freeze under same analysis). Second, retirees' monthly pension benefits are not affected by the COLA readjustment, nor have the retirees have had any of their past COLA payments withdrawn. Third, as to the parties' investment-based expectations, Plaintiffs' purported belief that they would be receiving whatever COLA was in place at their retirement for the rest of their lives was unreasonable because of the past history of changes to the COLA paid to retirees.

CONCLUSION

The Court should uphold the constitutionality of SB 10-1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, a true and correct copy of Respondent/Cross-Petitioner Colorado Public Employees' Retirement Association's Opening-Answer Brief was served via ICCES to the following individuals:

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