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.	▲**COURT USE ONLY**▲ Supreme Court Case No. 2012SC906
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STATE 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 a total of 3,427 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/ William V. Allen

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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, as they are in PERA's Opening-Answer Brief. 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 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. __."

The attachments described above were put before the trial court in PERA's Opposition to Motion for Summary Judgment and PERA's Motion for Summary Judgment. *See* Tr. #36552995; Tr. #36559770.

For the Court's convenience, State Defendants attach to this brief two transcripts from the above-referenced summary judgment Appendix, cited as App. A-6 and App. A-12 in the courts below, which contain the legislative history of Senate Bill 10-001. To maintain numbering consistency, the summary judgment documents are referred to in the attached Appendix as documents A-6 and A-12. Additionally, State Defendants include Attorney General Opinion 04-04 in the attached Appendix and designate it as App. A-1.

The Lexis-filed record transmitted by Plaintiffs for this appeal contains incorrect Lexis filing numbers as the titles for all the documents. State Defendants cite these documents by the correct Lexis filing number contained on the top of the first page of the document.

STATEMENT OF ISSUES PRESENTED

Respondents/Cross-Petitioners State of Colorado and Governor John Hickenlooper ("State Defendants") adopt Public Employees' Retirement Association's (PERA's) statement of the issues presented.

STATEMENT OF THE CASE AND FACTS

State Defendants adopt PERA's statement of the case and statement of facts.

STATEMENT ON STANDARD OF REVIEW

State Defendants adopt PERA's standard of review statement.

SUMMARY OF ARGUMENT

PERA filed a comprehensive opening-answer brief in support of the trial court's well-reasoned decision to grant summary judgment for Defendants on all of Plaintiffs' claims in this litigation. State Defendants agree with the arguments and authorities set forth in PERA's brief. Rather than repeat substantially similar arguments in this brief, State Defendants instead include further authority and analysis responding to specific arguments raised by Plaintiffs.

DeWitt's three-part modern balancing test applies in Colorado for all state and federal Contract Clause challenges. *In re Estate of DeWitt*, 54 P.3d 849, 858-59 (Colo. 2002). *DeWitt* followed precedent set forth in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), which recognized the Contract Clause is not absolute and does not completely immunize contracts from the State's police power when interference is necessary for the general good. *Allied*, 438 U.S. at 241. Though this modern test was developed well after *Police Pension & Relief Board v. McPhail*, 338 P.2d 694 (Colo. 1959) and *Police Pension & Relief Board v. Bills*, 366 P.2d 581 (Colo. 1961) were decided, the test is not inconsistent with either of those decisions. State Defendants are aware of no authority, implied or otherwise, that provides an exemption for pension benefits cases from the modern Contract Clause test.

Plaintiffs' continued reliance on *McPhail* and *Bills* is misplaced because both cases predate *DeWitt* and neither directly or fully

addresses the issue before the Court of whether different COLA formulas for retirees became frozen for life at retirement—something that has never occurred in 40 years. Plaintiffs also rely heavily on a 2004 Colorado Attorney General opinion that is off point and does not answer the question of whether retirees possess a right to a specific COLA for life without change.

Under all Colorado authority, Plaintiffs must prove—and here cannot—that they have a contract right to an unchangeable COLA for their lifetimes. *McPhail* and *Bills* are factually distinct from the case at hand and were issued years before the U.S. Supreme Court developed the modern balancing test applicable to all Contract Clause challenges. The District Court did not err in omitting *McPhail*, *Bills*, or the Attorney General Opinion from its analysis; instead, it properly focused on applying the modern Contract Clause test.

This Court should uphold the constitutionality of Senate Bill 10-001 because it satisfies the modern, three-part test for Contract Clause challenges: As the District Court determined, Plaintiffs do not have the

contract they allege; that is, Plaintiffs have no vested, contract right to a specific COLA formula for life. Second, Senate Bill 10-001 did not disrupt the parties' reasonable expectations about their COLA benefits because (a) there was no right to an unchangeable COLA for life and (b) the COLA formula has been repeatedly modified over the last 40 years,[1] meaning there was no substantial impairment. Third, Senate Bill 10-001, including the COLA change, was reasonable and necessary to serve a significant and legitimate public purpose. Finally, supporting the reasonableness and necessity of the changes made, Colorado's legislature heard considerable testimony from retirees and their representatives supporting the passage of the bill to ensure PERA's future solvency. The District Court properly granted summary judgment in favor of State Defendants and PERA. This Court should affirm the District Court's determination and uphold SB 10-001's constitutionality.

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[1] As the District Court pointed out in its order, "during [Plaintiff Laird's] 32 years of employment, the legislature had changed the COLA formula 11 times, including after he was eligible for retirement with full benefits." Ex. B, p.8.

ARGUMENT

I. *DeWitt*'s Modern, Balancing Test Is the Proper Test to Apply in Colorado for all State and Federal Contract Clause Challenges

The Court should reject Plaintiffs' position that the COLA formula is afforded absolute protection from change. Plaintiffs' view would require the District Court to have applied fundamentally different tests to claims brought under the Colorado Contract Clause (Count I) and the federal Contract Clause (Count III) despite functionally identical language. It is true that pre-*U.S. Trust* Contract Clause challenges such as *Home Builder & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) and *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878) were analyzed by the Court on a case-by-case basis, and thus offered little systematic guidance to lower courts. Mirroring federal jurisprudence, Colorado had not yet developed a consistent analytical structure for Contract Clause challenges at the time *Bills* and *McPhail* were decided. However, that changed after the *U.S. Trust* case.

In the wake of *U.S. Trust*, Colorado's Supreme Court in *DeWitt* definitively set forth the test for challenges under *both* the Colorado and federal Contract Clauses and Plaintiffs were thereafter required to prove all elements of the three-part modern test to prevail on their claims. In doing so, *DeWitt* expressly stated that *both* the Colorado and federal Contract Clauses "*are not to be interpreted as absolute*" and went on to apply the United States Supreme Court's three-part test to the *Colorado* Contract Clause. *DeWitt*, 54 P.3d at 858 (emphasis added).

A. Plaintiffs' Reliance on the 2004 Attorney General Opinion Is Misplaced

Plaintiffs' reliance on a 2004 Attorney General opinion that expresses general views regarding pension benefit rights does nothing to bolster Plaintiffs' attempt to create a retirement benefit that has never existed—a COLA formula frozen at retirement.

As a rule, Attorney General opinions are afforded "respectful consideration." *Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988). Here, the opinion is irrelevant because the questions presented did not concern whether a COLA is unchangeable during

decades of retirement. The text of the questions presented in the Opinion concerned the legislature's ability to reduce the capacity of *current employees* to earn additional retirement benefits and to increase the percentage that *current employees* contribute to PERA. The questions do not pertain to the benefits of Plaintiffs—persons who have actually retired and are already receiving a COLA. The opinion did not ask and did not answer the question presented here: whether PERA retirees had a vested right to a specific COLA for life without change. Rather, the two questions were:

> Question: What, if any, limitations exist upon the Legislature's ability to reduce the capacity of current employees to earn additional retirement benefits to assure the long term actuarial soundness of the plan?
>
> Question: What, if any, limitations exist upon the Legislature's ability to increase the percentage of their wages current employees contribute to PERA in order to assure the long term actuarial soundness of the plan?

Colo. Atty. Gen. Op. No. 04-04 at 1.[2]

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[2] *See* App. A-1 (Attorney General Opinion No. 04-04). Plaintiffs incorrectly cite this opinion as No. 05-04.

Both the District Court and Court of Appeals below did not consider the Opinion because neither the author's comments on retiree benefits in general, nor the *McPhail* and *Bills* opinions, are relevant to whether the COLA provisions here unmistakably establish the right to a particular COLA for the lifetime of retirees and their spouses. Attorney General Opinion 04-04 likewise did not examine the specific statutes and DPS provisions at issue here nor the 40 years of changes to the COLA for existing retirees. The Opinion also did not address the present situation where an economic crisis necessitated a readjustment to COLA pension payments—not the base benefit—to avoid running out of money to pay base pension benefits to all current and future members and retirees.

Finally, as State Defendants argued to the trial court, where an Attorney General opinion is not applicable to the facts at hand or is legally incorrect, a court may disregard it. *Fidelity Castle Pines, Ltd v. State*, 948 P.2d 26, 31 (Colo. App. 1997) (declining to apply Attorney General Opinion reasoning when statute at issue in the case was subtly different from the one analyzed by the Attorney General); *Leddy v.*

Cornell, 120 P. 153, 155-56 (Colo. 1912) (Attorney General Opinion is persuasive authority, but where opinion does not enjoy legal support, it need not be followed). Here, Opinion 04-04 did not include an analysis of *DeWitt*, and its Contracts Clause analysis is, at best, incomplete, and the District Court properly excluded the opinion from its analysis.

Instead, as the District Court below determined, the Supreme Court's adoption of the three-part, modern Contract Clause test in *DeWitt* applies to all subsequent Contract Clause challenges under Colorado law. *See* Ex. B, p.4. Plaintiffs seek to avoid the modern *DeWitt* test because even if they could establish a contractual right to a particular COLA formula for the rest of their lives, the General Assembly's modification of the COLA, in conjunction with the other changes in Senate Bill 10-001, unquestionably was reasonable and necessary, and promoted the legitimate public purpose of preserving the

existence of PERA base pension and COLA benefits.[3]

II. Senate Bill 10-001 Is Constitutional Under the Modern, Three-Part Balancing Test

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

Plaintiffs cannot meet the "substantial impairment" element of the Contract Clause test because Plaintiffs could have no reasonable expectation to a COLA frozen for life where: (1) the General Assembly changed the COLA formula for those retired numerous times in the past 40 years;[4] (2) Plaintiffs Halaas, Hopkins, and other retirees personally experienced a COLA change during their retirements;[5] (3) Plaintiff

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[3] Ex. B, p.11 (finding there was a rational basis for SB 10-001, and that "[a]s a matter of law, and based on the public record before the Court," SB 10-001 bore a reasonable relationship to a legitimate government interest in maintaining the solvency of PERA and eliminating PERA's unfunded liabilities).

[4] Ex. B, p.4-5.

[5] Ex. B, p.8 (noting that "when Plaintiff Halaas became a PERA member in 1972, judicial retirees received no COLA" and "[a]t the time she [Hopkins] retired on August 1, 2001, the 3.5% compounding COLA formula to which she would claim a lifetime right had been changed so often that it had only been in place for a total of five months.").

Justus and other DPS retirees signed retirement documents *expressly* acknowledging that the DPS COLA was subject to change during retirement;[6] (4) the 2008 worldwide recession which hurt the PERA pension plan could not leave retirement benefits untouched; (5) without a COLA change, current PERA and DPS employees would be required to contribute to a pension fund that will not exist during their retirement; and (6) for many putative class members, the current 2% compounding COLA is more valuable than the COLA formula in place at their retirement that they seek to have reinstated.

B. The COLA Change in Senate Bill 10-001 Was Reasonable and Necessary to Serve a Legitimate Public Purpose

The reasonableness and necessity of the General Assembly's modification of the COLA formula is exemplified by the overwhelming support of unions, PERA retirees, and bipartisan legislators who supported and voted for the change. In their motions for summary judgment, Defendants presented the facts necessary for the court to find that SB 10-001 was reasonable and necessary to serve a

[6] Ex. B, p.8.

legitimate public purpose of insuring that the PERA fund was fully funded and sustainable.[7]

Many who spoke in support of Senate Bill 10-001 during the five-hour hearing before the Senate Finance Committee and the seven-hour hearing before the House Finance Committee represented broad-based coalitions of current members as well as retirees and praised PERA for the long, open consultation process which it took in formulating the proposal.

Representatives from the Colorado Coalition for Retirement Security (CCRC), which represents over 40% of the approximately 475,000 total members of PERA,[8] supported the bill and testified

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[7] *See* App. A-6, A-12, and Appendix A to PERA's Motion for Summary Judgment and documents therein (Tr.#36559770).

[8] App. A-6(a) (Sen. Fin. Comm. Hrg. at 50:24-51:5). Dan Daly, spokesperson from CCRC, testified that "[t]he over 200,000 individual members of the coalition come from CEA, Colorado Association of School Executives, Colorado WINS, Friends of PERA, CAPE retirees, AFT Colorado, DPSRS retirees, the Association of Colorado State Patrol Professional (ACSPP), and the Colorado School and Public Employees Retirement Association." *Id.*

before the legislature that "the changes are necessary,"[9] "the best solution possible,"[10] and are "reflective of our goal of a long-term fiscal stability for PERA."[11] The coalition's spokesperson later reiterated: "We believe these changes are necessary and that's why we support this broad shared responsibility approach."[12]

Many other organizations and union groups spoke in support of the bill. Joanne Slanovich, "newly retired one year now after paying 36 years into PERA," and the president of the Douglas County Federation of Retired Teachers and Educators, stated: "We are also willing to have our three and a half percent cost of living reduced to a fixed two percent in July of 2011 to maintain and strengthen PERA."[13] Mark Burry, a retiree representing the CAPE (Colorado Association of Public Employees) Retirees organization, stated: "We recognize that PERA

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[9] App. A-6(a) (Sen. Fin. Comm. Hrg. at 55:17-25).

[10] App. A-6(a) (Sen. Fin. Comm. Hrg. at 55:13-25).

[11] *Id.*

[12] App. A-6(a) (Sen. Fin. Comm. Hrg. at 55:17-25).

[13] App. A-6(a) (Sen. Fin. Comm. Hrg. at 65:4-7).

must be placed on sound financial footing."[14] Another CAPE spokesperson said: "We have employees on the payroll who are paying into PERA now who if we do nothing will never receive a dime because we will run out of money. So something has to be done. If that's not necessity, I don't know what is."[15]

Eileen Bond, representing the Colorado Senior Lobby, also emphasized the need for retirees to consider the position of current employees:

> And the thing that I look at as a retired teacher is I care very much about those people coming along behind me. And for me to drain the system, have them pay into it to pay my pension, and then, when they get to be where I am to have nothing would be the most immoral thing I could imagine.[16]

The Association of Colorado State Patrol Professionals, representing the active and retired members, also stated its support: "[I]t's very strongly believed within our association that we need to do

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[14] App. A-6(a) (Sen. Fin. Comm. Hrg at 71:14-16).

[15] App. A-12(a) (House Fin. Comm. Hrg. at 115:19-23) (Miller Hudson).

[16] App. A-6(a) (Sen. Fin. Comm. Hrg. at 85:3-18).

this bill, so that there will be PERA in the future for the people we are hiring today. We could be selfish and say we want to keep our money. I want mine, forget everybody else. It's the wrong thing to do."[17]

Even Plaintiff Hopkins, in an e-mail to the fundraising organization SavePERACOLA run by Plaintiff Justus, expressed her regret at trying to exclude retirees from the burden to make the PERA pension fund sustainable: "I wish we had never started this lawsuit. I feel that it is morally reprehensible." Tr.# 36436236, Defs' Mot. to File Under Seal, Ex. A.[18]

The extensive testimony at the legislative hearings demonstrates that retirees, their union representations, and legislators, all recognized that Senate Bill 10-001 was a reasonable and necessary solution to the funding crisis facing the PERA pension fund. The legislature's passage

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[17] App. A-12(a) (House Fin. Comm. at 130:6-18) (Lonnie Westphal).

[18] In the Lexis record filed with court, exhibit A is not included with State Defendants' Motion to File Under Seal, presumably because it was filed at the time under the seal. However, the trial court in its order denying summary judgment to Plaintiffs also ruled that the e-mail was not privileged and should not have been withheld, and thus this document is now part of the court record. *See* Tr. # 38234000, Order at 3-5.

of Senate Bill 10-001, including the COLA change, was reasonable and necessary to accomplish the legitimate public purpose of preserving the very existence of the PERA pension fund. Plaintiffs have no basis to contest the legislative record showing that Senate Bill 10-001 was "reasonable and appropriately serves a significant and legitimate public purpose," *DeWitt*, 54 P.3d at 853.

State Defendants and PERA attached transcripts of the legislative testimony (in support of their argument that the COLA change was reasonable and necessary to serve a legitimate public purpose) to their Opposition to Summary Judgment and Motion for Summary Judgment briefs. *See* Tr.#36552995; Tr.#36559770. Ultimately, the District Court below did not need to rely on this testimony since it found that Plaintiffs had no vested right to a specific COLA formula.[19] However, because this uncontroverted testimony was before the courts below, and

[19] The District Court relied specifically on the public record underlying SB 10-001 in its analysis of Plaintiffs' Takings claim, determining that "[a]s a matter of law, and based on the public record before the Court," SB 10-001 bore a rational relationship to the legitimate governmental interest of insuring the solvency and future viability of PERA and remedying PERA's unfunded liabilities. App. B, p.11.

is in the record, the Court need not remand for determination on whether the change to the COLA formula was reasonable and necessary to serve a legitimate public purpose.

CONCLUSION

This Court should uphold the constitutionality of SB 10-001.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, a true and accurate copy of the foregoing State Defendants' Opening and Answer Brief was e-filed and served on the following individuals:

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