DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROUS, on behalf of Themselves and those similarly situated v. **Defendants:** STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON and SARA R. ALT, in their official capacities only.	**▲ COURT USE ONLY ▲** Case No. 2010cv1589 Division/Courtroom: 6 Judge Robert S. Hyatt
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PERA DEFENDANTS' MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT	

Defendants Colorado Public Employees' Retirement Association ("PERA"), Mark J. Anderson, and Sara R. Alt (jointly the "PERA Defendants") respectfully move this Court pursuant to Colo. R. Civ. P. 12(b)(5) for an order dismissing six of the eight claims in Plaintiffs' First Amended Class Action Complaint (the "Complaint").[1]

INTRODUCTION

The severe market downturn in 2008 caused substantial investment losses at PERA and at pension funds around the country. According to a study cited in Plaintiffs' Complaint, PERA experienced $11 billion in investment losses, with PERA's assets falling from $43 billion to $32 billion. *See* Ex. A at 27 (Pew Center on the States, *Pew Charitable Trusts, The Trillion Dollar Gap: Underfunded State Retirement Systems and the Roads to Reform* (2010) ("Pew Report")) (cited in Complaint ¶ 42).[2] As a result of these losses and other factors that contributed to PERA's substantial unfunded liabilities, actuarial projections showed that PERA would run out of money to pay pension benefits within 30 years. By legislative mandate, the PERA Board extensively studied the underfunding and consulted with its members, including retirees and current employees, before proposing a solution to the General Assembly. C.R.S. § 24-51-211(2) (2009); S.B. 09-282. In a bipartisan effort to address this critical funding shortfall, the General Assembly enacted Senate Bill 10-001 to make changes to the state pension system. Senate Bill 10-001 was signed into law by Governor Ritter on February 23, 2010.

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[1] The PERA Defendants are authorized to state that the Office of the Attorney General, representing Governor Ritter and the State of Colorado, join the PERA Defendants' arguments as to all claims. The PERA Defendants likewise join in the additional arguments raised in the Attorney General's motion to dismiss.

[2] For purposes of this motion to dismiss, PERA accepts as true the figures set forth in Plaintiffs' Complaint, including the Pew Report figures. PERA reserves its right to contest the accuracy of the figures at the appropriate stage of these proceedings.

The Legislature passed Senate Bill 10-001 for the express purposes of ensuring pension payments to current and future PERA retirees by enacting "modifications to the public employees' retirement association necessary to reach a one hundred percent funded ratio within the next thirty years." Ex. B, pmbl (S.B. 10-001). The Complaint acknowledges that Senate Bill 10-001 and the changes it made to the pension system are designed to address PERA's unfunded liabilities. Compl. ¶¶ 43-47. In addition to making significant changes to the pension benefits of current and future PERA employees, the Legislature modified the cost of living adjustment ("COLA") calculation for PERA retirees. The Legislature made no change to the base pension benefit for PERA retirees receiving a pension.

Plaintiffs ask this Court to strike down the efforts made by the Legislature to address the critical underfunding of PERA. At the core of Plaintiffs' class action lawsuit is their claim that, by changing the formula that calculates the cost of living adjustment, Senate Bill 10-001 violates the Contracts Clauses of the Colorado and United States Constitutions. Plaintiffs' lawsuit is premised on the contention that the Legislature is barred from modifying the COLA to be paid to retirees from a fixed rate of 3.5% per year (compounded annually) even though (1) the Legislature has changed the COLA formula *for retirees* numerous times over the past several decades; and (2) the actual cost of living *decreased* by 0.5% in 2008 and 0.7% in 2009.[3] In fact, Plaintiffs have no vested right to a particular COLA formula and to claim that a cost of living *adjustment* can never be *adjusted* defies law and logic.

Plaintiffs, in their First Amended Complaint, bring eight claims for relief. *All* of Plaintiffs' claims are premised on their singular objection to the Legislature's modification of the

[3] The Court may take judicial notice that consumer price index *decreased* by 0.5% in 2008 and 0.7% in 2009, a further effect of the economic collapse of 2008.

cost of living adjustment. The Defendants seek to streamline this dispute for the parties and Court and reduce it to its essential and important issues by eliminating six of Plaintiffs' eight claims that fail to state a claim for relief:

- Plaintiffs' Claim II, alleging a violation of Article V, Section 38 of the Colorado Constitution, should be dismissed because Section 38 only prohibits the General Assembly from modifying an obligation or liability owed *to* the state or a municipal corporation and not, as here, an obligation or liability allegedly owed *by* a governmental instrumentality.[4]

- Plaintiffs' Claim IV, alleging a Takings Clause violation, fails as a matter of law because (1) the Takings Clause does not prohibit governmental acts, and (2) an alleged governmental taking of money is not an actionable claim under the Takings Clause.

- Plaintiffs' Claim V, alleging a violation of Substantive Due Process, fails because (1) pension benefits are not fundamental rights protected by the United States Constitution, and (2) Plaintiffs concede that there was a rational basis for the General Assembly to enact Senate Bill 10-001 to address PERA's unfunded liabilities.

As to Plaintiffs' three 42 U.S.C. § 1983 claims seeking damages, their § 1983 claim premised on an alleged Contracts Clause violation (Claim VI) should be dismissed because an alleged violation of the Contracts Clause does not give rise to a § 1983 claim. Plaintiffs' § 1983 claims premised on their Takings and Substantive Due Process claims (Claims VII and VIII, respectively) should be dismissed because the underlying claims fail as a matter of law. Even if the Court does not dismiss the three § 1983 claims in their entirety, all three should be dismissed to the extent they impermissibly seek monetary damages since the Defendants being sued in their official capacity are not "persons" subject to § 1983 damage claims.

Accordingly, the only two claims that should remain are Plaintiffs' Claims I and III alleging violations of the Contracts Clauses of the Colorado and United States Constitutions.

[4] Although Plaintiffs' Complaint cites Colo. Const. art. V, *sec. 48*, it is evident from the quoted language in the Complaint that the Plaintiffs intended to refer to Colo. Const. art. V, *sec. 38*.

Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' Claims II, IV, V, VI, VII and VIII.

FACTUAL BACKGROUND

A. PERA and the State Pension System

PERA was created in 1931 and provides retirement and other benefits to more than 440,000 state, school, and local government employees.[5] PERA is funded by contributions from its members and from the more than 400 public employers that participate in PERA. Compl. ¶ 29. PERA members and their public employers are divided into five divisions—State, Local, Judicial, School, and the Denver Public Schools, and member and employer contributions are deposited into a trust fund for each division that PERA manages for the benefit of its members.[6] C.R.S. § 24-51-208 (2010).

When a PERA member retires, PERA pays the member a monthly pension benefit, the amount of which is based on the member's age at retirement, years of service, and "Highest Average Salary." C.R.S. §§ 24-51-602, 603. The member's pension benefit is determined by a formula in the PERA Statute and is equal to the member's Highest Average Salary times 2.5% times the member's years of service. C.R.S. § 24-51-603(1)(a).[7] This calculation for current PERA retirees was not changed by Senate Bill 10-001.

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[5] PERA was created and is governed by Article 51 of the Colorado Revised Statutes. *See* C.R.S. § 24-51-101 to § 24-51-1748. Those provisions are referred to generally in this Motion as the "PERA Statute."

[6] The Denver Public Schools pension system was merged into the PERA system as a separate division, effective January 1, 2010. *See* C.R.S. §§ 24-51-1701, -1703(1) (2010).

[7] There is a separate method for calculating a retirement benefit under a reduced service requirement, which was revised by Senate Bill 10-001. *See* Ex. B §§ 15, 29; C.R.S. §§ 24-51-604, 605 (2009).

B. The Legislature's Numerous Changes to the COLA Calculation

In addition to the base benefit, PERA retirees receive a yearly cost of living adjustment. Over the years the Legislature has periodically changed the PERA Statute to provide varying cost of living adjustments to retirees. Compl. ¶ 31.

Prior to March 1, 1994, the General Assembly annually approved the COLA. *See* Compl. ¶ 33. From 1970 to 1973, PERA retirees received a COLA of the *lesser* of (a) 1.5%, non-compounded, or (b) the increase in the consumer price index in the prior year. *See* C.R.S. § 111-1-36 (1970-1973). From 1974 to 1979, they received a COLA of the *lesser* of (a) 3%, non-compounded, or (b) the increase in the consumer price index in the prior year. *See* C.R.S. § 111-1-36 (1974), §§ 24-51-135, -224 (1975-1979).[8] The chart below compares the COLA to inflation, as reflected by the change in the consumer price index (CPI-W) during the year, from 1970 to 1979:

Date	COLA	CPI-W[9]
1970	1.5% Non-compounding	5.7%
1971	1.5% Non-compounding	4.4%
1972	1.5% Non-compounding	3.4%
1973	1.5% Non-compounding	6.2%
1974	3% Non-compounding	11.0%
1975	3% Non-compounding	9.1%
1976	3% Non-compounding	5.7%
1977	3% Non-compounding	6.5%

[8] From 1975 to 1978, the General Assembly also enacted ad hoc increases. *See* C.R.S. §§ 24-51-136, -225 (1975-78).

[9] From 1970 to 2004, the relevant CPI-W used was the average of the annualized monthly increases. *See, e.g.*, C.R.S. § 24-51-1002 (1993-2000). From 2005 to 2008, the change in the CPI-W was calculated as the percentage change in the consumer price index from one December to the next December. C.R.S. § 24-51-1002 (2005-2009). With the passage of Senate Bill 10-001, the change in the CPI-W will again be calculated as the average of the annualized monthly increases from the prior year. Ex. B § 20. The CPI-W is calculated by the United States Department of Labor, Bureau of Labor Statistics, and is available on the agency's website. *See* http://www.bls.gov/cpi/.

Date	COLA	CPI-W[9]
1978	3% Non-compounding	7.7%
1979	3% Non-compounding	11.4%

From 1980 to 1993, the COLA for retirees continued to be the lesser of (a) 3% for years before 1992 and 4% for years after 1992, non-compounded, or (b) the increase in the consumer price index in the prior year. C.R.S. §§ 24-51-135, -224 (1980-1986); §§ 24-51-1001, -1002 (1987-1993).[10] The COLA and change in consumer price index from 1980 to 1993 was as follows:

DATE	COLA	CPI-W
1980	3% Non-compounding	13.4%
1981	3% Non-compounding	10.3%
1982	3% Non-compounding	6.0%
1983	3% Non-compounding	3.0%
1984	3% Non-compounding	3.5%
1985	3% Non-compounding	3.5%
1986	3% Non-compounding	1.6%
1987	1.5%-3% Non-compounding[11]	3.6%
1988	3%-3.8% Non-compounding[12]	4.0%
1989	3% Non-compounding	4.8%
1990	3% Non-compounding	5.2%
1991	3% Non-compounding	4.1%
1992	3% Non-compounding	2.9%
1993	2.9%-4% Non-compounding[13]	2.8%

[10] Ad hoc increases to the retirees' benefits from a Cost of Living Stabilization Fund were approved every two years from 1980 to 1992. C.R.S. §§ 24-51-224 (1980, 1982, 1984, 1986); §§ 24-51-106 (1988, 1990, 1992).

[11] Because of low inflation in 1986, for the 1987 COLA, those who had retired after May 2, 1983, received a lower COLA of 1.5% to 2.7%, non-compounding, with those who had been retired for the shortest period receiving the lowest COLA. C.R.S. §§ 24-51-1001, 1002 (1987).

[12] Because of higher inflation in 1987, for the 1988 COLA, those who had retired between May 2, 1983, and May 1, 1986, received a higher COLA of 3.3% to 3.8%, non-compounding, as part of the accumulated COLA provision. C.R.S. §§ 24-51-1001, 1002 (1988).

[13] Because of low inflation in 1992, for the 1993 COLA, those who had retired after May 2, 1991, received a lower COLA of 2.9%, non-compounding. C.R.S. §§ 24-51-1001, 1002 (1993).

Beginning in 1994, the General Assembly changed the PERA Statute to eliminate the requirement that it approve an annual COLA for retirees. Compl. ¶ 34 (citing H.B. 93-1324 § 6). Also beginning on March 1, 1994, the Legislature changed the COLA to the *lesser* of (a) 3.5% compounded annually, or (b) the percent increase in the consumer price index in the prior year. C.R.S. § 24-51-1002 (1994). The ad hoc increases also were eliminated. Between 1994 and 2000, the COLA and CPI-W were as follows:

DATE	COLA	CPI-W
1994	2.82% Compounding	2.5%
1995	2.53% Compounding	2.9%
1996	2.84% Compounding	2.9%
1997	2.91% Compounding	2.3%
1998	2.22% Compounding	1.3%
1999	1.34% Compounding	2.2%
2000	2.23% Compounding	3.5%

In 2000, the General Assembly again changed the COLA provision of the PERA Statute to make the COLA 3.5% compounded annually. C.R.S. § 24-51-1002 (2000). This COLA provision was in effect through 2009. *See* C.R.S. § 24-51-1002 (2001-2009).[14] As demonstrated in the following chart, the COLA level from 2000 to 2009 was consistently higher than inflation.

DATE	COLA	CPI-W
2001	3.5% Compounding	2.7%
2002	3.5% Compounding	1.4%
2003	3.5% Compounding	2.2%
2004	3.5% Compounding	2.6%
2005	3.5% Compounding	3.5%
2006	3.5% Compounding	2.4%
2007	3.5% Compounding	4.3%
2008	3.5% Compounding	-0.5%
2009	3.5% Compounding	-0.7%

[14] The General Assembly twice changed the future COLA calculation for those who joined PERA on or after June 30, 2005. *See* S.B. 04-132; S.B. 06-235.

Thus, in the last decade, the fixed 3.5% COLA resulted in retirees' pension benefits growing far faster than inflation. In particular, in 2008 and 2009, despite *deflation* of 1.2% due to the recession, retirees' pensions rose by over 7% because of COLA. The result has contributed to a "dramatic decline" in PERA's funding level since 2000, as noted in the study cited in Plaintiffs' Complaint. Ex. A at 27 (cited in Compl. ¶ 42). That report attributed PERA's funding decline to three factors, the first of which was the "cost-of-living increases for retirees," which contributed to PERA's liabilities increasing by 115% since 1999 while its assets only increased by 45%. *Id.*

In 2009, through Senate Bill 10-001, the Legislature once again changed the COLA calculations for retirees. For 2010, the COLA for all retirees who joined PERA by December 31, 2006, will be adjusted to be the lesser of 2% or the 2009 annual increase in the consumer price index. Ex. B § 20.[15] Because the change in the CPI-W was negative 0.7% in 2009, those PERA retirees will receive no COLA in 2010. Beginning in 2011, these retirees' COLA will be 2%. *Id.* However, if PERA's annual investment returns are negative for the prior year, then for the next three years, the COLA will be the lesser of the 2% or the increase in the consumer price index. *Id.* When PERA's funding ratio reaches 103%, COLA will increase by 0.25% per year thus meaning that future COLA benefits could surpass the 3.5% fixed COLA in place from 2000 to 2009. *Id.* § 23.[16]

In addition to claiming that the Legislature is prohibited from changing the COLA calculation, Plaintiffs also assert that the date that the COLA becomes effective must remain

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[15] Senate Bill 10-001 also amended the COLA calculation for those who joined PERA after December 31, 2006. *See* Ex. B §§ 22-23.

[16] If PERA's funding ratio later falls below 90%, COLA would decrease by 0.25% each year it is below that ratio, but the COLA would not decrease below 2%. *See* Ex. B § 23.

fixed as March 1. However, the Legislature has repeatedly changed the effective date of the COLA increases. From 1970 until 1986, cost of living adjustments became effective on May 1. *See, e.g.*, C.R.S. § 24-51-1001 (1994). From 1986 until 1994, the COLA became effective on the earlier of May 1 or November 1 following a retiree's first anniversary of retirement. *Id.* From 1994 until 2009, the COLA became effective on March 1. C.R.S. § 24-51-1001 (2006).[17] After passage of Senate Bill 10-001, the effective date for the COLA will be July 1 for all retirees. Compl. ¶ 53.

C. Denver Public Schools Retirement System

Until 2009, the Denver Public Schools Retirement System ("DPSRS") was operated as a separate, stand alone retirement system. In May 2009, DPSRS was merged into PERA and began to operate as the fifth PERA division. *See* S.B. 09-282.[18]

At that time, the COLA for DPS retirees was statutorily set for the first time to be 3.25% compounded effective on July 1. *See* S.B. 09-282; C.R.S. § 24-51-1732 (2009). Prior to that time, as Plaintiffs concede, the COLA for DPS had changed substantially over the years. From 1970 until 1974, there was a 1% non-compounded COLA. From 1974 until 1980, there was a 2% non-compounding yearly increase. Compl. ¶ 38. That amount was raised to a 3% non-compounding COLA from 1981 to 1984. *Id.* ¶ 39. From 1985 to 1999, DPS retirees received a

[17] Any PERA member who joined after December 31, 2006, and becomes eligible for benefits has had the COLA applied on July 1. C.R.S. § 24-51-1009 (2006).

[18] Until 2000, the DPS Retirement Board made changes to DPSRS COLA. The Retirement Board consisted of eleven elected members of various employee classifications, two members of the Board of Education of the Denver Public Schools, the Superintendent, and an administrative officer of the Retirement Board, with all actions subject to final approval by the Board of Education. From 2000 to 2009, the Retirement Board was replaced with an eleven-member board of trustees, who were elected by members of various employee classifications.

COLA of 3.25% non-compounding. *Id.* From 2000 to 2009, DPS retirees received a 3.25% compounding COLA. *Id.*[19]

D. The 2008-2009 Recession and Senate Bill 10-001

According to the Pew Report, in 2008, PERA suffered investment losses of $11 billion, which constitutes a 26% decline in the value of its assets. Ex. A at 27 (cited in Compl. ¶ 42). The "recession, which officially began in December 2007, dealt a severe blow to all state pension systems. In calendar year 2008, public sector pension plans experienced a median 25 percent decline in their investments." *Id.* at 5.

PERA and the General Assembly became concerned about the impact of the 2008 market downturn on PERA's ability to pay future pension benefits. In May 2009, the General Assembly enacted Senate Bill 09-282, which mandated that PERA propose a solution to the underfunding problem. Codified as C.R.S. § 24-51-211(2) (2009), the relevant provision of Senate Bill 09-282 stated:

> On or before November 1, 2009, the [PERA] board shall submit specific, comprehensive recommendations to the general assembly regarding possible methods to respond to the decrease in the value of the association's assets . . . and to ensure that each division of the association will become and remain fully funded.

PERA submitted the comprehensive legislative proposal required by Senate Bill 09-282 by the November 2009 deadline.

At the Senate Finance Committee hearing to consider Senate Bill 10-001, Senate President Shaffer, a co-sponsor of the bill, observed that after the market decline in 2008, PERA's unfunded liability—i.e., the difference between PERA's benefit obligations and its

[19] In 2005, the COLA was changed for those hired in DPS on or after July 1, 2005. There were also seven ad hoc increases made to the DPSRS base benefit between 1976 and 2001.

assets available to pay for them—stood at $22 billion. Ex. C at 4 (*Concerning Modifications to the Public Employees' Retirement Association Necessary to Reach a One Hundred Percent Funded Ratio Within the Next Thirty Years: Hearing on S.B. 10-001 Before the S. Comm. on Finance*, 2010 Legis. (Colo. Jan. 26, 2010) (statement of Sen. Brandon Shaffer, Senate President)).[20] Senate Minority Leader Penry, another co-sponsor of the bill, called PERA's unfunded pension liability the "single largest financial liability facing the State of Colorado." *Id.* at 9-10 (statement of Sen. Joshua Penry, Senate Minority Leader). Senator Shaffer also noted, and testimony by PERA representatives confirmed, that PERA's projections showed that the state pension system would run out of money within 30 years. *Id.* at 5, 35 (statements of Sen. Brandon Shaffer, Senate President, and Greg Smith, General Counsel, PERA).

In addition to the COLA change set forth above, Senate Bill 10-001 made a number of changes affecting current and future PERA employees, and employers, including raising employer and employee contributions and eventually requiring current and future members to work longer and/or retire later than current retirees. Compl. ¶ 44; Ex. B at §§ 9, 12. Faced with

[20] Where, as here, a plaintiff is challenging the validity or effect of a statute, a court may refer to the legislative history of the statute in making its ruling on a Rule 12(b)(5) motion to dismiss. *See*, *e.g.*, *Phillips v. Bell*, No. 08-1420, 2010 WL 517629, at *9 (10th Cir. Feb. 12, 2010) (relying on legislative history to reverse trial court's denial of motion to dismiss); *N.Y. 10-13 Ass'n v. City of New York*, No. 98 CIV. 1425 (JGK), 1999 WL 177442, at *4-*5 (S.D.N.Y. Mar. 30, 1999) (taking judicial notice of "relevant statutes and legislative history" in challenge to statute for multiple alleged constitutional violations). Reference to the legislative history of Senate Bill 10-001 also is appropriate because: (1) Plaintiffs incorporated the legislative history by reference to it in the Complaint (Compl. ¶ 43 (referring to "PERA's current underfunding" as part of the Legislature's motivation for passing Senate Bill 10-001)); and (2) in determining whether Plaintiffs have stated constitutional claims for which relief may be granted, this Court's analysis must evaluate the purpose for which Senate Bill 10-001 was enacted. *See, e.g.*, *Ferguson v. People*, 824 P.2d 803, 810 (Colo. 1992) (considering the legislative history in reviewing constitutional challenge to statute).

critical underfunding of PERA, the Legislature through Senate Bill 10-001 undertook difficult but necessary measures to ensure that all current and future retirees receive their pensions.

STANDARD OF REVIEW

A complaint should be dismissed for failure to state a claim if, accepting the allegations of the complaint as true and considering other facts appropriate on a motion to dismiss, the non-moving party can prove no set of facts that entitle it to relief. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). The court "is not required to accept as true legal conclusions couched as factual allegations," and a claim may be dismissed if the substantive law does not support it. *W. Innovations, Inc. v. Sonitrol Corp*., 187 P.3d 1155, 1158 (Colo. App. 2008); *see also Teigen v. Renfrow*, 511 F.3d 1072, 1082-83 (10th Cir. 2007) (affirming dismissal of substantive due process claims); *Atlas Corp. v. United States*, 895 F.2d 745, 747, 756-57 (Fed. Cir. 1990) (affirming granting of motion for judgment on the pleadings because "[i]t is not necessary in every case to undertake an evidentiary hearing on the issue of whether a taking has occurred. Summary dismissal of a taking claim is appropriate where the circumstances alleged in the complaint, even if taken as true and all reasonable inferences are drawn in favor of the plaintiff, cannot establish that a taking has occurred."); *Henderson v. Gunther*, 931 P.2d 1150, 1152, 1154 (Colo. 1997) (affirming dismissal of substantive due process claims).

ARGUMENT

I. Plaintiffs Fail to State a Claim for an Article V, Section 38 Violation of the Colorado Constitution (Claim II)

This Court should dismiss Plaintiffs' claim of a violation of article V, section 38 of the Colorado Constitution because that provision only prohibits the General Assembly from modifying any "obligation or liability" owed ***to*** the state or a municipal corporation. Here, the

issue is whether the General Assembly is barred from modifying an obligation owed ***by*** a governmental instrumentality.

Section 38, entitled "No liability exchanged or release," states:

> No obligation or liability of any person, association, or corporation, *held or owned by the state*, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, or postponed or in any way diminished by the general assembly, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury. This section shall not prohibit the write-off or release of uncollectible accounts as provided by general law.

Section 38 prohibits the General Assembly from modifying any obligation owed *to the state* or a municipal corporation. Section 38 "grants to the State or to a municipal corporation the right not to have the General Assembly release or diminish any obligation or liability *owed to it*. The purpose of this provision is to protect the monetary obligations *owned by municipal corporations*." *Bd. of County Comm'rs v. E-470 Pub. Highway Auth.*, 881 P.2d 412, 423 (Colo. App. 1994) (emphasis added), *rev'd in part on other grounds sub nom, Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859 (Colo. 1995).

Here, Plaintiffs allege that there is an obligation owed *to them* by PERA. Section 38 thus has no application here because it does not apply to obligations owed *to persons* by the state, instrumentalities of the state, or municipal corporations.

Every case that has applied Section 38 confirms the plain language of the constitutional provision, and all involved obligations owed *to* governmental entities, mostly in the form of taxes, and not obligations owed *by* governmental entities. For example, in *City of Montrose v. Public Utilities Commission*, Montrose challenged the constitutionality of a statute allowing gas companies to revise tariffs by which a franchise fee paid by the gas company to a municipality would be surcharged to customers within the municipality. 732 P.2d 1181, 1192 (Colo. 1987). The Colorado Supreme Court ruled the statute was constitutional in part because it did not

change the gas company's obligation to pay the franchise fee to the municipality and thus did not violate Section 38. *Id.*

In a more recent case, the Court of Appeals reviewed the constitutionality of a statute requiring county officials to execute financial documents making bond proceeds available to the E-470 Public Highway Authority. *Bd. of County Comm'rs*, 881 P.2d at 423. The court reasoned that the statute did not violate Section 38 because it did not modify any obligations *owed to the county*. *Id.* ("Arapahoe County would be entitled to invoke this constitutional provision if H.B. 1316 altered any obligation *owed to it*.") (emphasis added); *see also Allardice v. Adams County*, 173 Colo. 133, 153, 476 P.2d 982, 992-93 (1970) (upholding bond issue which allowed General Assembly to create, as opposed to decrease or forgive, indebtedness); *Hinshaw v. Dep't of Welfare*, *City & County of Denver*, 157 Colo. 447, 453-54, 403 P.2d 206, 209 (1965) (holding that pensioner who had received excessive pension payments owed a personal debt *to* the state and the General Assembly, because of Section 38, could not release her from this obligation), *abrogated on other grounds by City of Colo. Springs v. Timberlane Assocs.*, 824 P.2d 776, 780-81 (Colo. 1992); *People ex rel. Hinkley v. Maytag*, 121 Colo. 446, 448, 218 P.2d 512, 514 (1950) (gift tax, imposed on the subject property at the time of donation, became a lien on the property vested in the state and could, under Section 38, only be relinquished or released upon the payment of the tax), *rev'd on other grounds by People ex rel. Dunbar v. Maytag*, 129 Colo. 316, 270 P.2d 782 (1954).

Section 38 prohibits the General Assembly from modifying an obligation owed *to* the state or a municipality but is inapplicable to the situation here: an alleged obligation owed *by* an instrumentality of the state. The Court should dismiss Plaintiffs' second claim.

II. Plaintiffs' Takings Claim Should Be Dismissed Because the Takings Clause Provides No Basis for the Relief Plaintiffs Seek (Claim IV)

The Fifth Amendment of the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." Plaintiffs' Takings Clause claim should be dismissed because: (1) the injunctive relief that Plaintiffs seek—undoing the Legislature's changes to COLA—is not an available remedy under the Takings Clause; and (2) an alleged taking of money by the government, as Plaintiffs allege here, is not actionable under the Takings Clause.[21]

A. The Takings Clause Cannot Support a Claim for Injunctive Relief

Plaintiffs seek a permanent injunction barring implementation of Senate Bill 10-001 and money damages "to make them whole for any loss and to restore them to the positions they would have been in but for the improper application of sections 19 and 20 of Senate Bill 10-001." Compl. at 14, ¶¶ C, F. Plaintiffs thus ask this Court to undo what the General Assembly has done in enacting Senate Bill 10-001 and to return them to the position they were in prior to the Legislature's action. *See id.* The Takings Clause, however, provides no basis to undo the acts of the Legislature.

Unlike other provisions of the Constitution, the Takings Clause does not prohibit government acts. The aim of the Takings Clause is compensatory, not prohibitory. The court in *Commonwealth Edison Co. v. United States* explained this distinction in granting a motion to

[21] A motion to dismiss is the appropriate vehicle for resolution of a legally improper Takings Clause claim. *Williams v. United States*, 86 Fed. Cl. 594, 605-06 (Fed. Cl. 2009) (granting motion to dismiss Takings Clause claim); *Swisher Int'l, Inc. v. Johanns*, No. 3:05-cv-871-J16-TEM, 2007 WL 4200816, at *10 (M.D. Fla. Nov. 27, 2007) ("As the Court stated previously, in-depth analysis on this issue [of whether it was a taking] is unnecessary."); *Adams v. United States*, No. 00-447 C, 2003 WL 22339164, at *8 (Fed. Cl. Aug. 11, 2003) (granting motion to dismiss Takings Clause claim); *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 32 (Fed. Cl. 2000) (same).

dismiss a Takings Clause claim. 46 Fed. Cl. 29 (Fed. Cl. 2000). In that case, the plaintiff electric utility alleged that a special monetary assessment imposed on it by the Energy Policy Act was a taking prohibited by the Fifth Amendment. *Id.* at 32. The Federal Circuit dismissed that claim, explaining:

> [W]hile ordinarily a plaintiff stating a takings claim must concede the lawfulness of the actions of the government that give rise to the alleged "taking," here the thrust of plaintiff's claim is that the Energy Policy Act is unlawful and, effectively, should be unenforceable. Such a holding, however, cannot properly derive from the Takings Clause, which is not prohibitory, but rather compensatory, in nature.

Id. at 41. The *Commonwealth Edison* court followed the reasoning of the Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, which explained that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." 482 U.S. 304, 314-15 (1987). The Supreme Court instructed that "[the] basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315 (emphasis in original).

Likewise, in *Nicholson v. United States*, 77 Fed. Cl. 605 (Fed. Cl. 2007), the court observed that "[t]he [Takings Clause] provision does not prohibit the taking of private property or deter governmental interference with property rights, but rather guarantees compensation for property owners when otherwise legitimate activities of the government amount to a taking." *Id.* at 614. The court added, "[a]mong the hallmarks of a Fifth Amendment taking is that the governmental conduct forming the basis of the taking is authorized and legitimate. As a threshold matter, takings claimants must concede the propriety of the governmental interference with their property interests." *Id*; *see also E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998)

(Kennedy, J., concurring in the judgment and dissenting in part) (explaining that the Takings Clause "presupposes what the government intends to do is otherwise constitutional").

Plaintiffs' claims here simply do not implicate the Takings Clause because Plaintiffs challenge the propriety of the Legislature's actions and seek to reverse the passage of Senate Bill 10-001. Because the Takings Clause provides no basis for their challenge to Senate Bill 10-001, Plaintiffs' fourth claim should be dismissed.

B. An Alleged Taking of Money by the Government Is Not Actionable Under the Takings Clause

Plaintiffs' core complaint about Senate Bill 10-001 is that it reduces the amount of money paid to them through cost of living adjustments. Compl. ¶¶ 26-29, 50-52; *id.* at 14, ¶ F. Plaintiffs' claim that Senate Bill 10-001 effectuates a taking of their future COLA payments because the Legislature modified the 3.5% COLA previously contained in the PERA Statute. Numerous courts have held, however, that a taking of money is not actionable under the Takings Clause. *See, e.g.*, *Commonwealth Edison Co.*, 46 Fed. Cl. at 40-41 (reviewing cases).

Summarizing the law in this area, the *Commonwealth Edison* court found that some courts "have squarely held that money is not 'property' within the meaning of the Takings Clause." *Id.* at 40 (citing cases). "Other courts, taking a more transactional approach, have concluded that government-imposed obligations to pay money are not the sort of governmental actions subject to a takings analysis." *Id.* at 40-41 (citing cases).

Following these lines of precedent, the *Commonwealth Edison* court concluded that government action that takes money from a party "cannot result in a compensable taking." *Id.* at 41. Claims of that type are "not susceptible to a taking analysis." *Id.* at 40; *see also United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (rejecting Takings Clause challenge to government fee imposed on awards by the Iran Claims Tribunal and explaining, "[i]t is artificial

to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee . . . ."); *Swisher Int'l, Inc. v. Johanns*, No. 3:05-cv-871-J16-TEM, 2007 WL 4200816, at *8 (M.D. Fla. Nov. 27, 2007) (holding that a government-imposed payment of money cannot result in a compensable taking).

As explained in *Branch v. United States*, there is a fundamental conceptual difficulty presented by applying the Takings Clause to an alleged taking of money. 69 F.3d 1571, 1574-76 (Fed. Cir. 1995). In *Branch*, the plaintiff, a trustee in bankruptcy for a bank holding company, challenged the cross-guarantee provision of the Financial Institutions Reform, Recovery and Enforcement Act, 12 U.S.C. § 1815(e). When one of the subsidiary banks became insolvent, the FDIC enforced the cross-guarantee provision against another of the banks in the amount of $99 million. *Id.* at 1574. The plaintiff challenged the $99 million as a taking under the Fifth Amendment for which it should be compensated. *Id.* The Court of Appeals rejected the plaintiff's argument, pointing out the circularity inherent in any claim under the Takings Clause for an alleged taking of money:

> To be sure, analyzing the assessment under the principles of takings law is awkward. If a particular governmental action is deemed a taking, it means that the government may engage in the action but must pay for it. . . . But because the property allegedly taken in this case was money, that leads to the curious conclusion that the government may take the bank's money as long as it pays the money back. At bottom, then, the takings claim raised in this case amounts to a contention that the Constitution forbids the government from enforcing the [statute] at all. . . . [W]e do not believe the Constitution disabled Congress from addressing a significant economic problem . . . .

Id. at 1575-76. Accordingly, Plaintiffs' Takings Clause claim also should be dismissed because it is premised on an alleged taking of money by the Legislature.[22]

III. Plaintiffs' Substantive Due Process Claim Should Be Dismissed Because Senate Bill 10-001 Bears a Rational Relationship to a Legitimate Government Interest (Claim V)[23]

The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Substantive due process rights are "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). Where, as here, no fundamental rights are involved, "the applicable test for reviewing a substantive due-process challenge to a statute . . . is the rational-basis standard of review." *Ferguson v. People*, 824 P.2d 803, 808 (Colo. 1992).[24]

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[22] In addition, the United States Supreme Court has stated on several occasions that a dismissal of a Takings Clause claim necessarily follows from the dismissal of a substantive due process claim. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641 (1993) ("Given that [plaintiff's] due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings Clause.") (citation omitted); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986) ("Although [the unsuccessful prior cases] were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved.").

[23] A motion to dismiss is a proper vehicle to resolve a substantive due process claim, including one reviewed under a rational basis standard. *See, e.g.*, *Henderson v. Gunther*, 931 P.2d 1150, 1152, 1154 (Colo. 1997) (affirming dismissal of substantive due process claims); *Ewy v. Sturtevant*, 962 P.2d 991, 995 (Colo. App. 1998) (reversing denial of motion to dismiss substantive due process claim); *Teigen v. Renfrow*, 511 F.3d 1072, 1082-83 (10th Cir. 2007) (affirming dismissal of substantive due process claims).

[24] Plaintiffs do not, and cannot, pursue a procedural due process claim because Senate Bill 10-001 was a legislative act that changed aspects of a benefit program. *See, e.g., McInerney v. Pub.*

A. Plaintiffs Do Not Have a Fundamental Right to a Fixed 3.5% COLA

The fundamental rights protected by substantive due process are created by the Constitution, not state law. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring) ("While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 32-33 (1973) ("[T]he key to discovering whether education is 'fundamental' . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.").

Here, the alleged right asserted by Plaintiffs (to a specific COLA calculation), if it exists, is a creation of state law. There is no explicit or implicit guarantee in the U.S. Constitution of a right by PERA members to receive a specific COLA, or to receive pension benefits at all. Accordingly, courts hold that a right to receive pension benefits is not a fundamental right. *See*, *e.g.*, *DiSabato v. Bd. of Trustees*, 674 N.E.2d 852, 856 (Ill. App. 1996) ("[Fundamental rights] do not include the plaintiffs' claim to a particular pension benefit calculation method."); *Walker v. City of Waterbury*, 601 F. Supp. 2d 420, 425 (D. Conn. 2009) ("Plaintiffs do not have a fundamental right to their vested pension benefits that is protected by the substantive component of the due process clause of the Constitution."), *aff'd*, No. 09-2104-CV, 2010 WL 114186, at *1 (2d Cir. Jan. 13, 2010) ("While we recognize the important public service that the plaintiffs

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Employees' Retirement Ass'n, 976 P.2d 348, 352-53 (Colo. App. 1998) ("[W]hen a statute does not require or prohibit specific conduct, but merely adjusts a statutory benefit level, procedural due process does not require notice and an opportunity to avoid the impact of the new law. The legislative process provides all the process that is due.").

provide, we cannot conclude that they enjoyed a fundamental right to the pension benefits they received pursuant to an ordinary employment contract.").

Likewise, numerous courts have held that contract rights and state-conferred financial benefits, like the COLA at issue here, are not protected by substantive due process. The Second Circuit affirmed the dismissal of a union's claim that its substantive due process rights were violated when the town stopped making payments to it for health and medical benefits under a collective bargaining agreement. *See Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington*, 31 F.3d 1191, 1192-93 (2d Cir. 1994). The Second Circuit explained, "[w]e do not think . . . that simple, state-law contractual rights, without more, are worthy of substantive due process protection. Such rights are not the type of important interests that have heretofore been accorded the protection of substantive due process." *Id.* at 1196 (internal quotation marks omitted); *see also Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) ("Routine state-created contractual rights are not deeply rooted in this Nation's history and tradition, and, although important, are not so vital that neither liberty nor justice would exist if [they] were sacrificed.").

Thus, even assuming that Plaintiffs have a contract right to a 3.5% COLA, no fundamental right is at stake and thus "the applicable test for reviewing a substantive due-process challenge to a statute is the rational-basis standard of review." *Ferguson,* 824 P.2d at 808.

B. Accepting the Allegations in the Complaint as True, There Is a Rational Basis for the General Assembly to Enact Senate Bill 10-001

Rational basis scrutiny is the least intrusive standard of review and it incorporates the presumption that the statute under review is constitutional. *Id.* When conducting a rational basis review, the court asks only whether it is conceivable that the governmental regulation bears a rational relationship to an end of government that is not constitutionally prohibited. *See FCC v.*

Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993); *Pace Membership Warehouse v. Axelson*, 938 P.2d 504, 507 (Colo. 1997). As the Tenth Circuit has explained, "under rational basis review, therefore, there is no need for mathematical precision in the fit between justification and means, and the law need not be in every respect logically consistent with its aims to be constitutional." *KT & G Corp. v. Att'y Gen.*, 535 F.3d 1114, 1142 (10th Cir. 2008) (citation omitted). "A challenged governmental act involving economic or social matters will be struck down only if no reasonably conceivable set of facts could establish a rational relationship between the act and a legitimate end of government." *Colo. Soc'y of Cmty. & Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 711 (Colo. 1987); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. at 315 ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"); *Koster v. City of Davenport, Iowa*, 183 F.3d 762, 768 (8th Cir. 1999) ("Substantive due process claims regarding economic legislation face a highly deferential rational basis test."); *Stern v. Halligan*, 158 F.3d 729, 731 (3d Cir. 1998) ("We have made clear that when 'general economic and social welfare legislation' is alleged to violate substantive due process, it should be struck down only when it fails to meet a minimum rationality standard, an 'extremely difficult' standard for a plaintiff to meet.") (citation omitted).

Here, there can be no dispute that preserving the solvency of PERA is a legitimate governmental interest. PERA contributes to the welfare of a significant segment of the state's population, and the General Assembly has broad authority to legislate to protect the general welfare. *People v. Zinn*, 843 P.2d 1351, 1354 (Colo. 1993).

Next, Plaintiffs concede through their factual allegations that Senate Bill 10-001 bears a rational relationship to the General Assembly's legitimate objective of remedying PERA's

unfunded liabilities that threatened its future viability. Plaintiffs' Complaint contains allegations acknowledging that PERA was underfunded, including: "In 2000, PERA was at 105% of its funding level; by 2008, PERA had dropped to 70% of its funding level." Compl. ¶ 41. Plaintiffs also cite to the Pew Report, which concluded that PERA was one of many pension funds facing significant shortfalls between the value of pension assets and the amount of benefit obligations encompassed within the system. *Id.* ¶ 42 (citing Pew Report (Ex. A) at 27). The Pew Report also identified PERA's large investment losses during the market downturn as one of the causes of PERA's unfunded liabilities. Ex. A at 27.

Plaintiffs further recognize and allege that the General Assembly passed Senate Bill 10-001 to address PERA's underfunding. Compl. ¶ 43. In addition, the preamble to Senate Bill 10-001 states that the law makes "modifications to the public employees' retirement association necessary to reach a one hundred percent funded ratio within the next thirty years." Ex. B, pmbl.

That Plaintiffs do not like one of the difficult choices the General Assembly made does nothing to alter the conclusion that the Legislature's actions bore a rational relationship to a legitimate governmental interest. *See Colo. AFL-CIO v. Donlon*, 914 P.2d 396, 406 (Colo. App. 1995) (Briggs, J., concurring) ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e] the congressional choice from constitutional challenge.") (alteration in original). Disagreement with a legislative decision does not establish a lack of rational basis for the statute nor does it permit the court to speculate whether there could have been a different method to approach the issue. *See, e.g.*, *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) ("[R]ational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question."); *Scavello v. Twp. of Skippack*, No. 08-CV-5992, 2009

WL 3209538, at *3 (E.D. Pa. Oct. 1, 2009) ("Although Plaintiffs suggest that there were alternative ways to address this problem, [rational basis review] does not require, and in fact does not even permit, the courts to determine whether legislative bodies chose the 'best' available option for achieving their legitimate governmental interest."); *Murphy v. Pub. Serv. Elec. & Gas Co.*, No. L-2536-07, 2009 WL 276540, at *4 (N.J. Super. Ct. App. Div. Feb. 6, 2009) ("The legislative framework is entirely non-whimsical, it is entirely rational and furthers what the legislation said it furthered. Plaintiff's mere disagreement and five years after the fact experience does not retroactively negate the rational basis . . . .").

Based on the facts this Court may consider on this motion to dismiss, Senate Bill 10-001 is rationally related to the legitimate government purpose of protecting PERA so that it may continue to provide pension benefits to public employees. The Court should dismiss Plaintiffs' claim alleging a violation of substantive due process.

IV. Plaintiffs Fail to State Claims Under 42 U.S.C. § 1983 for Violations of the Contracts Clause, Takings Clause, and Substantive Due Process (Claims VI to VIII)

Section 1983 provides a remedy against state officials acting "under color of state law" whose acts deprive someone of any "rights, privileges, or immunities secured by the Constitution and laws." *Bates v. Henneberry*, 211 P.3d 68, 70 (Colo. App. 2009) (internal quotation marks omitted). "[T]o seek redress under section 1983, a plaintiff 'must assert the violation of a federal *right*, not merely a violation of federal *law*.'" *Id.* (quoting *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original)). Plaintiffs' Complaint includes three § 1983 claims—Claims VI, VII, and VIII—premised on alleged violations of the Contracts Clause, Takings Clause, and Substantive Due Process, respectively. All claims should be dismissed because (1) a § 1983 claim cannot be based on a Contracts Clause violation; (2) Plaintiffs have not stated cognizable

Takings Clause or Substantive Due Process violations of federal rights, and (3) the Defendants are not "persons" subject to damages under § 1983.

A. Section 1983 Claims Cannot Be Based on an Alleged Violation of the Contracts Clause

The Contracts Clause of the United States Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. The United States Supreme Court holds that a law is invalid under the Contracts Clause if it substantially impairs a contractual relationship and is not reasonable and necessary to serve an important and legitimate public purpose. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17, 19-21, 29 (1977). However, not every alleged violation of the federal constitution will support a claim under § 1983. *See, e.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (holding that the Supremacy Clause does not create rights enforceable under § 1983). Because the Contracts Clause is one of the provisions of the Constitution that does not create rights enforceable under § 1983, Claim VI of the Complaint should be dismissed.

In *Kilbourn v. Fire & Police Pension Ass'n*, 971 P.2d 284 (Colo. App. 1998), the court concluded that a violation of the Contracts Clause does not give rise to liability under § 1983. The plaintiff in that case brought a claim challenging the revocation of his occupational disability pension provided by the Fire and Police Pension Association. *Id.* at 285-86. The plaintiff argued that the revocation impaired his vested right in his pension violated the Contracts Clauses of the federal and state constitutions, and the federal constitutional violation supported his claim for relief under 42 U.S.C. § 1983. *Id.* at 288-89.

The Court of Appeals rejected plaintiff's arguments. With respect to the plaintiff's § 1983 claim, the court also stated that "a violation of the Contracts Clause does not give rise to a § 1983 cause of action." *Id.* at 288. In support of its conclusion, the *Kilbourn* court cited *Carter*

v. Greenhow, 114 U.S. 317 (1885). In *Carter*, the Supreme Court held that the sole remedy for an alleged impairment of a contract right by state law was to seek a judicial declaration that the state law is unconstitutional under the Contracts Clause. 114 U.S. at 322-23.

Relying on *Carter*, several federal district courts also have concluded that a violation of the Contracts Clause does not give rise to a § 1983 claim for damages. *See, e.g.*, *Am. Fed'n of State, County & Mun. Employees, Local 2957 v. City of Benton, Arkansas*, No. 4:04-CV-492 (RSW), 2005 WL 2244257, at *7 (E.D. Ark. Aug. 2, 2005) ("[T]he plaintiffs are not entitled to damages for a violation of the Contract Clause; they are only entitled to declaratory and injunctive relief.") (citing and quoting *Carter*); *Andrews v. Anne Arundel County, Maryland*, 931 F. Supp. 1255, 1267 & n.14 (D. Md. 1996) (explaining that *Carter* held that no § 1983 claim lies for a violation of the Contracts Clause). Consistent with these federal district courts, the Colorado Court of Appeals, and the U.S. Supreme Court, Plaintiffs' § 1983 claim cannot be based upon an alleged violation of the Contracts Clause and therefore should be dismissed.

B. Plaintiffs' Section 1983 Claim Based on Alleged Violations of the Takings Clause (Claim VII) and Substantive Due Process Clause (Claim VIII) Should Be Dismissed Because Plaintiffs' Underlying Claims Fail as a Matter of Law

As explained above, Plaintiffs have failed to state a cognizable claim under the Takings and Substantive Due Process Clauses. Accordingly, Plaintiffs' § 1983 claims based on the alleged violations of the Takings and Substantive Due Process Clause should also be dismissed. *See New Phone Co. v. N.Y. Dep't of Info. Tech. & Telecomms.*, No. 06-5276-cv, 2009 WL 4547751, at *2 (2d Cir. Dec. 7, 2009) ("NPC's claims under 42 U.S.C. Sections 1983 and 1988 are based upon its allegations that [the statute] violate the TCA. Having found that NPC's TCA claims are without merit, these claims necessarily fail.").

C. Even if Plaintiffs' Section 1983 Claims Are Not Dismissed in Their Entirety, All Three Claims Should Be Dismissed to the Extent They Seek Monetary Damages

In their Relief Requested, Plaintiffs ask the Court to "[a]ward Plaintiffs and the Class *monetary damages* (plus interest), pursuant to . . . 42 U.S.C. § 1983." Compl. at 14, ¶ F (emphasis added). Plaintiffs' § 1983 claims are against Governor William Ritter, PERA Board of Trustees Chair Mark J. Anderson, and PERA Board of Trustees Vice Chair Sara R. Alt, in their official capacities only.[25]

In *Tepley v. Public Employees' Retirement Ass'n*, the Court of Appeals explained that under § 1983 only "persons" may be sued for damages. 955 P.2d 573, 580 (Colo. App. 1997) (citing *Gomez v. Toledo*, 446 U.S. 635 (1980)). States and entities deemed to be arms of the state, however, "are not 'persons' for purposes of § 1983, and, thus, are not subject to suit for violations of that section." *Id.* (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989)). The *Tepley* court held that, because PERA is an instrumentality of the state under section 24-51-201, it is not a person under § 1983 and "a claim for damages will not lie against it or its Board." *Id*; *see also McInerney v. Pub. Employees' Retirement Ass'n*, 976 P.2d 348, 351 (Colo. App. 1998) (affirming dismissal of § 1983 claim for monetary damages against PERA).

Here, PERA is granted substantial authority and independence under state law. Of the fifteen trustees on the PERA board, eleven are elected from among the membership of the various divisions and retired members. C.R.S. § 24-51-203 (2009). The Board has broad powers over PERA, including the determination of membership status within the divisions, eligibility for benefits, and "complete control and authority to invest the funds of the association." C.R.S. §§ 24-51-205(1), -206(1). As set forth in *Tepley*, PERA is, however, an instrumentality of the state,

[25] The Attorney General's companion motion to dismiss discusses that Governor Ritter, acting in his official capacity, is similarly not a person under § 1983 and therefore not subject to a § 1983 claim for money damages.

C.R.S. § 24-51-201(1), and it therefore is not a "person" subject to claims for money damages under § 1983. Accordingly, Plaintiffs' claims for money damages in connection with Claims VI, VII, and VIII against PERA board members Mark J. Anderson and Sara R. Alt in their official capacities should be dismissed.

CONCLUSION

For the foregoing reasons, the PERA Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' second, fourth, fifth, sixth, seventh, and eighth claims in their First Amended Complaint.

Respectfully submitted this 10th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2010, a true and accurate copy of the foregoing PERA Defendants' Motion to Dismiss First Amended Class Action Complaint was served via Lexis-Nexis File & Serve on the following individuals:

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Pursuant to C.R.C.P. 121, Section 1-26, a printed copy of this document with original signatures will be maintained by Reilly Pozner LLP and made available for inspection upon request.