DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of themselves and those similarly situated, Plaintiffs, v. STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON AND SARA R. ALT, IN THEIR OFFICIAL CAPACITIES ONLY, Defendants.	▲ **COURT USE ONLY** ▲ Case No.: 2010-CV-1589 Division: 6
PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED COMPLAINT	

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I. INTRODUCTION

Plaintiffs brought this class action suit to challenge newly-passed legislation which reduces the guaranteed annual increase to pension benefits that they receive from the Colorado Public Employees' Retirement Association ("PERA"). Plaintiffs and class members include retired public school teachers who taught millions of Colorado's children; retired state judges who interpreted and enforced the laws of Colorado; and retired state and local government workers who ensured the proper functioning of all sectors of Colorado government. Plaintiffs and class members were promised certain pension benefits as part of their total compensation. By eliminating these benefits, Defendants have violated Plaintiffs' rights under the Colorado and United States Constitutions.

Defendants have filed two motions to dismiss,[1] seeking to dismiss several of Plaintiffs' claims for relief. Except as to two points,[2] Defendants' motions should be denied, and the Court should hear Plaintiffs arguments.

II. THE FACTS ALLEGED

A. The Parties

Gary R. Justus, Kathleen Hopkins, Eugene Halaas and Lisa Silva-Derou (collectively "Plaintiffs") proceed on behalf of a class (as defined below, "Class") against PERA, a governmental entity that administers a defined benefit pension plan for Colorado's public employees. Amended Complaint ("Complaint") ¶ 6. Plaintiffs and members of the Class ("Class Members") have spent all or most of their working lives in public service. Id. ¶ 25.

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[1] Because Plaintiffs herein respond to two separate motions to dismiss and are addressing a number of arguments, they exceed the recommended page limit for a single brief.

[2] Plaintiffs agree with Defendants that Count II may be dismissed. Further, Plaintiffs agree that monetary damages may not be pursued against state officials under 42 U.S.C. § 1983 but that injunctive relief is available.

Plaintiff Justus, a Colorado resident, worked for the Denver Public Schools ("DPS") for over 29 years before retiring in 2003. Id. ¶ 1. Until December 31, 2009, he received a pension through the Denver Public Schools Retirement System ("DPSRS"). On January 1, 2010, DPSRS became part of PERA[3], and Mr. Justus now receives his pension benefits from PERA.

Plaintiff Hopkins, a Colorado resident receiving pension benefits from PERA, worked approximately 15 years for the State of Colorado before retiring in July 2001. Id. ¶ 2.

Plaintiff Halaas, a California resident who receives pension benefits from PERA, worked over 27 years as a judge for the State of Colorado before retiring in 1999. Id. ¶ 3.

Plaintiff Silva-Derou, a Colorado resident, is a current employee of the Colorado Department of Public Health and Environment and an active PERA member. Id. ¶ 4. As of February 28, 2010, Ms. Silva-Derou was eligible to receive a full service pension benefit from PERA because she had met PERA's age and service requirements. Id.

The Defendant State of Colorado, through various agencies and instrumentalities of state government, engaged in the wrongdoing complained of in this case. Id. ¶ 5. PERA is a governmental entity that administers a defined benefit pension plan for Colorado's public employees, and is also a "qualified plan" within the meaning of § 401(a) of the Internal Revenue Code. Id. ¶ 6. PERA is governed by its Board of Trustees. Id.

Defendant Bill Ritter, the Governor of the State of Colorado, signed the operative statute, Senate Bill 10-001, into law, and is charged with enforcing it. Id. ¶ 7. Defendant Mark J. Anderson, Chair of the PERA Board of Trustees, is charged with administering PERA pension funds in accordance with state law, including Senate Bill 10-001. Id. ¶ 8. Defendant Sara R. Alt, Vice Chair of the PERA Board of Trustees, is also charged with administering PERA pension

[3] References herein to "PERA" include the former DPSRS.

funds in accordance with state law, including Senate Bill 10-001. Id. ¶ 9. Governor Ritter, Mr. Anderson, and Ms. Alt (collectively, "Individual Defendants") are sued in their official capacity only. Id. ¶¶ 7-9.

B. The Retirement Benefits At Issue

Class Members' PERA retirement benefits are an integral and significant part of their compensation for public service. Id. ¶ 26. Because public employees typically do not receive Social Security benefits for the time that they worked in government service, for most public employees, PERA substitutes for Social Security. Id. ¶ 27. PERA benefits are funded by contributions from all participating public employees and the governmental entities that employ them—PERA members are required by law to contribute at least 8% of their wages to PERA. Id. ¶ 29.

At all times relevant to this case, the state law governing PERA and the DPSRS pension plans guaranteed annual increases to pension benefits, either by way of a cost of living adjustment (COLA) or a specified percentage adjustment. Id. ¶ 30. Before March 1, 1994, the pertinent law provided that "cost of living increases in retirement benefits and survivor benefits shall be made only upon approval by the General Assembly." Id. ¶ 33 (citing Colo. Rev. Stat. § 24-51-1101 (1992)). In 1993, the Legislature amended the PERA statute, providing that after March 1, 1994, annual COLA increases were automatic by law and no longer dependent on yearly approval by the General Assembly. Complaint ¶ 34 (citing H.B. 93-1324, § 7 (1993)). By operation of law, from 1994 through 2000, pension benefits of PERA retirees were automatically adjusted upward by a COLA determined under a formula specified in the governing statute, yielding various yearly percentage increases which are specifically set forth in the Complaint. See id. ¶ 35.

In 2000, the Legislature amended the PERA statute again, replacing the annual variable COLA adjustment with a guaranteed 3.5% annual increase effective March 1, 2001. Id. ¶ 36 (citing 2000 Colo. Laws Ch. 186 § 7; Colo. Rev. Stat. § 24-51-1002 (2009)). Consistent with this amendment, the PERA Summary Plan Description ("SPD") published in October 2000, stated:

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

Complaint ¶ 37 (quoting from SPD at 22).

DPSRS has provided some form of guaranteed annual adjustment to pension benefits since 1974, when it instituted a non-compounding 2% yearly increase. Complaint ¶ 38. In 1981, DPSRS increased the annual pension adjustment to 3.0% (non-compounding); in 1985, DPSRS raised the yearly adjustment to 3.25% (non-compounding); and in 2000, DPSRS began compounding the interest. Id. ¶ 39. When DPSRS became part of PERA in 2010, PERA assumed DPSRS' obligation to provide the guaranteed 3.25% (compounded) annual increase for DPS Subclass Members. Id. ¶ 40 (citing Colo. Rev. Stat. § 24-51-1732 (effective January 1, 2010)).

In 2000, PERA was at 105% of its funding level; by 2008, PERA had dropped to 70% of its funding level. Id. ¶ 41. According to a recent study by the Pew Charitable Trust, a primary cause of PERA's current underfunding is that Colorado public employers failed to make sufficient contributions to maintain a full funding level. The Pew study found that between 2001-2008, employer contributions fell to 50%-70% of the amount actuarially required to maintain stable funding -- a shortfall of some $2.4 billion. Id. ¶ 42 (citing "The Trillion Dollar

Gap: Underfunded State Retirement Systems and the Road to Reform," Pew Charitable Trust (February 2010) at 27).

Earlier this year, the Legislature enacted Senate Bill 10-001, which Governor Ritter signed into law on February 23, 2010. Id. ¶ 43. *Senate Bill 10-001 eliminated the guaranteed 3.5% annual increase for the PERA Public Employee subclass and the 3.25% annual increase for DPS retirees, replacing these with an annual COLA to be calculated under a new formula that is capped at 2%.* Id. ¶ 45 (citing SB 10-001 § 20).

Due to the 2% cap on the new COLA formula, Plaintiffs and Class Members will receive pensions in amounts that are substantially less than the amounts specified by law when their pension rights vested or when they actually retired. Id. ¶ 50. As a result of Defendants' application of Senate Bill 10-001, a hypothetical "average" retiree will lose more than $165,000 in benefits over the next twenty years. Id. ¶ 52.

Defendants have not restricted application of the changes called for by Senate Bill 10-001 to new hires and employees yet to attain eligibility to retire, but have applied the changes to cover all PERA members, including those like Plaintiffs and Class Members whose rights to pension benefits vested before the amendment took effect on March 1, 2010. Id. ¶ 48.

Plaintiffs proceed on behalf of the following class:

> (1) All PERA members who received or may receive pension benefits from PERA on or after March 1, 2010, and (1) who are not in the DPS Division and became eligible to retire or retired between March 1, 1994 and February 28, 2010, inclusive; or (2) who are in the DPS Division and became eligible to retire or retired between January 1, 1974 and February 28, 2010, inclusive.
>
> (2) all individuals who have received or may receive pension benefits from PERA because they were, are or will be "qualified survivors" of individuals described in subparagraph 12(1) above; or
>
> (3) all individuals who as of March 1, 2010 were receiving or who were eligible to receive pension benefits from PERA because they were "qualified survivors" of

> (4) PERA members who died between March 1, 1994 and February 28, 2010, inclusive, before becoming eligible to retire, or (2) DPSRS members who died between January 1, 1974 and December 31, 2009, inclusive, before becoming eligible to retire.

Complaint ¶ 12.

Plaintiffs proceed on behalf of two proposed subclasses: (1) the Public Employee Subclass, who are PERA members (and survivors) in the school, state, local government and judicial divisions; and (2) the Denver Public School Subclass – PERA members (and survivors) in the Denver Public School division.

III. PLAINTIFFS' CLAIMS FOR RELIEF AND DEFENDANTS' MOTIONS TO DISMISS

In Counts I and III, Plaintiffs seek a declaration that Sections 19 and 20 of Senate Bill 10-001 violate the Contract Clause of the Colorado Constitution and the Contract Clause of the United States Constitution. None of the Defendants have moved to dismiss either of these claims, and, as noted in footnote 1, Plaintiffs agree with Defendants that Count II may be dismissed.

In Count IV, Plaintiffs allege violation of the Takings Clause of the Fifth Amendment of the United States Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." Defendants argue that this claim fails as a matter of law because the Takings Clause does not prohibit governmental acts and an alleged governmental taking of money is not actionable under the Takings Clause.

In Count V, Plaintiffs allege violation of the right to Substantive Due Process guaranteed by the Fourteenth Amendment of the United States Constitution. Defendants argue, *inter alia*, that this claim should be dismissed because pension benefits are not fundamental rights protected by the United States Constitution.

Counts VI through VII proceed under 42 U.S.C. § 1983 for violations of the federal constitutional provisions. Defendants maintain that the Contracts Clause count (Claim VI) should be dismissed because, Defendants maintain, a violation of the Contracts Clause cannot give rise to a § 1983 claim. Defendants also argue that 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.

IV. ARGUMENT

A. Controlling Standards

Defendants PERA, Anderson, and Alt ("PERA Defendants") have moved to dismiss based solely on C.R.C.P. 12(b)(5), asserting that in Counts IV, V, VI, VII, and VIII, Plaintiffs have failed to state a claim upon which relief may be granted. Defendants Ritter and the State of Colorado ("State Defendants") move to dismiss Counts IV through VIII under both C.R.C.P. 12(b)(5) and C.R.C.P. 12(b)(1).

C.R.C.P. 12(b)(5) motions to dismiss test a complaint's legal sufficiency to determine whether the plaintiff has asserted a claim for which relief may be granted. City of Colorado Springs v. Andersen Mahon Enterprises, LLP, __ P.3d __, 2010 WL 1238873, at *2 (Colo.App. April 1, 2010) (citing Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856, 858 (Colo.App.2007)). In evaluating a motion to dismiss, the court must accept all material factual averments as true, and must view the complaint's allegations in the light most favorable to the plaintiff. Id. Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are generally viewed with disfavor and should be granted only if it can be shown "beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." Id. (quoting from Coors Brewing Co. v. Floyd, 978 P.2d 663, 665 (Colo. 1999)). A court cannot

grant a motion to dismiss for failure to state a claim unless no set of facts can prove that the plaintiff is entitled to relief. Students for Concealed Carry on Campus, LLC v. Regents of University of Colorado, ___ P.3d ___, 2010 WL 1492308, *2 (Colo.App. April 15, 2010) (citing Lobato v. State, 218 P.3d 358, 367 (Colo. 2009). A court may properly dismiss claims under Rule 12(b)(5) only where a complaint fails to give defendants notice of the claims asserted. State ex rel. Suthers v. Mandatory Poster Agency, Inc., ___ P.3d ___, 2009 WL 4981891, at *2 (Colo.App. Dec.24, 2009) (citing Hemmann Mgmt. Services v. Mediacell, Inc., 176 P.3d 856, 858 (Colo.App.2007)). Whether a claim is stated must be determined solely from the complaint; the court must consider only those matters stated within the four corners of the complaint. Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg, 160 P.3d 297, 299 (Colo.App. 2007).

C.R.C.P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. When the district court determines a jurisdictional issue without an evidentiary hearing and accepts all of the plaintiff's assertions of fact as true, the jurisdictional issue may be determined as a matter of law. Asphalt Specialties, Co., Inc. v. City of Commerce City, 218 P.3d 741, 744 (Colo.App. 2009) (citing Hansen v. Long, 166 P.3d 248, 250-51 (Colo.App. 2007)).

B. Plaintiffs State A Claim For Relief Under The Federal Takings Clause (Count IV).

In Count IV, Plaintiffs seek a declaration that Sections 19 and 20 of Senate Bill 10-001 violate the Takings Clause of the United States Constitution.

The Fifth Amendment of the United States Constitution provides: "private property [shall not] be taken for public use, without just compensation." "This provision is made applicable to the states under the Fourteenth Amendment to the United States Constitution." Kirk v. Denver

Pub. Co., 818 P.2d 262, 267 (Colo. 1991) (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 122 (1978)).

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

> Resolving the question of "what constitutes a taking" is a problem of considerable difficulty, and courts have been unable "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."…The determination of whether a "taking" has occurred by reason of a governmental regulation interfering with or impairing the interest of a private property owner involves essentially an "ad hoc, factual" analysis. Kaiser Aetna v. United States, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979).

818 P.2d at 267-68 (some citations omitted).

In resolving a "taking" issue, the Kirk court explained that the United States Supreme Court has considered the totality of circumstances underlying the taking, including such factors as the character of the governmental action, its economic impact, and its interference with reasonable economic expectations of the property owner. Id. at 268 (citations omitted). Also, in resolving a "taking" issue, one must evaluate the "justice and fairness" of the governmental action. Lake Durango Water Co., Inc. v. Public Utilities Comm'n of State of Colorado, 67 P.3d 12, 19 (Colo. 2003) (citing Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998)).

Property interests emanate from state law. Kirk, 818 P.2d at 267. Here, Plaintiffs had a legitimate expectation that they would receive annual pension increases at the levels specified

under the law and by the PERA and DPSRS plans in effect when they became eligible to retire or when they retired. In a seminal law review written over four decades ago,[4] former Yale Professor Charles Reich described pensions:

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

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

Indeed, Colorado's appellate courts have repeatedly found that the promise of a pension is a term of the employment contract between a public employee and his or her government employer that is constitutionally protected once the employee vests in the benefits. Police Pension and Relief Bd. of City and County of Denver v. McPhail, 139 Colo. 330, 342 (1959); Police Pension and Relief Bd. of City and County of Denver v. Bills, 148 Colo. 383 (1961); Spalding v. Colorado Dep't of Revenue, 870 P.2d 521, 523 (Colo.App. 1993). Although these cases arose under the Contract Clause, the analysis of whether a plaintiff has a requisite property right in his pension is the same under the Contract Clause and the Takings Clause. Parella v. Retirement Bd. of Rhode Island Employees' Retirement System, 173 F.3d 46, 58-59 (1st Cir. 1999) ("The facts here require us to consider whether plaintiffs had the requisite property right to support a Takings Clause claim by analyzing their claim under the Contract Clause.").

The Bills case is directly on point here. In Bills, the plaintiffs retired from the Denver Police Department at a time when the city charter provided that pensions would rise at half the rate of increases to the salaries of current police officers. After the plaintiffs retired, the city

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

charter was amended to repeal this so-called "escalator clause." The Colorado Supreme Court held that the amendment could not be applied retroactively to those who had vested in their pension benefits – those retired or eligible to retire:

> In Police Pension and Relief Board of the City and County of Denver v. McPhail, 139 Colo. 330, 338 P.2d 694, this "contract principle" was recognized and approved and it was held that when a member of the Denver police department retires from active service his retirement rights thereupon become a vested contractual obligation, not subject to a unilateral change of any type whatsoever. Accordingly, that portion of the 1956 charter amendment which in so many words purports to deny to those who had *already* retired from the police department the increase in pension which would otherwise result from the increase in pay granted by another provision of this same 1956 charter amendment was held unconstitutional, being in violation of *Article II, section 11 of the Colorado Constitution* in that it impaired the obligation of a contract.

Bills, 148 Colo. at 388-89 (emphasis in original).

Defendants do not address McPhail or Bills or any of the controlling factors identified by the Colorado Supreme Court. Rather, relying principally on two decisions of the Federal Claims Court, Defendants argue that Count IV should be dismissed because the "Takings Clause does not prohibit governmental acts." PERA Memo. 15. To the contrary, it is clear that this Court has the power to declare SB 10-001 to be unconstitutional under the Takings Clause. Notably, in Kirk, the Colorado Supreme Court reviewed the constitutionality of Colorado Revised Statutes Section 13-21-102(4) (1987), which required a party receiving an exemplary damages award to pay one-third of all such damages collected into the state general fund. 818 P.2d at 262. The Court concluded that "section 13-21-102(4) effectuates a forced taking of the judgment creditor's property interest in the judgment and does so in a manner and to a degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just compensation." Id. at 264 (citing U.S. Const. amends. V & XIV; Colo. Const. art. II, § 15).

Further, at the motion to dismiss stage, other courts have clearly found that plaintiffs may utilize the Takings Clause to declare legislative changes to pension laws to be unconstitutional. See National Educ. Assoc. – Rhode Island v. Retirement Bd. of R.I. Employees' Retirement System, 890 F.Supp. 1143, 1166 (D. R.I. 1995) (denying motion to dismiss Takings Clause claim where plaintiffs claimed that legislation was unconstitutional in denying them state pension benefits); San Diego Police Ass'n v. Aguirre, 2005 WL 3180000 at *9 (S.D. Cal. Nov. 5, 2005) (denying motion to dismiss Taking Clause claim as to the City of San Diego and its pension system over reduction of city pension benefits), *aff'd sub nom.* San Diego Officers' Ass'n v. San Diego City Employees', 568 F.3d 725 (9th Cir. 2009) (upholding summary judgment for pension system on Takings Clause claim where imposition of Final Offer did not affect a constitutionally protected interest).

Defendants also argue that alleged takings of money are not actionable under the Takings Clause. See PERA Memo. at 17. First, as explained above, the taking here involves the impairment of contractual rights to a government pension, which unquestionably is constitutionally protected, see Bills, 148 Colo. at 38, and not merely the taking of funds. Moreover, the Court's reasoning in Kirk again defeats the PERA Defendants' argument because the statute found to be unconstitutional there clearly involved the taking of "money." National Educ. Assoc. – Rhode Island and San Diego Police Ass'n are also on point, as the courts there held that plaintiffs alleging the taking of pension benefits stated claims for relief. See also Sommers Oil Co. v. United States, 241 F.3d 1375, 1381 (Fed.Cir. 2001) (holding that takings claim alleging government improperly seized $41,000 in currency was sufficient to withstand a motion to dismiss for failure to state a claim upon which relief could be granted).

C. Plaintiffs State A Claim Under The Due Process Clause Of The Fourteenth Amendment (Count V).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from arbitrarily and unlawfully interfering with an individual's property rights. It provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

In their motions to dismiss, Defendants argue that plaintiffs do not have a substantive due process right in their COLAs. Defendants claim that COLAs are a creation of state law and that the United States Constitution contains no explicit or implicit guarantee "to receive a specific COLA, or to receive pension benefits at all." PERA Memo. 20. However, the court in Mayborg v. City of Bernard, 2006 WL 3803393 (S.D. Ohio Nov. 22, 2006), ruled that a retiree's interest in postretirement benefits is protected by Substantive Due Process. The court reasoned:

> "The Supreme Court has held repeatedly that the property interests in a person's means of livelihood is one of the most significant that an individual can possess." Ramsey v. Board of Education, Whitley Co., Ky, 844 F.2d 1268, 1273 (6th Cir. 1988) citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985)). The Court cannot accept the diminution of the retirement benefit as a finite loss. For thirty years on average, the Retirees provided loyal, dedicated and, at times life-threatening, service to the City. In addition to the heart-felt thanks of the citizenry of St. Bernard, these Retirees gave that dedicated service with the reasonable expectation that their retirement from City service would bring a pension and medical benefits. **By its actions, the City is effectively taking some part of the years of service of each Retiree. This deprivation causes more than the loss of premium reimbursement and C-9 Trust Fund reimbursement. The Retirees also suffer the social stigma of having the City diminish the value of their public service, reduce the amount of the pension available, and the loss of economic autonomy their public careers were expected to provide.**

Id. at *12 (emphasis added). Indeed, courts have found that the substantive due process doctrine protects aspects of public employment that are considerably equally or less compelling than the pension rights at issue here. See, e.g., Harrah Independent School Dist. v. Martin, 440 U.S. 194, 198-99 (1979) (finding school district violated tenured teacher's right to substantive due process

by increasing penalty for non-compliance with continuing-education requirement); Harrington v. Harris, 118 F.3d 359, 369 (5th Cir. 1997) (determining that deans at a state-supported law school had their right to substantive due process denied because merit pay evaluations were arbitrary and capricious); Moore v. Warwich Public Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986) (reversing district court's dismissal and finding that former superintendent stated an actionable substantive due process claim relating to his discharge prior to expiration of his one-year contract); Brenna v. Southern Col. State College, 589 F.2d 475, 476 (10th Cir.1978) ("Professor Brenna was tenured and thus had a property interest deserving of the procedural and substantive protections of the Fourteenth Amendment."); St. Louis Teachers Union v. Bd. of Educ. of City of St. Louis, 652 F.Supp. 425, 435-36 (E.D. Mo. 1987) (teachers union stated claim for deprivation of substantive due process over district's use of new teacher evaluation system based on student test scores).

Defendants also argue that even if Plaintiffs have a substantive due process right to their pension benefits, there is a rational basis to SB 10-001. While Plaintiffs agree that the government has an interest in a healthy pension system, it was not rational for the General Assembly to cut the vested pension benefits of those who have retired and who are eligible to retire, given not only the Colorado Supreme Court's pronouncement in Bills but also that there were other legitimate legislative options available. For example, instead of cutting vested benefits, the Legislature could have applied the new COLA level to those not yet vested in their benefits and replaced defined benefit plans with defined contribution and hybrid plans for new hires, just as Michigan, New Jersey and Utah have recently done. See "Pensions and Retirement Plan Enactments in 2010 State Legislatures," National Conference of State Legislatures (http://www.ncsl.org/?TabId=20255) (last visited May 28, 2010). Whether it was rational to cut

the Plaintiffs' and Class Members' vested rights before other measures were undertaken, is a fact-based determination that should not be decided on a motion to dismiss. See Moore, 794 F.2d at 329; St. Louis Teachers Union, 652 F.Supp. at 435-36.

D. Plaintiffs May Bring A Declaratory Judgment Action To Determine Whether SB 10-001 Violates the Federal Constitution And Under 42 U.S.C. § 1983.

In Sections II and IV of their brief,[5] the State Defendants argue that Counts IV and V should be dismissed because plaintiffs may not bring a direct action alleging violations of the United States Constitution, or alternatively, that these counts should be merged with Counts VII and VIII, which are brought pursuant to 42 U.S.C. § 1983.

Counts IV and V are not direct actions under the United States Constitution but are rather claims under the Declaratory Judgment Act. None of the cases the State Defendants cite involve a plaintiff who brought a declaratory judgment action to determine whether a statute violated the federal Constitution *and* a claim under 42 U.S.C. § 1983. To the contrary, Colorado courts permit such claims to be brought together. See Weston v. Casserta, 37 P.3d 469, 473 (Colo.App. 2001) (issuing a declaratory judgment *and* finding Section 1983 violations where notices terminating welfare benefits did not comply with federal due process protections).

E. Plaintiffs State A Claim Under 42 U.S.C. § 1983 Based On The Individual Defendants' Violation Of The Contracts Clause Of The United States Constitution.

In Count VII, Plaintiffs proceed against the Individual Defendants in their official capacities under 42 U.S.C. § 1983 based on their violation of the Contracts Clause of the United States Constitution.[6] 42 U.S.C. § 1983 provides:

[5] Although referred to as Section IV, it is actually the third section of the Argument part of the brief.

[6] Contrary to State Defendants' assertion on page 4 of their brief, Plaintiffs have not alleged a claim under Section 1983 against the State of Colorado.

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Defendants cite a decision of the Colorado Court of Appeals, Kilbourn v. Fire and Police Pension Ass'n, 971 P.2d 284 (Colo. App. 1998), for the proposition that under Carter v. Greenhow, 114 U.S. 317 (1885), a violation of the Contracts Clause does not give rise to a § 1983 cause of action. PERA Memo. 25. The court in Kilbourn did not provide any analysis supportive of its holding, and many courts have found that the 125-year-old decision in Carter *does not* prohibit a claim under Section 1983 based on a Contract Clause violation. For example, in Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir. 2003), the Ninth Circuit found that the United State Supreme Court has explicitly read Carter narrowly and the Ninth Circuit rejected the interpretation advanced by the defendant there and Defendants here. 336 F.3d at 887 (citing Dennis v. Higgins, 498 U.S. 439, 451 n.9 (1991)) (Carter can only be read to have "held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the right secured to him by that clause of the Constitution [the contract clause], to which he had chosen not to resort.").

The Ninth Circuit then explained that the rights guaranteed by Section 1983 are "liberally and beneficently construed," id. at 887 (quoting Dennis v. Higgins, 498 U.S. 439, 443 (1991)), and rejected the argument that Section 1983 provides no relief for a party deprived of its rights under the Contracts Clause. The Ninth Circuit further explained that the right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution, and that a deprivation of that right may therefore give rise to a cause of action under Section 1983. Id.

F. The Eleventh Amendment Is Not Applicable To the Claims Pled.

State Defendants make two arguments regarding the applicability of the Eleventh Amendment in this case, neither of which is supported by case law.

First, State Defendants seek to dismiss Counts III, IV and V (the declaratory judgment actions based on alleged violations of the federal constitution) brought against the State of Colorado.[7] State Defendants claim that "Eleventh Amendment immunity is not limited to protecting States from lawsuits in federal court, but also protects states from suits in their own courts for violations of federal law."[8] State Memo. 4-5. This is not a correct statement of the law. The United States Supreme Court has stated "on many occasions" that the Eleventh Amendment does not apply to actions brought in state courts.[9] Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 204-05 (1991) (citations omitted); see Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States."). Further, the related doctrine of sovereign immunity does not bar declaratory judgment actions against the state or state officials premised on the violation of the federal Constitution . See Ager v. Public Employees' Retirement Ass'n Bd., 923 P.2d 133, 137 (Colo.App. 1995) (issuing declaratory judgment where state defendants violated procedural due process protections under federal Constitution).

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[7] Defendants also state that they seek to dismiss Counts VI, VII and VIII, the Section 1983 claims, against the State of Colorado but the Complaint clearly states that the civil rights claims are being brought only against the Individual Defendants only. As such, State Defendants arguments against these counts are moot.

[8] The case cited by State Defendants on this point -- Middleton v. Hartman, 45 P.3d 721, 727 (Colo. 2002) – discussed the doctrine of sovereign immunity, not the Eleventh Amendment.

[9] The reason why Plaintiffs here have not and cannot bring the civil rights claims against the State of Colorado is because the state is not considered a "person" under Section 1983. Will v. Michigan Dept. of State Police, 491 U.S. 56 (1989).

Second, State Defendants argue that the "Eleventh Amendment to the U.S. Constitution bars Plaintiffs' § 1983 against Governor Ritter." PERA Memo. 5. Again, the Eleventh Amendment has no applicability in state court. To the extent that State Defendants mean to argue that the civil rights claim is barred by the doctrine of sovereign immunity, as clarified in footnote 1, *supra*, Plaintiffs are seeking only prospective injunctive or declaratory relief to remedy an ongoing violation of the United States Constitution. This type of relief is permitted under of the Ex Parte Young exception to the doctrine of sovereign immunity, which the Colorado Supreme Court has recognized on numerous occasions. See, e.g., Middleton, 42 P.3d at 727 (citing Ex Parte Young, 209 U.S. 123 (1908)). Moreover, state governors are frequently proper defendants in cases brought under Section 1983 that seek injunctive relief. See, e.g., Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979) (prison overcrowding case brought against Missouri Governor and state officials); Arkansas Day Care Ass'n, Inc. v. Clinton, 577 F.Supp. 388 (D. Ark. 1983) (claim against Arkansas Governor predicated on Establishment Clause violation).

V. CONCLUSION

For the reasons stated above, the Court may grant Defendants' motions to dismiss as to Count II and should deny the motions to dismiss for the remainder of the Counts.

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Respectfully submitted,

By: /s/Richard Rosenblatt
Richard Rosenblatt, #15813
Richard Rosenblatt & Associates, LLC
Address: 80805 East Prentice Avenue
Greenwood Village, CO 80111
Phone Number: (303) 721-7399 x 11
FAX Number: (720) 528-1220
E-mail: rrosenblatt@cwa-union.org

William T. Payne
Stephen M. Pincus
John Stember
Stember Feinstein Doyle Payne &
Cordes, LLC
429 Forbes Avenue
Allegheny Building, 17th Floor
Pittsburgh, PA 15219
Phone Number: (412) 281-8400
FAX Number: (412) 281-1007
wpayne@stemberfeinstein.com
spincus@stemberfeinstein.com
jstember@stemberfeinstein.com

On behalf of Plaintiffs,
Gary R. Justus, Kathleen Hopkins, Eugene Halaas, Lisa Silva-Derou and others similarly situated

CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of May, 2010, I have electronically filed **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO STAY BRIEFING ON CLASS CERTIFICATION** via LexisNexis File & Serve that will electronically notify and serve all registered, interested parties to the case including the following:

John W. Suthers, Attorney General
Maurice G. Knaizer, First Asst. Attorney General
William V. Allen, Senior Asst. Attorney General
Megan Paris Rundlet, Asst. Attorney General*

ATTORNEY GENERAL – STATE OF COLORADO
1525 Sherman Street, 7th Floor
Denver, CO 80203
P: 303-866-5235 F: 303-866-5671
maurie.knaizer@state.co.us
will.allen@state.co.us
megan.rundlet@state.co.us

*Counsel of Record
ATTORNEYS FOR DEFENDANTS STATE OF COLORADO AND GOVERNOR BILL RITTER

Daniel M. Reilly
Eric Fisher
Jason M. Lunch
Lindsay A. Unruh
Caleb Durling

REILLY POZNER LLP
511 Sixteenth Street, Suite 700
Denver, CO 80202
P: 303-896-6100 F: 303-893-6110
dreilly@rplaw.com
efisher@rplaw.com
jlynch@rplaw.com
cdurling@rplaw.com

Mark G. Grueskin
Edward T. Ramey
Kara Veitch

ISAACSON ROSENBAUM P.C.
1001 17th Street
Suite 1800
Denver, CO 80202
mgrueskin@ir-law.com
eramey@ir-law.com
kveitch@ir-law.com

ATTORNEYS FOR DEFENDANTS PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO, MARK J. ANDERSON, *and* SARA R. ALT, *in their official capacities only*

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s/Richard Rosenblatt
RICHARD ROSENBLATT & ACCOS. LLC