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Denver, Colorado 80202</td><td rowspan="2">▲ COURT USE ONLY ▲

Case No. 2010cv1589

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Judge Robert S. Hyatt</td></tr>
<tr><td>Plaintiffs:
GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS, JR. and ROBERT LAIRD, JR., on behalf of Themselves and those similarly situated
v.
Defendants:
STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR JOHN HICKENLOOPER, CAROLE WRIGHT and MARYANN MOTZA, in their official capacities only.</td></tr>
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<tr><td colspan="2">PERA DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT</td></tr>
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Defendants Colorado Public Employees' Retirement Association ("PERA"), Carole Wright and Maryann Motza (collectively "PERA Defendants") oppose Plaintiffs' motion for partial summary judgment on Count I alleging a violation of the Colorado Contract Clause.

INTRODUCTION

Colorado PERA and the Denver Public School Retirement System have made cost of living adjustment ("COLA") payments for more than 40 years. During that time, the General Assembly changed the COLA formula for PERA retirees ten times and DPSRS readjusted the COLA for its retirees twelve times. Every time the COLA formula was changed for existing retirees, it was applied to *all* retirees retired at the time of the change. The General Assembly's latest modification of the retiree COLA in Senate Bill 10-001 does not change the fundamental mechanism for pension benefits—it is and has always been a base benefit plus a separately calculated cost of living adjustment that has repeatedly changed during retirement.

Plaintiffs' Colorado and federal Contract Clause claims thus fail because Plaintiffs have no contractual right to the COLA formulas in place at their respective retirements for life without change. Plaintiffs' Contract Clause claims also fail because the General Assembly's latest in a long history of modifications to the COLA formula was reasonable and necessary, and served the legitimate public purpose of preserving the very existence of the PERA pension fund for this and future generations.

From late 2007 into 2009, the United States and countries around the world experienced the worst financial collapse since the Great Depression. The U.S. economy was officially in a recession for 18 months from December 2007 until June 2009, "the longest of any recession since World War II."[1] The Dow Jones Industrial Average sank from 14,279 in October 2007 to 8,776 on December 31, 2008 (a 39% decrease) and bottomed out at 6,440 in March 2009 (a 55% decrease).[2] The severe market downturn in 2008 caused substantial losses for all investors around the world, including PERA. While faring better than many of its peers and the market indices, PERA experienced a 26% loss, amounting to $11.8 billion, with assets falling from $41.3 billion to $29.5 billion.[3] PERA pays more than *$3 billion* in annual benefits to retirees and has $57 billion in accrued liabilities. The 2008 economic crisis left PERA with an unfunded liability of $27.5 billion as of December 31, 2008. As a result of the decrease in assets, PERA's funding ratio at year-end 2008 was 53% based on the market value of its assets, a 33% drop in one year.[4] In other words, PERA's liabilities were almost twice as much as its assets. For the first time in its 80-year history, PERA's long-term viability was imperiled.

In May 2009, the Colorado General Assembly mandated that the PERA Board submit comprehensive recommendations to the General Assembly by that November to ensure that the PERA trust fund become and remain fully funded.[5] In accordance with this legislative mandate, the PERA Board extensively examined potential solutions to remedy the critical underfunding.

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[1] Press Release, Business Cycle Dating Committee, National Bureau of Economic Research, Sept. 20, 2010, http://www.nber.org/cycles/sept2010.html.

[2] *See Dow Jones Industrial Average Stock*, http://finance.yahoo.com/q/hp?s=^DJI+Historical+Prices.

[3] PERA Comprehensive Annual Financial Report for Fiscal Year 2008 ("2008 PERA CAFR") at 31, *available at* http://www.copera.org/pera/formspubs/reports.htm; PERA Comprehensive Annual Financial Report for Fiscal Year 2007 ("2007 PERA CAFR") at 71, *available at* http://www.copera.org/pera/formspubs/reports.htm.

[4] 2008 PERA CAFR at 31.

[5] App. B-34 (C.R.S. § 24-51-211(2) (2009)); S.B. 09-282. In this brief, references to "App." refer to the Appendix binder separately submitted to the Court. References to "Ex." refer to exhibits attached to this brief.

The PERA Board consulted with retirees, current employees, employers, inactive members, retiree organizations, union groups and legislators before proposing a solution to the General Assembly. Comprehensive analysis by several independent actuaries concluded that without changes to the PERA pension system, it would run out of money within 30 years. In addition, PERA's assets were projected to decrease to less than 40% of its liabilities in as little as seven years, a critical threshold because PERA would be forced to sell long-term investments to meet short-term obligations thus accelerating the decline to insolvency. PERA, for the first time in its history, was receiving contributions from current employees knowing that those individuals would never receive a pension benefit because the pension fund would not exist when they retired. PERA had to undertake the difficult process of identifying what changes were necessary to ensure that the pension system would be sustainable in perpetuity.

PERA's actuaries modeled many different benefit and contribution changes. In so doing, one fact became clear: without again changing the COLA for existing retirees, there was nothing that could be done to make the PERA funds sustainable. PERA would run out of money before it would see sufficient savings from other contribution and benefit changes.

With substantial input from retirees, employees, employers, retiree organizations, union groups and legislators, PERA developed its recommended legislative package, termed "2/2/2 Plus." The recommended package had three major components: (1) a reduction to the then-existing COLA to 2% compounded for all current and future retirees (it had been 3.5% compounded); (2) an increase in employer contributions of 2% of salary; and (3) an increase in employee contributions (through foregone salary increases) of 2% of salary. The contribution increases would result in current employees and employers paying more than 28% of salaries into the pension fund. In addition to these major components, the package included additional changes to the benefit structure for all retirees, active members, inactive members, and future hires which are not directly relevant here.[6]

Numerous legislative hearings took place regarding potential solutions to the financial crisis facing PERA, including the 2/2/2 Plus proposal. Legislators vigorously debated the PERA proposal and demanded details and thorough explanations from PERA personnel. The General Assembly also took testimony from numerous sources both for and against the bill, including union and coalition groups representing retirees and active members, individual retirees presenting analysis and alternatives, and independent pension experts providing nationwide perspective on pension benefit changes. Based on extensive testimony and analysis, and to satisfy retiree coalitions and unions, the legislature made several amendments to the bill to ensure that the least drastic alternatives were chosen.

With the unanimous support of union groups and retiree organizations representing more than 200,000 PERA retirees and members, the General Assembly 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."[7] Governor Ritter signed Senate Bill 10-001 on February 23, 2010.

Senate Bill 10-001 did not take any money from the PERA pension system. Rather, it increased contributions to the PERA pension system and reduced present COLA payments in order to create a larger pool of investable funds and thus provide for sustainable pension benefits

[6] The entire 2/2/2 Plus proposal is located at http://www.copera.org/pera/legislation/sb10001.htm.

[7] App. B-35 (S.B. 10-001 pmbl).

in the future. This is not a case of the state abrogating contracts to save money and balance the budget. The PERA retirement fund is maintained separately from the state budget and must be self-sustainable.

Senate Bill 10-001 is constitutional. In 2002, the Colorado Supreme Court followed decades of Colorado and federal authority and definitively set forth the test to determine whether a challenged statute is constitutional under *both* the Colorado and United States Contract Clauses. *See In re Estate of DeWitt*, 54 P.3d 849, 853 (Colo. 2002). *DeWitt* ruled that even if a contract right is impaired, "a court should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose when considered against the severity of the contractual impairment." *Id.* at 858. Senate Bill 10-001 complies with the Colorado and United States Contract Clauses for three distinct reasons:

(1) Plaintiffs have no contractual right to an unchangeable cost of living *adjustment* for the rest of their lives;

(2) Senate Bill 10-001's changes to the COLA formula were foreseeable based on the numerous prior changes to the formula and are consistent with the parties' reasonable expectations; and

(3) even if Senate Bill 10-001 substantially impaired a contract right, it is constitutional because the General Assembly's modification of the COLA formula is reasonable and necessary to address the legitimate public purpose of ensuring the long term sustainability of the PERA pension system.

Inexplicably, Plaintiffs fail to cite *DeWitt* or mention the modern Contract Clause test in their motion, instead relying almost exclusively on the 1959 and 1961 *McPhail* and *Bills* decisions. *See Police Pension & Relief Board v. McPhail*, 139 Colo. 330, 338 P.2d 694 (1959); *Police Pension & Relief Board v. Bills*, 148 Colo. 383, 366 P.2d 581 (1961). The Colorado Supreme Court in *DeWitt* definitely set forth the test for challenges to *both* the Colorado and federal Contract Clauses and Plaintiffs thus must prove all elements of the modern test. Contrary to Plaintiffs' view, Colorado courts have never applied different tests to alleged violations of the Colorado and federal Contract Clause. There likewise is no express or implied exclusion for pension benefits under *DeWitt* and numerous state courts, and all federal courts, apply the modern test to Contract Clause challenges involving pension benefits.

Moreover, under *all* Colorado Contract Clause authority, Plaintiffs' Contract Clause claims fail because they cannot establish a contractual right to a particular COLA formula for life without change. Plaintiffs' assertion that every PERA retiree is contractually entitled to the COLA formula in place at retirement fails because: (1) the plain language of the PERA and DPSRS COLA provisions have never included durational language stating, or suggesting, that a particular COLA formula is "for life without change"; and (2) for 40 years, the COLA formulas applied to retirees have repeatedly changed and have never been frozen at the date of retirement. Contrary to decades of history and without any legislative language to support their position, plaintiffs Justus, Hopkins, Halaas and Laird now claim that they are contractually and constitutionally entitled in perpetuity to the cost of living adjustment in effect at the time of their respective retirements. Neither the facts, the law, nor the vast majority of other retirees support their position.

Plaintiffs misread *McPhail* as standing for the proposition that the General Assembly is powerless to change any retiree pension benefit even if a change is necessary to preserve the existence of a pension plan covering 470,000 people. Pls' Mot. at 13. On the contrary, *McPhail* states that "changes may be made in the pension system looking to strengthening and bettering it" and held that the retiree pensions at issue "were subject to increase *or decrease* . . . ."

McPhail, 139 Colo. at 343, 338 P.2d at 701 (1959).[8] Further, neither *McPhail* nor *Bills* involved "actuarial necessity" and do not address what pension benefit changes are permissible when a public pension fund faces an unprecedented financial crisis that imperils its survival. Finally, even if the Court were to find an irreconcilable conflict between *DeWitt* and *McPhail*, as the more recent case, *DeWitt* would govern over *McPhail*.

Based on Plaintiffs' ignorance of *DeWitt* and misreading of *McPhail*, they do not address the "substantial impairment" or "reasonable and necessary for a legitimate public purpose" elements required under the modern Contract Clause test. Thus, if the court determines that the *DeWitt* test applies here, or reads *McPhail* and other Colorado pension benefit cases to require consideration of actuarial necessity, Plaintiffs' summary judgment motion necessarily fails.

MATERIAL FACTS

A. PERA and the State Pension System

PERA was created in 1931 and provides retirement and other benefits to more than 470,000 state, school, and local government employees.[9] PERA directly covers about 10% of Coloradans, and indirectly covers a substantially greater percentage of Colorado families with at least one member being a PERA member or beneficiary. As a result, a threat to the long-term financial health of the PERA pension system has a tremendous impact on the state.

PERA is funded by contributions from its members and from the more than 400 public employers that participate in PERA.[10] PERA members and their public employers are divided

[8] Emphasis is added throughout this brief unless otherwise indicated.

[9] PERA was created and is governed by Article 51 of the Colorado Revised Statutes. C.R.S. § 24-51-101 to § 24-51-1748 (2011).

[10] 2008 PERA CAFR at 42, 49.

into five divisions—State, Local, Judicial, School, and the Denver Public Schools—and member and employer contributions are deposited into a separate trust fund for each division that PERA manages for the benefit of its members.[11]

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."[12] This base benefit calculation for current PERA retirees was not changed by Senate Bill 10-001. In addition to the base benefit, for the last 40 years, PERA has paid a varying cost of living adjustment to retirees.

B. Since the First COLA Was Paid in 1969, the General Assembly Has Continuously Changed the COLA Paid to PERA Retirees

For 40 years, the General Assembly has repeatedly modified the COLA formula for existing retirees. Despite PERA paying pension benefits since 1936, the first COLA payment did not occur until 33 years later, in 1969.[13] At that time, the legislature passed a one-time increase of the base benefit of retirees based on how long they had been retired, with those retired on or before 1961 receiving a 14% increase and those who had retired in 1968 receiving 1.5%.[14]

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[11] C.R.S. § 24-51-208 (2011). The Denver Public Schools pension system was merged into the PERA system as a separate division, effective January 1, 2010. C.R.S. §§ 24-51-1701, -1703(1) (2011).

[12] C.R.S. §§ 24-51-602, -603 (2011).

[13] App. B-1 (C.R.S. § 111-1-37 (1970)).

[14] *Id.*

From 1970 to 1973, PERA retirees received a COLA of the *lesser* of (a) 1.5%, noncompounded, or (b) the increase in the consumer price index in the prior year.[15] During that time, PERA retirees from the judicial division did not receive a COLA. The calculation of the COLA beginning in 1970 also involved a "banking" component that offered protection against high inflation.[16]

From 1974 to 1979, retirees received a base COLA of the *lesser* of (a) 3% noncompounded, or (b) the increase in the consumer price index in the prior year.[17] PERA judicial retirees began to receive a COLA in 1974, but their COLA was the *lesser* of (a) 1.5% noncompounded, or (b) the increase in the consumer price index in the prior year.[18]

From 1975 to 1978, the General Assembly enacted "catch-up cost of living supplements" on top of the base COLA formula.[19] This catch-up COLA supplement was paid on a yearly basis from the General Fund in addition to the base COLA.[20] The catch-up COLA represented a considerable portion of the total COLA received by retirees. For example, in 1975, pre-1952

[15] Apps. B-1 & B-2 (C.R.S. §§ 111-1-36 (state division); 111-2-27 (local government and school divisions) (1970-73)).

[16] For more detail on "banking" see PERA's Reply in Support of Mot. to Dismiss at 3-4 & n.2.

[17] Apps. B-2 (C.R.S. §§ 111-1-36 (state division), -2-27 (local government and school divisions) (1973)), App. B-3 & B-7 (C.R.S. §§ 24-51-135 (state division), -224 (local government and school divisions) (1975-1979)).

[18] App. B-2 (C.R.S. § 111-6-14 (1973)), Apps. B-3 & B-7 (C.R.S. § 24-51-614 (1975-1979)).

[19] App. B-3 (C.R.S. § 24-51-136 (state division), -224 (local government and school divisions) (1975)).

[20] Apps. B-3 & B-4 (C.R.S. § 24-51-136 (state division), -224 (local government, school, and judicial divisions) (1975)); Apps. B-4 to B-6 (C.R.S. § 24-51-136 (state division), -224 (local government, school, and judicial divisions) (1976-78)).

retirees received a 21.5% increase; 1960 retirees received 14.2%; and 1970 retirees received 4.1%.[21]

From 1980 to 1993, the base COLA for retirees continued to be the *lesser* of (a) 3% for years before 1992 and 4% for 1993, noncompounded, or (b) the increase in the consumer price index in the prior year.[22] During this time, judicial retirees received the lesser of 1.5% or the CPI increase until 1988, when their rate was also raised to 3% and then 4% noncompounded for 1993.[23] In 1992, changes were also made to the calculation of the HAS which resulted in an increase in base benefits for retirees who had accrued more than twenty years of service credit.[24]

In 1980, the General Assembly substantially changed the "catch-up COLA" supplement to the base COLA. The legislature enacted the Cost of Living Stabilization Fund to replace the previous catch-up COLA provision.[25] From 1980 to 1992, every two years, the legislature approved a fully funded, catch-up COLA supplement from the Cost of Living Stabilization Fund.[26] For example, in 1992, the catch-up COLA for pre-1952 retirees was 348% of their base benefit, for 1970 retirees it was 180%, for 1980 retirees 28%, and for 1990 retirees 1%. Throughout this period from 1980 to 1992, the catch-up COLA payments funded from the Cost

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[21] Apps. B-3 & B-4 (C.R.S. § 24-51-136 (state division), -224 (local government, school, and judicial divisions) (1975)).

[22] Apps. B-8 to B-11 (C.R.S. §§ 24-51-135 (state division), -225 (local government and school divisions) (1980-1986)); Apps.B-12 to B-18 (C.R.S. §§ 24-51-1001, -1002 (1987-1993)).

[23] Apps. B-8 to B-11 (C.R.S. § 24-51-614 (1980-1986)); Apps. B-12 to B-18 (C.R.S. § 24-51-1002(2) (1987-1993)).

[24] App. B-17 (C.R.S. § 24-51-603 (1992)).

[25] Apps. B-8 & B-9 (C.R.S. § 24-51-136 (1980)).

[26] Apps. B-8 to B-12 C.R.S. § 24-51-136 (1980-1986), Apps. B-13 to B-17 (C.R.S. §§ 24-51-1005 & -1006 (1988-1992)).

of Living Stabilization Fund were highly variable and had a substantial impact on retirees' overall benefit payment.

In 1994, to reduce the cost of the COLA and increase the actuarial soundness of the PERA pension plan, the General Assembly, for the first time, capped the total COLA payment to retirees. The General Assembly eliminated the Cost of Living Stabilization Fund and ended the biannual increase that provided a catch up to actual inflation (with no cap) that had been paid in full from PERA trust funds since 1980.[27] In its place, the General Assembly instituted a single COLA formula that paid retirees the *lesser* of (a) 3.5% compounded, or (b) the increase in the consumer price index in the prior year.[28] In addition, the General Assembly reset the "banking" provisions which had been in effect since 1970, thus eliminating previously banked amounts.[29] In 1997, the General Assembly enhanced the HAS calculation for those retirees with over twenty years of service credit.[30]

In 2000, the General Assembly again changed the COLA provision for retirees, setting the COLA formula at 3.5% compounded annually thus eliminating, for the first time, the tying of the COLA to actual inflation.[31] The General Assembly also terminated the banking provision that had been in place since 1970, thus eliminating up to 6.93% in banked inflation protection that retirees had accumulated since 1994.[32]

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[27] App. B-18 (C.R.S. 24-51-1005 & -1006 (1994) (repealed effective March 1, 1994)).

[28] App. B-19 (C.R.S. § 24-51-1002 (1994)).

[29] *Id.* (resetting base year from 1969 to 1993 for calculation of banking provision).

[30] App. B-22 (C.R.S. § 24-51-603 (1997)).

[31] Apps. B-25 to B-33 (C.R.S. § 24-51-1002 (2000-2009)).

[32] *See discussion* PERA's Mot. to Dismiss First Am. Comp. at 7.

The result of the 2000 change to the COLA formula was that, for the first time since a COLA was paid in 1969, the COLA paid to retirees 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%

Due to low inflation, the compounded 3.5% COLA resulted in retirees' pension benefits growing far faster than inflation, which averaged only 2.2%.[33] In 2008 and 2009, despite *deflation* of 1.2% due to the recession, retirees' pension benefits rose by over 7%.

In Senate Bill 10-001, the General Assembly once again changed the COLA calculations for all members in the system including those already retired. For 2010, the COLA for all retirees who joined PERA by December 31, 2006, was the lesser of 2% or the 2009 annual increase in the consumer price index.[34] Because the change in the CPI-W was negative 0.7% in 2009, those PERA retirees received no COLA in 2010. Beginning in 2011, these retirees' COLA will be 2% unless PERA's annual investment returns are negative for the prior year, then for the next three years, the COLA will be the lesser of 2% or the increase in the consumer price

[33] 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/. The annual average CPI-W from 2000 to 2009 was 2.2%.

[34] App. B-35 (S.B. 10-001 § 20); C.R.S. § 24-51-1002 (2011).

index.[35] When PERA returns to financial soundness and its funding ratio reaches 103%, the COLA will increase by 0.25% per year with no cap.[36]

For ease of reference, the historical COLA changes applied to those already retired are summarized as follows:

- From 1970 to 1973, the base COLA was the *lesser* of 1.5% *noncompounded* or the CPI increase.

- From 1974 to 1992, the base COLA was the lesser of 3% noncompounded or the CPI increase.

- From 1975 to 1978, supplemental COLA "catch up" payments were appropriated from the General Fund and paid in addition to the base COLA.

- From 1980 to 1992, every two years, a supplemental to the base COLA was paid from PERA pension funds (the Cost of Living Stabilization Fund) to match past inflation.

- For 1993, the base COLA was changed for one year to the lesser of 4% noncompounded or the CPI increase.

- From 1994 to 2000, the base COLA was capped for the first time at the lesser of 3.5% compounded or the CPI increase. The Cost of Living Stabilization Fund and the biannual COLA increases it provided to catch up to actual inflation were eliminated and any prior "bank" against high inflation was reset to zero.

- From 2001 to 2009, the COLA was modified to eliminate the variable component tied to inflation and was capped at 3.5% compounded annually. The banking provision, and all accumulated "bank" against high inflation since 1994, was eliminated.

- For 2010, the COLA returned to a variable rate tied to inflation at the lesser of 2% compounded or the CPI increase which resulted in no COLA for 2010.

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[35] *Id.*

[36] App. B-35 (S.B. 10-001 § 23); C.R.S. § 24-51-1009.5 (2011). 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%. *Id.*

- For 2011 and forward, COLA is 2% compounded unless PERA has a negative investment return in the prior year, then it is the lesser of 2% compounded or the CPI increase for the next three years. Automatic annual 0.25% COLA increases without limit when funding ratio reaches 103% and remains above 90% funded.

In addition to claiming that the General Assembly is prohibited from modifying the COLA formula for post-1993 PERA retirees, Plaintiffs also assert that the date that the COLA becomes effective must remain fixed as March 1. However, the General Assembly also has repeatedly changed the effective date of the COLA calculation. From 1970 until 1986, cost of living adjustments became effective on May 1.[37] 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.[38] From 1994 until 2009, the COLA became effective on March 1.[39] After passage of Senate Bill 10-001, the effective date for the COLA will be July 1 for all retirees.[40]

C. The Denver Public Schools Retirement System Repeatedly Modified the Cost of Living Adjustment Formula for Its Retirees

Not a single DPS retiree has received the contractual benefit on which Plaintiff Justus bases his Contract Clause claims—a frozen cost of living adjustment based on the date of retirement (or full vesting). Rather, every DPS retiree has received a COLA payment based on the most recent DPS COLA formula regardless of when he or she retired or became fully vested.

Until January 1, 2010, DPSRS was operated as a separate, stand alone retirement system. On January 2, 2010, DPSRS merged into PERA and began to operate as the fifth PERA division.

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[37] *See, e.g.*, App. B-11 (C.R.S. 24-51-135) (1985).

[38] *See, e.g.*, App. B-19 (C.R.S. § 24-51-1001 (1994)).

[39] *See, e.g.*, App. B-30 (C.R.S. § 24-51-1001 (2006)). Any PERA member who joined after December 31, 2006, and became eligible for benefits has had the COLA applied on July 1. *Id.* (C.R.S. § 24-51-1009 (2006)).

[40] App. B-35 (C.R.S. § 24-51-1002(2) (2010)).

At that time, the COLA for DPS retirees was statutorily set for the first time to be 3.25% compounded effective on March 1, 2010. On November 2, 2009, the DPSRS Board of Trustees passed resolution #17 endorsing the comprehensive proposal recommended by the PERA Board of Trustees, including the modification of the COLA formula for former DPS retirees.[41]

Like the PERA COLA provisions, the DPS COLA provisions (called an Annual Retirement Allowance Adjustment ("ARAA")) changed repeatedly over the years. The ARAA began in 1965. From 1965 until 1973, there was a 1% *noncompounded* ARAA. From 1974 until 1980, the ARAA was 2% noncompounded.[42] There were two supplemental increases during this period. In 1976, all retirees received an additional 1% for every year they had been retired.[43] In 1980, the DPS Retirement Board authorized an additional increase of 1% for each year of retirement to the base benefit, with the base benefit including the 1976 supplement.[44]

That ARAA was changed to 3% noncompounded from 1981 to 1984.[45] In 1983, the DPS Retirement Board approved a third 1% per retired year increase to retirees' base benefit, with the base benefit including all prior base building supplements.[46] In 1985, the ARAA again was changed, this time to 3.25% *noncompounded*. From 1985 to 2000, DPS retirees received a 3.25%, noncompounded, cost of living adjustment with the base benefit including all prior base

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[41] Ex. 1 (DPS Resolution #17).

[42] Apps. C-1 to C-3 (DPSRS Plan § 70.60 (1974-1980)).

[43] Apps. C-2 to C-25 (DPSRS Plan § 70.55 (1976-2009)).

[44] Apps. C-4 to C-25 (DPSRS Plan § 70.57 (1980-2009)).

[45] Apps. C-4 to C-5 (DPSRS Plan § 70.60 (1981-1984)).

[46] Apps. C-5 to C-25 (DPSRS Plan § 70.59 (1983-2009)).

building supplements.[47] In 1988, the DPS Retirement Board approved an additional increase of 0.25% per retired year to the base benefit (including all prior base building supplements).[48]

In 1995, all DPSRS retirees had their base benefit reset to the greater of (a) 65% of the increase in the CPI-U since the retirees' date of retirement or (b) the accumulated increase of all previous ARAA and supplemental increases.[49] In 1998, all DPSRS retirees had their base benefit reset to the greater of (a) 80% of the increase in the CPI-U since the retirees' date of retirement or (b) the accumulated increase of all previous ARAA and supplemental increases.[50]

In 2001, the DPS Retirement Board again changed the ARAA paid to all retirees, this time to 3.25% compounded. In addition, in 2001, retirees received a one-time supplemental payment of $25 per year of service.[51] From 2001 to 2009, DPS retirees received a 3.25% compounded ARAA, with the base benefit including all previous supplements.[52]

In summary, the historical ARAA formulas that have been applied to DPS retirees already retired are as follows:

- 1% noncompounded (1965-1973)
- 2% noncompounded (1974-1980)
- 3% noncompounded (1981-1984)
- 3.25% noncompounded (1985-2000)
- 3.25% compounded (2001-2009)

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[47] Apps. C-5 to C-25 (DPSRS Plan § 70.60 (1985); § 70.65 (1985); § 70.70 (1986-2000)).

[48] Apps. C-7 to C-25 (DPSRS Plan § 70.60 (1988-2009)).

[49] Apps. C-11 to C-13 (DPSRS Plan § 70.80 (1995-1997)).

[50] Apps. C-16 to C-25 (DPSRS Plan § 70.80 (2000-2009)).

[51] Apps. C-17 to C-25 (DPSRS Plan § 70.85 (2001-2009)).

[52] Apps. C-17 to C-25 (DPSRS Plan § 70.88 (2001-2009)).

- Adjustments to retiree base benefits by set percentage or dollar amount (1976, 1980, 1983, 1988, 2001)
- Base benefit reset in comparison with inflation increase (1995, 1998).

D. Beginning in 2003, the General Assembly Increased Employer and Employee Contributions and Reduced Benefits

Benefiting from the economy's sustained growth in the 1990s and the corresponding increase in asset values, PERA's funding increased ratio to above 100% at the end of 1999.[53] In response, the General Assembly made changes that inured to the benefit of Plaintiffs and many other current retirees, but negatively impacted PERA's long-term health. For example, as already discussed, the COLA was changed to 3.5% compounding, rather than floating with inflation as it had since 1969. Also, in an effort to encourage older workers to retire, the age and service credit requirement for a full retirement was reduced from the Rule of 85 to the Rule of 80.[54]

In early 2001, within months of the COLA change, the "dot-com" bubble burst and with it the stock market slumped in value, negatively impacting PERA's assets, investment returns, and thus its funding ratio. In response, PERA supported the passage of two significant bills to reduce benefits and increase contributions for current employees and employers. The primary changes were: (1) for those hired on or after July 1, 2005, their future COLA benefit would again be tied to inflation and would be the *lesser* of 3% compounded or the CPI-W[55]; and (2) an

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[53] Ex. 2 at 15, 64 (PERA Comprehensive Annual Financial Report for Fiscal Year 1994); Ex. 3 at 19, 66 (PERA Comprehensive Annual Financial Report for Fiscal Year 1999).

[54] Apps. B-22 & B-23 (C.R.S. § 24-51-602 (1997-1998)).

[55] App. B-29 (C.R.S. § 24-51-1002(1)(a.5) (2004)). After Senate Bill 10-001, these PERA members who started after July 1, 2005, but by December 31, 2006, are now subject to the same 2% cap as those members hired prior to July 1, 2005. C.R.S. § 24-51-1002(2) (2011).

additional employer contribution rising to an additional 3% of salaries called an amortization equalization disbursement (the "AED").

In 2006, the General Assembly further reduced benefits and raised age and service credit requirements for current and future employees to receive full service retirement benefits. New hires after December 31, 2006 also would have a portion of their employer and employee contributions paid into an Annual Increase Reserve Fund (akin to the Cost of Living Stabilization Fund which existed from 1980 to 1992).[56] Those members would receive a COLA of the lesser of 3% or the CPI increase *provided that* the net present value of the COLA payment could not exhaust more than 10% of the Annual Increase Reserve's year-end balance.[57]

The legislature in 2006 also implemented the supplemental amortization equalization disbursement (the "SAED").[58] Although the employer pays the SAED, it is effectively an employee contribution in the form of foregone salary increases. The SAED was scheduled to increase by 0.5% a year from 2008 to 2013, resulting in an additional 3% in salary effectively being paid by all current and future employees as contributions.

As a result, *before* the passage of Senate Bill 10-001, the combined total contributions for the state and school divisions had reached 20.95% in 2009—with employer contributions of 10.15%, employee contributions of 8%, AED of 1.8%, SAED of 1%—the highest rate in

[56] App. B-30 (C.R.S. § 24-51-1009 (2006)). Senate Bill 10-001 also changed the COLA formula for those who joined PERA after December 31, 2006. App. B-35 (S.B. 10-001 §§ 22-23); C.R.S. §§ 24-51-1009, -1009.5 (2011).

[57] App. B-30 (C.R.S. § 24-51-1009 (2006)). Senate Bill 10-001 also lowered the COLA payable to those in the tier of employees hired after December 31, 2006, to the lesser of 2% or the CPI increase provided that the net present value of the COLA payment could not exhaust more than 10% of the Annual Increase Reserve's year-end balance. App. B-35 (S.B. 10-001 §§ 22-23); C.R.S. §§ 24-51-1009, -1009.5 (2011).

[58] App. B-31 (C.R.S. § 24-51-411(1) (2007)).

PERA's history, and were scheduled to increase to more than 24% by 2013. Despite these significant increases to contributions by employees and employees, the 3.5% compounded COLA paid to retirees remained unchanged.[59]

Senate Bill 10-001 made a number of changes that further adversely impacted current and future PERA employees and employers.[60] All employees working for the school and state divisions will see an additional 2% increases in their AED and SAED contributions over the next decade.[61] As a result of Senate Bill 10-001 and the earlier increases to employer and employee contributions, the total contributions for the state and school divisions will reach 28.15% in 2018.[62]

Current and future employees also will need to work more years to receive any retirement benefit. Those who become members after December 31, 2010, but before January 1, 2017, will be governed by the Rule of 88, meaning one could retire with a full service retirement benefit at age 60 with 28 years of service credit.[63] Finally, for members hired on or after January 1, 2017 will be subject to the Rule of 90, meaning retiring with a full service retirement benefit at age 60 would require 30 years of service credit unless the member earns his or her last 10 years of service credit in the state or school divisions.[64] Because of changes made in the 2000s and Senate Bill 10-001, a new hire in 2011 and 2017 will work eight or ten years longer respectively,

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[59] Apps. B-25 to B-33 (C.R.S. § 24-51-401(1.7) (2000-2009)); Apps. B-26 to B-B-28 (C.R.S. § 24-51-408(6) (2001-2003)); Apps. B-29 to B-34 (C.R.S. § 24-51-411 (2004-2009)).

[60] Apps. B-36 (S.B. 10-001 §§ 9, 12); C.R.S. §§ 24-51-411 & -602 (2011); Sec. Am. Comp. ¶ 46.

[61] C.R.S. §§ 24-51-401(1.7) & -411 (2011).

[62] The 28.15% will be comprised of 10.15% employer contributions, 8% employee contributions, an AED of 5% (state) and 4.5% (school), and a SAED of 5% (state) and 5.5% (school). *Id.*

[63] C.R.S. § 24-51-602(1.5)(a) tbl. B.2 (2011).

[64] C.R.S. § 24-51-602(1.7)(a) tbl. B.3 (2011).

than those retirees within the proposed class, pay the highest contribution levels in the history of PERA, and be eligible for lesser COLA benefits in retirement.

E. Senate Bill 10-001 Is a Reasonable and Necessary Solution to PERA's Unprecedented Funding Crisis

In May 2009, the General Assembly mandated that PERA propose a solution to the critical underfunding, stating:

> 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.[65]

In response, in August 2009, the PERA board held eight "listening tour" meetings across the state, attended by approximately 2,500 PERA members, retirees, union representatives, and legislators. PERA board members explained the reasons for the underfunding and potential solutions and encouraged questions from the attendees. PERA also solicited online comments from its current and future retirees as to the potential changes they supported or opposed. Approximately 4,200 people submitted comments.

Unions and retiree organizations were significant participants throughout PERA's formulation of its legislative proposal. In testimony before the General Assembly, Dan Daly, the spokesperson for the Colorado Coalition for Retirement Security, a coalition representing over 40% of the approximately 475,000 total members of PERA, described the six month process undertaken by PERA in which the stakeholder groups participated:

> Their [PERA Board's] efforts have been nothing short of monumental over the past six months. Combined, we have all attended hundreds of meetings and literally heard from thousands perhaps tens of thousands. I quit counting, at some

[65] S.B. 09-282 (codified as C.R.S. § 24-51-211(2) (2009)).

> point, concerned active and retired PERA members. And so thanks to everyone who's helped to get us to this point.[66]

Gary Hoy, on behalf of the Colorado School and Public Employee Retirement Association, testified: "[R]epresenting those 40,000 people, I decided it was necessary for me to hear what [PERA] had to say. So I trailed Meredith and his troop of advisors around the state. I attended the meetings in Fort Collins, Grand Junction, Durango, Aurora, Denver, Greeley, Sterling . . . ."[67]

Legislators also were active members in this consultative process and attended listening tour meetings across the state.[68] Representative Andrew Kerr, describing the Listening Tour which he attended as "one example of what I think has been a very open engaging process [of PERA] coming in and reporting the information that they need to, but also being out talking to the beneficiaries and employees as well."[69]

During this time, PERA conducted numerous actuarial studies using several independent actuaries. All the studies came to the same conclusion: the PERA pension funds would run out of money in less than 30 years absent changes to their contribution and benefit structure. In as little as nine years, the pension funds would reach a critical 40% funded level requiring the investment allocation to become more conservative thus accelerating the "death spiral" to insolvency even if the funds returned 8.5% every year.[70]

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[66] App. A-6(a) (Sen. Fin. Comm. Hrg. at 51:13-20) (Dan Daly).

[67] *Id.* (Sen. Fin. Comm. Hrg. at 73:7-23) (Gary Hoy).

[68] *See, e.g.*, App. A-14(a) (Second Reading in House at 20:21-25, 21:1-9) (Rep. Ferrandino); App. A-12(a) (House Fin. Comm. Hrg. at 256:21-257:7) (Rep. Roberts).

[69] App. A-12(a) (House Fin. Comm. Hrg. at 12:6-10) (Rep. Andrew Kerr, co-sponsor).

[70] App. A-12(a) (House Fin. Comm. Hrg. at 6:14-7:9) (Rep. Andrew Kerr, co-sponsor).

Fulfilling its statutory mandate, on October 30, 2009, PERA submitted to the General Assembly its 2/2/2 Plus proposal to reach fully funded status in thirty years. After submitting the proposal to the General Assembly, the PERA board held an additional thirteen shareholder meetings across the state to explain the proposal and passed out ballots asking if attendees supported or opposed the 2/2/2 Plus proposal. Once again, union representatives and legislators participated in the meetings.[71] Of the over one thousand votes cast, approximately 84% supported the proposal.[72]

Senate Bill 10-001 was introduced on the first day of the 2010 legislative session and given the designation "10-001" to indicate it was a bill of historic importance.[73] The General Assembly, unions, retiree coalitions, retirees, and active PERA members engaged in extensive debates regarding the bill and its impacts on retirees, employers, and employers. The Senate Finance Committee held a five-and-a-half hour hearing during which 38 witnesses testified and the House Finance Committee held a seven hour hearing during which 27 witnesses testified.[74] Legislators received testimony and materials from numerous sources, including PERA, retiree organizations, unions, individual retirees, current employees, and independent experts on

[71] App. A-6(a) (Sen. Fin. Comm. Hrg. at 15:17-23) (PERA Executive Director Meredith Williams).

[72] App. A-4(a) (Jt. Budget Comm. Hrg. at 63:1-6) (Meredith Williams).

[73] App. A-5(a) (Opening of Legislative Session at 6-7) (Sen. Pres. Shaffer, co-sponsor).

[74] App. A-2 (Legis. Audit Comm. Hrg.) (Nov. 2, 2009); App. A-3 (2009 Jt. Fin. Comm. Hrg.) (Nov. 16, 2009); App. A-4 (Jt. Budget Comm. Hrg.) (Dec. 17, 2009). The three readings of the bill in the Senate occurred on January 13, January 29, and February 1, 2010, respectively, and occurred in the House on February 3, February 12, and February 16, 2010, respectively. *See* Apps. A-5, A-8, A-10, A-11, A-14, A-15. The other hearings occurred on January 26, 2010 (Senate Finance), January 27 (Joint Finance), January 29 (Senate Committee on Appropriations), February 10 (House Finance), and February 12 (House Committee on Appropriations). *See* Apps. A-6, A-7, A-9, A-12, A-13.

nationwide pension changes. Those who opposed the bill were also given a chance to speak, and fifteen individuals, including Plaintiff Justus, spoke in opposition before the Senate and House of Representatives.[75] Plaintiff Justus, and other retirees, provided extensive argument and documentation to support their objections to changing the COLA for retirees—the same arguments Plaintiff Justus now makes to this Court.

Many who spoke in support of Senate Bill 10-001 during the first, five-hour hearing before the Senate Finance Committee represented broad-based coalitions of current members as well as retirees and praised PERA for the long, open consultation process which the organization took in formulating the proposal. The Colorado Coalition for Retirement Security, which represents over 40% of the approximately 475,000 total members of PERA, spoke in support of the bill.[76] Dan Daly, the coalition spokesperson, stated:

> What we in the coalition do agree on is the status quo is not acceptable. Senate Bill 001 as presented today is the best solution possible at this time. It's reflective of our goals, specifically, our goal of shared sacrifice meaning employers, employees, and retirees all have a financial stake in security this system under Senate Bill 001.
>
> It's reflective of our goal of a long-term fiscal stability for PERA meaning the unfunded liability will be amortized in 30 years and the fund will be able to pay benefits [in] perpetuity. That's the ultimate goal here, retirement security for our retirees.[77]

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[75] App. A-6(b) (Sen. Fin. Comm. Hrg.); A-12(b) (House Fin. Comm. Hrg.).

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

[77] App. A-6(a) (Sen. Fin. Comm. Hrg. at 52:13-25) (Dan Daly).

Daly later reiterated: "We believe these changes are necessary and that's why we support this broad shared responsibility approach."[78] Coalition spokesperson Don Shaefer likewise testified: "We're not happy about having to change the PERA Program. But we also do not want to see the demise of PERA's defined benefit plan. We know that changes need to be made and they need to be made this year. We don't want to delay the process any longer."[79]

Many other organizations and union groups spoke in support of the bill. Joanne Slanovich, "newly retired one year now after paying 36 years into PERA," and the president of the Douglas County Federation of Retired Teachers and Educators, stated: "We are also willing to have our three and a half percent cost of living reduced to a fixed two percent in July of 2011 to maintain and strengthen PERA."[80] Mark Burry, a retiree representing the CAPE (Colorado Association of Public Employees) Retirees organization, stated: "We recognize that PERA must be placed on sound financial footing."[81] Another CAPE Retirees spokesperson said: "We have employees on the payroll who are paying into PERA now who if we do nothing will never receive a dime because we will run out of money. So something has to be done. If that's not necessity, I don't know what is."[82]

Even among those opposed to the bill, there was an acknowledgement by many that retirees had to accept some reduction in the COLA. One opponent who proposed a graduated COLA said his proposal "does not argue against the two percent COLA because we believe that

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

[79] App. A-6(a) (Sen. Fin. Comm. Hrg at 101:12-21) (Don Shaefer).

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

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

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

we are – I am a retiree and he is – *we have a moral obligation to make sacrifices too with the liability of PERA. Nor are we arguing that the retirees are being treated unfairly relative to those others in PERA who are not retired.*"[83] Another opponent supported a COLA holiday of up to three years "because I understand retirees have to contribute to solving these problems."[84]

Considering the wealth of testimony and alternatives, the General Assembly adopted many aspects of the 2/2/2 Plus Plan, but rejected others, including the proposed two year COLA holiday (for 2010 and 2011), and the requirement for a 110% funding level prior to automatic, 0.25% annual increases to the COLA. Seeking the least possible impact on retirees consistent with the need to change the COLA, the legislators added a 2% compounded COLA for 2011, amounting to $66 million in COLA payments to retirees, and lowered to 103% the funding level when the COLA would automatically increase by 0.25% per year, without limitation. On February 16, 2010, the General Assembly passed Senate Bill 10-001 with strong bipartisan support in both the Senate and House of Representatives.

F. Despite Better Investment Returns in 2009, PERA Remains Significantly Underfunded

PERA's 26% loss in 2008 was devastating not only in sheer loss of assets, but was compounded by the failure to achieve the 8.5% assumed and necessary rate of return to meet benefit obligations. The effective loss was thus almost 35% from where the assets needed to be in order to meet benefit obligations. PERA made a 17.4% return in 2009, exceeding its then

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[83] App. A-12(a) (House Fin. Comm. Hrg. at 140:4-10) (Dr. Richard Blanke).

[84] App. A-6(a) (Sen. Fin. Comm. Hrg. at 110-111) (David Wymet).

8.0% assumed rate of return by 9.4%, but it would have still needed a 46% return in 2010 to be back on track for 2011.[85] PERA simply could not invest itself to financial health.

Senate Bill 10-001 did not "overfix" the problem by modifying benefits and contributions more than necessary. Rather, as section 24-51-211(1) mandates, the plans remain projected to reach a 100% funded level in approximately thirty years.[86]

STANDARD OF REVIEW

"In determining the constitutionality of statutes it must be borne in mind that every act which has received the sanction of the general assembly is to be considered constitutional, unless the contrary appears *beyond reasonable doubt*." *Union Pac. Ry. Co. v. DeBusk,* 12 Colo. 294, 303, 20 P. 752, 756 (1888). "A construction of statutory language that creates doubts as to the constitutional validity of the legislation should be assiduously avoided if an alternative construction consistent with legislative intent is available." *Perry Park Water & Sanitation Dist. v. Cordillera Corp.*, 818 P.2d 728, 732 (Colo. 1991). "[W]e must uphold the constitutionality of a statute unless a '*clear and unmistakable'* conflict exists between the statute and a provision of the Colorado Constitution." *E-470 Pub. Highway Auth. v. Revenig*, 91 P.3d 1038, 1041 (Colo. 2004).

To be entitled to summary judgment, Plaintiffs thus must prove that the General Assembly's latest modification of the COLA formula paid to retirees is a "clear and unmistakable" violation of the Colorado Contract Clause. Plaintiffs cannot meet this high standard.

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[85] *See* PERA Comprehensive Annual Financial Report for Fiscal Year 2009 at 37, *available at* http://www.copera.org/pera/formspubs/reports.htm.

[86] *Id.* at 7.

ARGUMENT

I. The Colorado Supreme Court's 2002 *DeWitt* Decision Sets Forth the Governing Law for Challenges Under the Colorado and Federal Contract Clauses

A. The Colorado and Federal Contract Clauses Are Not Absolute

The Colorado and federal Contract Clauses are functionally identical. The Colorado Constitution provides, in pertinent part, that "No . . . law impairing the obligation of contracts . . . shall be passed by the general assembly." Colo. Const. art. II, § 11. The United States Constitution states, in pertinent part, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Colorado courts hold that "these clauses, while designed to protect vested contract rights from legislative invasion, *are not to be interpreted as absolute*." *In re Estate of DeWitt*, 54 P.3d 849, 858 (Colo. 2002) (citing *Ohio & Colo. Smelting & Refining Co. v. Pub. Util. Comm'n*, 68 Colo. 137, 140-45 187 P. 1082, 1084-85 (1920)); *see also In re Estate of Becker*, 32 P.3d 557, 564 (Colo. App. 2000) ("The prohibition against impairing the obligation of contracts is not to be read literally . . . .").

The Colorado Supreme Court further explained: "[T]he clauses must be read to permit legislative action that promotes 'the common weal, or . . . general good of the public, though contracts previously entered into between individuals may thereby be affected.'" *DeWitt,* 54 P.3d at 858 (quoting *Ohio & Colo. Smelting*, 68 Colo. at 143, 187 P. at 1084); *see also Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 786 (Colo. App. 2002) ("[L]egislation that impairs a contract is not unconstitutional if the challenged statute reasonably serves a legitimate public concern when balanced against its impairment of a contract.").

In *DeWitt*, the Colorado Supreme Court extensively cited and followed United States Supreme Court precedent and held that the initial inquiry "in assessing an alleged contract clause violation . . . is 'whether the change in state law has operated as a substantial impairment of a contractual relationship.'" 54 P.3d at 858 (quoting *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 186 (1992)). The answer to this inquiry involves consideration of two issues: "First, the court must ascertain whether there is a contractual relationship; to establish this component, a party must demonstrate that the contract gave him a vested right." *Id.* (citing *Dodge v. Bd. of Educ.,* 302 U.S. 74, 77-78 (1937)) (holding that a reduction in a supplemental pension for retired teachers did not violate the Contract Clause because the retirees did not have a contract right to the supplement).

If no vested contract right exists for the claimed benefit, the analysis ends and there is no violation of the Colorado or federal Contract Clauses. *See, e.g.*, *Parker v. Wakelin*, 123 F.3d 1, 9 (1st Cir. 1997) (finding that there was no contract right and therefore "[b]ecause there is no attempt here to take away retirees' benefits, there can be no plausible contract clause claim in this case"). If a contract right exists, the court must then proceed to the next question: "Second, a court must determine whether a change in the law impairs that contractual relationship . . . [and] whether the impairment is substantial." *DeWitt*, 54 P.3d at 858. "To prove substantial impairment of a contractual relationship, a party must demonstrate that the law was not foreseeable and thus disrupts the parties' expectations." *Id.* (citing *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 245 (1978)). The *DeWitt* court also instructed:

> Because the contract clause *is not an absolute bar to legislative regulation of contracts*, the Supreme Court has explained that a sliding scale of sorts is appropriate when assessing whether the impairment of contract violates the contract clause: 'The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at the first stage.'

Id. (quoting *Allied Structural Steel,* 438 U.S. at 245); *see also Zimmerman v. Bd. of Cnty. Comm'rs*, 218 P.3d 400, 426 (Kan. 2009) ("If an impairment is not substantial, our analysis ends and there is no violation of the Contract Clause.") (citations omitted).

As set forth by the *DeWitt* court, the inquiry continues if a change in the law results in substantial impairment to a vested contract right:

> [A] finding that a law impairs a contract does not end the inquiry. Notwithstanding such a finding, *a court should uphold a challenged statute if it is reasonable and appropriately serves a significant and legitimate public purpose when considered against the severity of the contractual impairment.*

DeWitt, 54 P.3d at 858 (citations omitted); *see also City of Charleston v. Pub. Svc. Comm'n of W. Va.,* 57 F.3d 385, 391 (4th Cir. 1995) ("Only if there is a contract, which has been substantially impaired, and there is no legitimate public purpose justifying the impairment, is there a violation of the Contract Clause."; granting summary judgment holding that statutory amendment did not cause substantial impairment).

Plaintiffs do not mention *DeWitt* or the modern Contract Clause test in their motion and make no attempt to meet the governing Colorado and federal Contract Clause test. Plaintiffs concede that the "reasonable and necessary" element is part of their federal Contract Clause claim, alleging that "Defendants' actions were neither reasonable nor necessary . . . ." Sec. Am. Comp. ¶ 70. Plaintiffs, however, effectively take the position that despite functionally identical language, this Court should apply fundamentally different tests to their claims brought under the Colorado Contract Clause (Count I) and the federal Contract Clause (Count III) because pension benefits are afforded absolute protection from change. Plaintiffs are mistaken. *DeWitt* expressly states that *both* the Colorado and federal Contract Clauses "*are not to be interpreted as absolute*" and applied the United States Supreme Court's three-part test to the *Colorado* Contract Clause. *DeWitt*, 54 P.3d at 858.

Numerous other Colorado courts have found claims under the Colorado and federal Contract Clauses to be indistinguishable and have relied on federal precedent. *See Parker v. City of Golden*, 119 P.3d 557, 564 (Colo. App. 2005) (citing *DeWitt* and *Allied Structural Steel* in conducting single analysis for both federal and state Contract Clause claims), *rev'd on other grounds*, 138 P.2d 285 (Colo. 2006); *In re Larson*, 260 B.R. 174, 202-03 (D. Colo. 2001) (applying modern balancing test to state and federal Contract Clause claims).

Moreover, in *DeWitt*, the Colorado Supreme Court cited pension benefit cases, specifically referencing one of the seminal cases on the government's right to modify pension benefits, *Dodge v. Bd. of Educ.,* 302 U.S. 74 (1937), as well as *McPhail*, on which Plaintiffs so heavily rely. *DeWitt*, 54 P.3d at 858. The Colorado Supreme Court thus was well-aware of pension benefit authority when it applied the modern Contract Clause test and there is nothing in *DeWitt* stating, or implying, an exception for pension benefit cases.

B. <u>The Vast Majority of State Courts, and All Federal Courts, Apply the Modern Contract Clause Test to Pension Benefit Challenges</u>

In the 1970s and 1980s, the United States Supreme Court first articulated the modern Contract Clause balancing test that the Colorado Supreme Court, and courts across the nation, have since adopted. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel*, 438 U.S. 234; *Energy Reserves Grp. v. Kan. Power & Light*, 459 U.S. 400 (1983). This Contract Clause balancing test has been applied in the vast majority of subsequent state pension cases challenging the Contract Clause of state constitutions, and all challenges to the federal Contract Clause. *See, e.g.*, *Ret. Adjunct Professors of the State of R.I. v. Almond*, 690 A.2d 1342, 1345 & n.2 (R.I. 1997) ("Over time, we have adopted the test devised by the United States Supreme Court in scrutinizing alleged contract-clause violations."); *Wis. Prof'l Police Ass'n v. Lightbourn*, 627 N.W.2d 807, 848 (Wis. 2001) (applying U.S. Supreme Court's "three-step methodology for analyzing impairment-of-contract claims" to state and federal Contract Clause pension claims); *N.J. Educ. Ass'n v. State*, 989 A.2d 282, 290-91 & n.9 (N.J. Super. 2010) (applying modern Contract Clause test to both United States and New Jersey Contract

Clause provisions because they "are applied coextensively and provide the same protection" and the "two clauses provide 'parallel guarantees'") (citations omitted).[87]

In *Retired Adjunct Professors*, a retiree organization sued Rhode Island, arguing that amendments to the state pension laws about working after retirement violated the state and federal Contract Clauses. 690 A.2d at 1344. Applying the three-part federal test to both constitutional challenges, the Rhode Island Supreme Court rejected the claims, finding that the retirees "were not entitled to conclude that these provisions were fossilized in legislative amber" and "should have known that the State would be free to fiddle with the terms on which it might decide to offer such reemployment opportunities to them at any time." *Id.* at 1345.

Federal courts have uniformly applied the modern Contract Clause test to pension benefit challenges. *See, e.g.*, *Md. State Teachers Ass'n v Hughes*, 594 F. Supp. 1353, 1364 (D. Md. 1984) (applying federal test to challenge to readjusted COLA and granting summary judgment to the defendants because "the legitimate expectations of the plaintiff class did not include an immutable, unalterable pension plan as to *future* benefits"); *Parella v. Ret. Bd.*, 173 F.3d 46, 59-61 (1st Cir. 1999) (applying federal test to challenge of retroactive capping of public employees' pension benefits); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 367-73 (2d Cir. 2006) (affirming the granting of summary judgment to state after applying federal test to challenge of

[87] *See also Taylor v. State & Educ. Empls. Grp. Ins. Program*, 897 P.2d 275, 279 (Okla. 1995) (applying federal test to state and federal Contract Clause challenges to creation of group insurance program which required deductions from state pension fund); *Smith v. Bd. of Trustees*, 851 So. 2d 1100, 1109 (La. 2003) (applying federal test to state and federal Contract Clause claims brought by retirees concerning rules for working after retirement; *Studier v. Mich. Pub. Sch. Empls.' Ret. Bd.*, 679 N.W.2d 88, 97 (Mich. App. 2004) (applying federal test to state and federal Contract Clause claims brought by retirees concerning changes to retiree health insurance benefit), *rev'd in part on other grounds*, 698 N.W.2d 350, 366-67 (Mich. 2005) (ruling that no contract right to retiree health insurance benefits).

wage freeze of public workers in financially-stricken Buffalo).

The 1959 and 1960 *McPhail* and *Bills* cases on which Plaintiffs heavily rely were decided *before* the United States Supreme Court developed the modern Contract Clause test that has since been widely adopted by courts around the country. The Colorado Supreme Court's adoption and application of the modern Contract Clause test in *DeWitt* to *both* the Colorado and federal Contract Clauses governs here and Plaintiffs must meet that test. They cannot.

C. Senate Bill 10-001 Satisfies Pre-*DeWitt* Authority Including *McPhail*

Though not applying the modern Contract Clause test because it did not yet exist, the Colorado Supreme Court in *McPhail* "conceded that change is permissible" for the pension benefits of retirees, and explained that "changes may be made in the pension system looking to strengthening and bettering it and it may be conceded that this is permissible. In other words, it is not desirable to tie the hands of the Legislature forever after the enactment . . . ." 139 Colo. at 343, 338 P.2d at 701. Under such standard, there is no question that Senate Bill 10-001 resulted in "strengthening and bettering" the PERA pension system.

Contrary to Plaintiffs' assertion that *McPhail* held that "public pension benefits may not be reduced *for any reason*," the supreme court actually recognized that retirement benefits could "increase *or decrease*." *Id.* at 344, 338 P.2d at 701. The *McPhail* court noted that if "plaintiffs fulfilled all conditions they would receive a pension that would be subject to increase *or decrease* based upon the salary of the rank which they occupied as of the date of retirement." *Id.*[88] Thus, retirees were not guaranteed a fixed escalation in benefits after retirement but rather retirees' *entire benefit payment* was variable and tied to keeping retiree benefits in line with

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[88] In prior briefing to the Court, Plaintiffs omitted the critical "or decrease" language and inserted an ellipse in its place. Pls' Mot. for Modified Case Management Order at 8 (quoting *McPhail*).

salaries of current employees. If salaries decreased because of deflation, funding shortfalls, or otherwise, retirees would suffer the same fate. *Id.* Likewise, here, the COLA has changed repeatedly, for better and worse, and there is no basis for it now to become frozen at the date of retirement (or full vesting) for the first time in its 40 year history.

Moreover, in contrast to the unprecedented 2008 economic crisis here that resulted in the shared sacrifice of employees, employers, and retirees, in *McPhail* and *Bills*, voters approved *two increases* in the salaries of current police officers at the same time they eliminated the tying of retiree benefits to current employee pay. *See McPhail*, 139 Colo. at 332, 338 P.2d at 695; *Bills*, 148 Colo. at 385-86, 366 P.2d at 582. The *Bills* court thus reasonably concluded that the change to retiree benefits "was unaccompanied by a corresponding change of a beneficial nature, was not shown to be actuarially necessary, nor that it in anywise strengthened or bettered the pension plan." 148 Colo. at 391, 366 P.2d at 585.

The pension benefit at issue in *McPhail* and *Bills* also materially differs from that present here. The escalator clause in those cases tied a retiree's *entire benefit* to the salary of current employees and thus its elimination changed the entire pension benefit structure. Further, in *McPhail* and *Bills*, the pension benefit structure had not materially changed for 37 years. *See McPhail*, 139 Colo. at 332, 338 P.2d at 695 (discussing that the amendment in 1956 "repealed a provision which had been in force since 1919"). The retirees in those cases thus were hired and worked their entire 25 years careers under the same pension structure that was changed, for the first time, after they had met the service requirements. On the contrary, here, the COLA formula paid to retirees changed repeatedly during the employment of each of the named Plaintiffs, and *during the retirement* of all pre-2001 retirees. The act complained of in *McPhail* also was dramatically different from the COLA change in Senate Bill 10-001—the complete *termination* of tying retiree benefits to current salaries thus ensuring that retiree benefits could never increase, versus the *retention* of the COLA benefit at a modified level with the potential for complete restoration, and an ultimate increase, in the COLA.

Here, the fundamental mechanism for pension benefits has not changed—it remains a base benefit plus a separately calculated cost of living adjustment that has *repeatedly changed* during and after retirement. Senate Bill 10-001 does not change that structure and does not alter the base pension benefit for any retiree. As it has done numerous times before, the General Assembly has only changed the COLA formula that provides a supplement to the retirees' base benefit calculated at retirement.

Plaintiffs seek to bolster *McPhail* by citing several pre-*DeWitt* cases involving partially vested benefits that cite *McPhail* for the broad proposition that pension benefits vest after retirement.[89] That is not the issue here. The narrow question before the Court is whether different COLA formulas for retirees became frozen for life at retirement—something that has never occurred in 40 years.

Moreover, the Colorado Supreme Court has recognized the need to balance partially vested pension benefits against the need to ensure the overall health of a pension benefit plan. In *Peterson v. Fire & Police Pension Ass'n*, the Colorado Supreme Court found that when a

[89] In *City of Aurora v. Ackman*, 738 P.2d 796, 800 (Colo. App. 1987) (cited in Pls' Mot. at 13), the court found that the requirement to receive pension benefits could not be increased from 20 to 25 years for those firemen that had already completed 20 years of service. The court's ruling was premised on the defendant city's acknowledgement that pension benefit modifications "were not actuarially required and no 'changing conditions' mandated their adoption." *Id.* at 801. Plaintiffs also quote one sentence from *McInerney v. Public Employees' Retirement Ass'n*, 976 P.2d 348, 352 (Colo. App. 1998) addressing the general position that retirement pay may be a vested benefit. Pls' Mot. at 13. The plaintiff in *McInerney*, however, did not claim a vested right to pension benefits, but rather claimed that his procedural due process rights were violated because he was not informed of the detrimental changes to his pension benefits. 976 P.2d at 349.

pension fund was collapsing under nearly $300 million in unfunded liabilities, legislation that reduced benefits to spouses of retired firefighters to ensure the long-term health of the plan was constitutional. 759 P.2d 720, 725 (Colo. 1988). The court found, "Had the General Assembly not changed the funding scheme for death and disability pensions, the City and County of Denver eventually would have exhausted its pension funds." *Id.* The court then ruled that the "legislation resulted in beneficial changes because it improved funding so that money would be available in the future to pay pensions" and "conclude[d] that ensuring that the individual petitioners receive survivor benefits as long as they remain eligible offsets the harm the petitioners are suffering due to their lower monthly benefit payments." *Id.* Here, the PERA plan had unfunded liabilities of $27.5 billion at the end of 2008, more than the entire annual budget for the state of Colorado, and over ninety times larger than the size of the crisis in *Peterson*.

After *DeWitt*, there is no reasoned basis for drawing a bright line between "partially" and "fully" vested benefits and making only partially vested benefits modifiable when actuarial necessity exists. As the *Peterson* court recognized, "Ensuring that the statewide pension system is actuarially sound justifies any corresponding detriments to the group." 759 P.2d at 726. Such conclusion applies to all pension beneficiaries. If a pension plan will go bankrupt without reasonable modifications to fully vested benefits, it makes no sense to permit changes only to partially vested benefits thus guaranteeing the demise of the pension fund with severe harm to all beneficiaries—whether fully vested, partially vested, or unvested. Under modern Contract Clause jurisprudence whether pension rights are partially or fully vested does not alter the test. In both situations, if a contract right exists, the impairment must be reasonable and necessary to accomplish a legitimate public purpose.

Plaintiffs also rely on four California cases and one West Virginia decision. Pls' Mot. at 16-17. The first case cited by Plaintiffs, *United Firefighters of Los Angeles City v. City of Los Angeles*, 210 Cal. App. 3d 1095 (1984), applied the modern, multi-factor balancing test set forth in *DeWitt*—that Plaintiffs ignore—and thus considered whether a modification to a COLA formula was reasonable and necessary. *Id.* at 1110. In *United Firefighters*, a city charter amendment capped a COLA at 3% and diverted the $43 million savings to "other items or added it to the city's general reserve fund" and "contributed to the pension systems no portion of the additional $43 million . . . ." *Id.* at 1113. The *United Firefighters* court thus found that the COLA modification "was neither reasonable nor necessary to the maintenance of the integrity and soundness of the pension systems" because "[w]hile it reduces the benefits which must be paid, it in no manner enhances the integrity or soundness of the funds . . . ." *Id.*

Here, in contrast, every penny of the lower benefit payments realized by the COLA change, and other benefit changes, will remain within the PERA pension fund to immediately improve its financial soundness and provide additional funds to invest to reduce the funding shortfall. None of the "saved" benefit payments are being diverted to Colorado's general fund or are being used for any purpose other that to improve the actuarial soundness of the PERA pension fund.

The other three California cases Plaintiffs cite do not mention or consider whether the pension benefit changes violated the Contract Clauses of the state or federal Constitutions, and thus failed to acknowledge that pension benefits may be modified if reasonable and necessary to accomplish a legitimate public purpose. Each of those cases relied strictly on prior California state court decisions that also did not go beyond the first step of the modern test and simply concluded that if pension benefits exist they can not be modified for any reason. Where

Plaintiffs' claims here are for violations of the Colorado and federal Contract Clauses, case law that fails to apply any constitutional analysis (much less the modern test) is irrelevant to Plaintiffs' constitutional challenges.

Though applying the "reasonable and necessary" portion of the modern Contract Clause test, the *United Firefighters* court relied on materially different, and far more liberal, California pension cases in its analysis of whether pension benefits vested. For example, as opposed to Colorado and the vast majority of nationwide courts, California courts hold that public employees have a right to pension benefits in place when they *accepted* public employment as well as those added during employment. *United Firefighters*, 210 Cal. App. 3d at 1107.[90]

Like the California cases, the West Virginia decision cited by Plaintiffs does not undertake a Contract Clause analysis and instead relies exclusively on prior West Virginia decisions. *See Booth v. Sims*, 456 S.E.2d 167 (W. Va. 1995) (Pls' Mot. at 16). The dissent in *Booth* stressed these shortcomings of the majority opinion, explaining:

> The majority mentions the impairment of contract clause of the West Virginia Constitution in its opinion. . . . [but] makes [no] . . . attempt to discuss the law surrounding the doctrine of impairment of contract. . . . [O]ur impairment of contract doctrine is patterned after the federal doctrine, which is contained in Article 1, Section 10 of the United States Constitution. . . . The majority completely avoids any analysis of this doctrine although it states this doctrine controls the constitutionality of the legislative amendments in this case.

Id. at 192 (noting that "this doctrine is not an absolute bar to legislative modification of a contract"). These out-of-state cases thus further defeat Plaintiffs' apparent view that their

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[90] Plaintiffs misstate the holding of *Claypool v. Wilson*, 6 Cal. Rptr. 2d 77 (Cal. App. 1992) as "striking down repeal of COLA." Pls' Mot. at 17. On the contrary, the *Claypool* court *upheld* a statute repealing a COLA program because "no contract rights are impaired." *Id.* at 79.

Contract Clause claims should be excluded from the modern Contract Clause test as set forth in *DeWitt*.

Plaintiffs' view that *McPhail* absolutely bars any modification of retiree pension benefits not only is inaccurate, but if such an absolute rule ever existed, it does not after the development of the modern Contract Clause test in the 1970s and 1980s and its application to the Colorado Contract Clause in the 2002 *DeWitt* ruling. Even if the Court were to find an irreconcilable conflict between *DeWitt* and *McPhail*, as the more recent case, *DeWitt* would govern over *McPhail*. *See, e.g., Bullock v. Daimler Trucks N. Am., LLC*, No. 08-CV-00491-PAB-MEH, 2010 WL 1286079, at *2 n.2 (D. Colo. Mar. 29, 2010) (finding that even if defendant's citations to older Colorado supreme court cases "call into question the 'knew or should have known' standard" of a more recent Colorado Supreme Court decision, "in Colorado 'where decisions are conflicting, the latest govern'") (quoting *Parker v. Plympton*, 85 Colo. 87, 97, 273 P. 1030, 1034 (1928), *superseded by rule on other grounds as stated in Klipp v. Grusing*, 119 Colo. 111, 200 P.2d 917 (1948)).

D. Plaintiffs' Reliance on an Attorney General Opinion Is Misplaced

Plaintiffs also rely heavily on an attorney general opinion that comments on the general question of whether some retiree benefits may be vested, not whether retirees are entitled to a particular COLA formula for the rest of their lives. The question is not whether pension benefits, in general, fall under the Contract Clause, but whether a cost of living *adjustment* is fixed and unchangeable for the lifetime of a retiree.

Plaintiffs' overbroad reading of the 2004 Attorney General opinion is illustrated by their concession that some retiree benefits may change, including specifically the COLA, depending on the statutory language. Plaintiffs exclude pre-1994 PERA retirees from their classes because of their view that changes made to COLA provisions by the General Assembly in 1994 *first* created a contract right to a COLA. Though Plaintiffs misread the 1994 amendments, their position illustrates that whether a retiree pension benefit may be changed turns on the General Assembly's intent as reflected in the statutory language, and there is no bright line rule prohibiting modification of all retiree benefits.

In addition, the attorney general opinion does not consider the governing *DeWitt* analysis and does not recognize that legislative actions that are reasonable and necessary to achieve a legitimate public purpose do not violate the Contract Clause even if they impair contractual rights. Even if the attorney general opinion was on point and considered the governing law, it is, at best, afforded "respectful consideration." *See Colo. Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) ("the [attorney general] opinion is obviously entitled to respectful consideration . . . . A court's resolution of an issue of statutory construction, however, must proceed from an independent analysis of the statutory scheme . . . .").[91]

Plaintiffs must satisfy the *DeWitt* test and prove that they had a contract right to a particular COLA for the rest of their lives, and that General Assembly's 2001 modification was a substantial impairment that was not reasonable or necessary to accomplish a legitimate public purpose. They cannot do so. Although Senate Bill 10-001 need only satisfy one of the three grounds for constitutionality under the multi-factor *DeWitt* test, it satisfies all three. The result here is the same under *DeWitt*, *McPhail* and *Bills*—Senate Bill 10-001 is constitutional.

[91] S*ee also State Dep't of Rev. v. Arnold*, 909 So.2d 192, 194 (Ala. 2005) (finding attorney general opinions are "merely advisory" and noting that the present attorney general "disavows the opinion as erroneous, explaining that it represents 'the sort of mistake that sometimes happens when legal advice is given in a non-adversarial context'"); *Freedom Newspapers, Inc. v. Orange Cnty. Emp'rs Ret. Sys. Bd. of Dirs.*, 11 Cal. Rptr. 2d 488, 496 n.18 (Cal. App. 1992), *rev'd on other grounds*, 863 P.2d 218 (Cal. 1993) ("Unlike court decisions, opinions and letters of the Attorney General are not forged in the crucible of the adversarial process, nor are they subject to direct review by higher courts.").

II. Plaintiffs Have No Contract Right to a Cost of Living *Adjustment* that Is Unchangeable for Their Lifetimes

Under *DeWitt*, *McPhail*, and all other Colorado and federal Contract Clause cases, the threshold showing is the existence of a contract right. Plaintiffs' Contract Clause claims fail because Plaintiffs have no contract right to an unchangeable COLA for the rest of their lives.

The COLA change in Senate Bill 10-001 did not terminate the COLA, rather it retained the COLA benefit at a modified level with the potential for complete restoration, and an ultimate increase, in the COLA. The fundamental mechanism for pension benefits is the same—a base benefit plus a separately calculated cost of living adjustment. As it has done numerous times before, the General Assembly has only changed the COLA formula that provides a supplement to the retirees' base benefit calculated at retirement.

A. <u>Plaintiffs Must Prove that the Colorado General Assembly Unmistakably Relinquished Its Right to Modify the COLA Formula</u>

"The goal in construing statutes is to ascertain and give effect to the general assembly's intent." *In re Crow v. Penrose-St. Francis Hosp.*, 169 P.3d 158, 165 (Colo. 2007). To ascertain that intent, courts "first look to the plain language of the statute." *People v. Martinez*, 51 P.3d 1046, 1051 (Colo. App. 2002). A court "may not read additional terms into, or modify, the plain language of a statute . . . ." *Dubois v. Abraham*, 214 P.3d 586, 588 (Colo. App. 2009).

"We presume that a statute is constitutional; unless the conflict between the constitution and the law is *clear and unmistakable*, we will not disturb the statute." *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004). "[W]hen a statute is susceptible to both constitutional and unconstitutional interpretations [courts] *must* adopt the constitutional interpretation of the statute." *Renteria v. Colo. State Dep't of Personnel*, 911 P.2d 797, 799 (Colo. 1991) (finding statute constitutional).

Courts also apply an additional "unmistakability" requirement specifically to pension benefit challenges under the Contract Clause. The First Circuit explained that "[t]his threshold requirement for the recognition of public contracts has been referred to as the '*unmistakability doctrine*'" because "legislatures should not bind future legislatures from employing their sovereign powers in the *absence of the clearest of intent to create vested rights protected under the Contract Clause* . . . ." *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir. 1997). "[W]here a public contract allegedly arises out of *statutory language*, the hurdle under the first component of the first part of the test—proving that a contractual relationship exists—is necessarily higher, since 'normally state statutory enactments do not of their own force create a contract with those whom the statute benefits.'" *Parella v. Ret. Bd.,* 173 F.3d 46, 60 (1st Cir. 1999).

Here, the "constitutional interpretation" of the COLA provision in Senate Bill 10-001 is that it does not violate the Contract Clause because prior COLA provisions did not *unmistakably* create a lifetime right to a particular COLA formula. If the prior COLA provisions could reasonably be interpreted as permitting changes to retiree COLA formulas (as actually did occur for 40 years), the Court *must* find the current COLA provision constitutional as applied to current PERA and DPS retirees.

Plaintiffs provide nothing in their summary judgment motion that remotely meets the high standards necessary to find C.R.S. § 24-51-1002 (2010), or any other part of Senate Bill 10-001, unconstitutional. On the contrary, as set forth below, the text and application of the prior COLA provisions unambiguously establish that retirees have no lifetime right to whatever COLA formula happened to be in place at their retirement.

B. <u>The PERA COLA Provisions Contain No Language Granting Plaintiffs a Lifetime Right to the COLA Formula in Place at Their Respective Retirements</u>

Plaintiff Halaas became eligible to retire with full benefits on July 20, 1998 and retired on January 12, 1999. Halaas claims a lifetime right to a prior COLA formula in place at his retirement (or full vesting), alleging entitlement "to benefits at the levels that were specified under Colorado law when [his] pension rights vested or when [he] actually retired." Sec. Am. Comp. ¶ 63. He thus seeks to revert to the 1998 or 1999 COLA formula and concedes that he has no right to the COLA provided by the General Assembly in 2001 after his retirement.

The 1998 and 1999 COLA formulas provide the *lesser* of actual inflation from 1992 to 1998, or 3.5% compounded:

> The cumulative increase applied to benefits paid shall be recalculated annually as of March 1 and shall be the lesser of: (a) The total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1, 1993; and (b) The percent increase in the consumer price index from 1992, or the year prior to the year in which the benefit becomes effective, whichever is later, to the year preceding March 1.

App. B-22 & B-23 (C.R.S. § 24-51-1001 (1998 & 1999)).

Halaas' current position that the 1998 and 1999 COLA provisions were unchangeable for his lifetime finds no support in the plain language of those provisions. There is nothing remotely stating that the variable COLA based on the lesser of actual inflation or 3.5% compounded is permanent, unchangeable, or for the lifetime of a retiree. Such position also is defeated by the fact that the 1999 COLA provision *was changed* in 2001 by the General Assembly and applied to all retirees, including Halaas, who thus received a *different* COLA benefit than that in place at the time of his retirement.

Plaintiff Hopkins became eligible to retire with full benefits on July 31, 2001, retired the next day, and claims a lifetime right to the 2001 COLA formula. That provision states:

> the cumulative increase applied to benefits paid shall be recalculated annually as of March 1 and shall be the total percent derived by multiplying three and one-half percent, compounded annually, times the number of years such benefit has been effective after March 1.

App. B-26 (C.R.S. § 24-51-1002 (2001)). The 2001 COLA provision is no more unchangeable as applied to retirees than was the 1999 COLA provision, or any other COLA provision in place in the preceding 30 years. Nothing in the text of the 2001 COLA provision states that the 3.5% cost of living adjustment is permanent, unchangeable, or for the lifetime of a retiree. Plaintiff Hopkins reads in the critical language "without change" and "for life" into the 2001 COLA provision.

Plaintiff Laird became eligible to retire with full benefits on August 24, 2007, and retired on July 1, 2010 at age 57. Prior to Laird's retirement in July 2010, Senate Bill 10-001 became effective. Laird will receive payment under the COLA formula in the bill—consistent with Plaintiffs' claimed contract right to the COLA in place at retirement. Laird, however, apparently seeks to revert to the 2007 COLA formula (3.5% compounded). Plaintiffs fail to explain how Laird, or other retirees with vesting and retirement dates spanning different COLA formulas, can have an unchangeable contract right to two different COLA formulas for the rest of their lives.

As explained by the Third Circuit in a case involving claims by a class of retirees seeking lifetime health benefits without change, durational language making benefits unchangeable may not be read into a statute:

> A plain reading of the phrases, 'will continue' and 'shall remain,' certainly does not *unambiguously* indicate that the benefits will continue *ad infinitum* . . . . It cannot be said that the phrases clearly and expressly indicate vesting since there is simply no durational language to qualify these phrases. That is, the [contracts] do not state that retiree benefits 'will continue for the life of the retiree,' or that they 'shall remain unalterable for the life of the retiree.'

Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., U.A.W. v. Skinner Engine Co., 188 F.3d 130, 141 (3d Cir. 1999) (emphasis in original). Had the Colorado General Assembly intended to confer a permanent, unchangeable COLA formula for life, it could have easily done so. It did not. *See Nat'l Educ. Ass'n-R.I. ex rel. Scigulinksy v. Ret. Bd.*, 172 F.3d 22, 28 (1st Cir. 1999) (finding modification of retirement benefits to be constitutional because "it is easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries (e.g., those who have retired).").

In similar cases, courts have held that retirees are not entitled to a particular COLA formula in perpetuity where, as here, no statutory language expressly provides for such right. In *Levine v. State Teachers Retirement Board*, No. CV 9605562830, 1998 WL 46441 (Conn. Super. Jan. 28, 1998), a class of teachers eligible for retirement benefits claimed that a "statute create[d] a 'vesting' in their retirement benefits that includes the COLA amounts in effect at the time of this vesting" and "they have contractual rights to 'pension benefits and then-existing COLA.'" *Id.* at *3. The *Levine* court examined the text of the statute and found no Contract Clause violation because: "*There is no clear statement from the legislature that it created a contract with the plaintiffs as to a specific COLA amount.*" *Id.* at *8. The court thus ruled that "the plaintiffs hold no substantive rights to a particular COLA amount. . . . [and] plaintiffs are not statutorily entitled to receive a particular COLA amount." *Id.* at *4.

Here, there is nothing in the language of any COLA provision that unmistakably establishes that the General Assembly prohibited future legislatures from modifying the COLA formula for retirees. Minimally, one reasonable reading of the COLA provisions is that the COLA formulas are not fixed for life. Finding the COLA formula to be changeable is not only supported by the language and history of the COLA benefit, but is the required result because "when a statute is susceptible to both constitutional and unconstitutional interpretations [courts] *must* adopt the constitutional interpretation of the statute." *Renteria*, 811 P.2d at 799.

(1) Plaintiffs' Statutory Construction Arguments Are Flawed

Plaintiffs' first argument for a lifetime right to an unchangeable COLA for PERA retirees is that "State law provides that members of PERA who have 'met the age and service requirements . . . shall, upon written application of the board, receive service retirement benefits, according to the benefit formula set forth in 24-51-603 (1) (a), (2), and (3).'" Pls' Mot. at 5 (quoting C.R.S. § 24-51-602 (2010)) (emphasis deleted). The statutory provisions cited by Plaintiffs, however, do *not* include the COLA provision which is located at C.R.S. § 24-51-1002. Rather, sections 24-51-603 (1) (a), (2), and (3) cover *only* the base benefit and reinforces the fact that the COLA formula is distinct from the base benefit.

Plaintiffs next find significance in the 1994 amendments to the COLA and claim that, *for the first time*, the General Assembly created a contractual right to a COLA benefit. Pls' Mot. at 7. Plaintiffs fundamentally misunderstand the pre- and post-1994 COLA provisions and thus the changes made by the 1994 legislation. As explained above, between 1980 and 1994, the COLA consisted of two parts: (1) a base COLA (lesser of 4% noncompounded or inflation in 1993); and (2) a supplemental COLA paid every two years from a cost-of-living stabilization fund ("CLSF") that made up the difference between the base COLA and actual inflation. *See, e.g.*, App. B-17 (C.R.S. §§ 24-51-1002(2) (annual COLA); *id.* at -1005 & -1006 (biannual CLSF) (1992)). The annual *base* COLA thus was just as "automatic" prior to 1994 as it was after 1994. However, whether some or all of the COLA was automatic each year does nothing to answer the question of whether the COLA was, as Plaintiffs claim, frozen for the lifetime of retirees.

Plaintiffs next argue that the General Assembly's use of the word "shall" in COLA provisions supports their position. Pls' Mot. at 7. Plaintiffs are mistaken because the word "shall" is used in *all* of the COLA provisions going back decades—all of which were subsequently amended and changed the COLA paid to retirees. For example, beginning in 1970, when the first PERA COLA was enacted, the statute stated: "The amount of the benefit on the effective date of the benefit *shall* be increased by one and one-half per cent for each full year contained in the period . . . ." *See, e.g.*, App. B-1 (C.R.S. §§ 111-1-36; 111-2-27 (1970)). That COLA provision was amended in 1974 to read: "The amount of the benefit on the effective date of the benefit *shall* be increased by three per cent for each full year contained in the period . . . ." *See, e.g.*, App. B-3 (C.R.S. § 24-51-135 (1975)). The supplement COLA payment from the Cost of Living Stabilization Fund from 1980 to 1994 also used the word "shall", stating: "Such increases *shall* be paid in addition to any other benefits or increases paid pursuant to the provisions of this article." *See, e.g.*, App. B-17 (C.R.S. § 24-51-1005 (1992)).

Likewise, the current COLA provision in Senate Bill 10-001 also requires that COLA payments "shall" be made *under the current formula* but certainly does not "unmistakably" establish the General Assembly's intent to create a contractual right to an unchangeable COLA. By merely using the word "shall," the General Assembly plainly had no intention in 1973, 1974, 1982, 1994, 2001, 2010, or any other time it adjusted the COLA, to create a contractual right to a frozen COLA formula at *the same time* it changed the retiree COLA formula.

Plaintiffs also include a reference to C.R.S. § 24-51-502 (2010) addressing service credit and assert that it supports their claim that "they vested in the previous COLA formula." Pls' Mot. at 17. On the contrary, section 24-51-502(3) was added by the legislature to resolve into what tier of benefits a particular service credit purchase of past employment fell. This is explained in the legislative history of Senate Bill 06-235 during the House Finance Committee hearing held on May 2, 2006. *See* House Fin. Comm. Hrg. on S.B. 06-235, 2006 Legis. (Colo. May 2, 2006) (describing the bill as "[i]f [members] leave their account with PERA, they will return in the plan they left. If not, reinstatement adds service to the plan at the time of purchase," and that purchasers "buy into the program that is in effect at the time of purchase") (Greg Smith, PERA General Counsel). Plaintiffs' need to rely on a plainly inapplicable service credit statute exemplifies that the COLA provisions contain no durational language and nothing to prove that the General Assembly "clearly and unmistakably" ceded its authority to readjust the COLA formula for retirees.

(2) <u>Even if PERA Letters and Other Informal Information Could Be Considered, It Supports PERA's Position</u>

Parties cannot rely on extrinsic evidence to vary the meaning of an unambiguous statute. *See, e.g., Holcomb v. Jan-Pro Cleaning Sys. of S. Colo.*, 172 P.3d 888, 890 (Colo. 2007). Even where a statute is ambiguous, courts rely on "legislative history, the consequences of a given construction, and the end to be achieved by the statute." *See People v. Disher*, 224 P.3d 254, 256 (Colo. 2010); *see also* C.R.S. § 2-4-203 (2011) (listing "aids in construction" when a statute is ambiguous to include "[t]he object sought to be attained," "[t]he circumstances under which the statute was enacted, "[t]he legislative history," "[t]he common law or former statutory provisions," "[t]he consequences of a particular construction" and "[t]he legislative declaration or purpose").

Here, for the reasons explained above, the COLA provision are not ambiguous and nothing in the statutory language unmistakably establishes that the General Assembly intended to grant every retiree a lifetime right to the COLA in place at his or her retirement. Even if the Court considers the PERA fact sheets and newsletters attached to Plaintiffs' motion, informal communications are not the type of extrinsic evidence that the Court could properly consider to determine the meaning of a statute. Rather, if the Court found the COLA provisions ambiguous, the Court could determine the General Assembly's intent by considering: (1) 40 years of prior law reflecting numerous changes to the COLA formulas; (2) the legislative history of the COLA provisions; (3) the dire consequences of Plaintiffs' construction on the sustainability of the PERA pension fund; and (4) the goal of the COLA provisions. *See Disher*, 224 P.3d at 256; C.R.S. § 2-4-203. All such sources support the conclusion that the General Assembly never intended to, and did not, grant retirees the right to a COLA formula for life without change.

In addition, informal *PERA* communications regarding a statutory provision does nothing to inform the Court as to the *General Assembly's* intent as to the meaning of the statute. The documents on which Plaintiffs rely state precisely such fact.

Plaintiffs' Exhibit 7, a PERA fact sheet entitled "Benefits At A Glance," expressly recognizes that the statutory language governs:

> This [July 2004] fact sheet provides general information about Colorado PERA benefits. PERA membership rights, benefits, and obligations are governed by Title 24, Article 51 of the Colorado Revised Statutes, and the Rules of the Colorado Public Employees' Retirement Association, which *take precedence over any interpretations in this fact sheet*.

Pls' Ex. 7. Even considering the content of the fact sheets and Plaintiffs' other attachments, there is no language in any document stating that the COLA formula in place at retirement is for life without change. On the contrary, numerous retirement benefits discussed in PERA's informal communications have changed thus defeating Plaintiffs' position that retiree benefits freeze at retirement.

C. <u>The DPS Plan Documents Likewise Contain No Language Establishing that the COLA Formula Was Unchangeable for the Lifetime of a DPS Retiree</u>

Plaintiff Justus, who worked for the Denver Public Schools and was never a State of Colorado employee or active PERA member, became eligible to retire on October 28, 2002, and retired on December 20, 2003. The 2002 and 2003 DPS Plan provisions under which Justus claims a right to lifetime benefits without change are as follows:

> Monthly retirement and survivor benefit payments, including the increases determined under the provisions of Sections 70.55, 70.57, 70.59, 70.60, 70.80, and 70.85 attributable to retirement or death of an eligible employee of this District who retired or died after December 1, 1945, shall be increased as follows: (1) Effective on January 1 of every year, beginning January 1, 2001, the retirement allowance or survivor benefit payment payable on December 31 of the preceding year shall be increased by three and one-quarter percent (3-1/4%).

App. C-19 (DPSRS Plan § 70.88 (2003)). Like the PERA COLA provisions, the DPS cost of living adjustment formulas, called an Annual Retirement Allowance Adjustment (ARAA), contain no durational language stating that a retiree is entitled to a particular COLA formula until his or her death.

Prior to 2001, the base amount of the DPS cost of living adjustment was increased by a *noncompounded* percentage. For example, in 1999, the base benefit was increased by 3.25% noncompounded:

> Monthly retirement and survivor benefit payments, including the increases determined under the provisions of Sections 70.55, 70.57, 70.59, and 70.60, and 70.80 attributable to retirement or death of eligible employees of this District who retired or died after December 1, 1945 shall be increased as follows: (1) Effective on January 1 of every year, beginning January 1, 1986, the basic retirement allowance or survivor benefit payment payable shall be increased by an amount equal to three and one-quarter percent (3-1/4%) thereof for each full calendar year which has elapsed since such basic benefits first became payable . . . .

App. C-15 (DPSRS Plan § 70.70(1) (1999)). The cost of living adjustment provisions in earlier DPSRS Retirement and Benefits Plans each specify a *noncompounding* rate (from 1% to 3.25%) over the base retirement benefit. Each ARAA formula builds on a different prior base benefit and COLA changes. Not one of the DPSRS cost of living adjustment provisions includes any language stating that the particular COLA provision in place at retirement is fixed for the lifetime of a retiree.

Plaintiff Justus expressly acknowledged the changeable nature of the ARAA formula when he signed a "Retirement Conference Checklist" immediately prior to his December 2003 retirement. On November 7, 2003, Plaintiff Justus met with DPS personnel to discuss his retirement benefits, including his cost of living adjustment. At the conclusion of that meeting, Justus signed a "Retirement Conference – Checklist" expressly stating that his "current" cost of living adjustment after retirement was "***subject to change***." Ex. 4 (Gary Justus Retirement Checklist). The Retirement Conference Checklist stated in full: "*Current* Annual Retirement Allowance Adjustment (ARAA) is 3.25% compounded annually (*subject to change*)." *Id.* There is a handwritten check mark next to the ARAA language indicating that such issue was specifically discussed during Plaintiff Justus' retirement conference.

DPSRS first began using the "Retirement Conference-Checklist" in early 1987. DPSRS used different versions of the checklist each indicating that the ARAA was changeable. The checklists used from 1987 through 2009 stated: (1) the "current" ARAA is "subject to change" (2003-2009); (2) the ARAA is "presently" a certain percentage (1997-2001); (3) the ARAA "percent may vary" (1991-1997); and (4) the ARAA "percent may vary" preceded by blank spaces to identify either the date and the current ARAA percentage or only the current ARAA percentage. Ex. 5 (DPSRS Retirement Checklist Compilation).

Plaintiffs fail to include any DPS COLA language in their motion and make no argument as to why any DPS COLA language created a lifetime right to a particular ARAA formula. Rather, Plaintiffs only claim that "DPSRS has been providing *some form* of guaranteed annual adjustment to member pensions since at least 1981—when DPSRS began increasing pensions annually by 3.0% (noncompounding)." Pls' Mot. at 9. Plaintiffs are correct—DPSRS has provided "some form" of a COLA to retirees, but not the *same form* for life—which is what Plaintiffs claim to be their contract right here.

D. <u>The Colorado Legislature and the DPS Retirement Board Have Repeatedly Modified the Cost of Living Adjustment Formula for Retirees</u>

Here, since 1969—when the Colorado Legislature first added a COLA benefit to base pension benefits—it has repeatedly modified the COLA benefit paid to retirees. As set forth in detail above, the General Assembly has: (1) changed the base COLA percentage numerous times; (2) changed from a base and supplemental COLA to a single COLA; (3) tied the COLA to inflation; (4) provided complete inflation catch-up under two different mechanisms; (5) added and eliminated "banking" provisions; (6) capped the COLA; (7) eliminated the tie to inflation; (8) changed from a noncompounding rate to compounding; (9) re-tied the COLA to inflation; and (10) most recently, tied the COLA to the financial health and performance of the PERA pension fund. Over 40 years, the General Assembly passed on every one of these changes to retirees.

The changeable nature of the PERA COLA is exemplified by the General Assembly's 1993 modifications to the COLA benefits for retirees—the same legislation that Plaintiffs rely on to argue that a contract right to a COLA first arose. In 1993, the General Assembly became concerned that the uncapped and escalating COLA benefits adversely impacted the actuarial soundness of the PERA pension plan. App. A-16(a) (House Fin. Comm. Hrg. on S.B. 93-1324, 1993 Legis. at 5:6-10 (Colo. Mar. 24, 1993)) (Rep. Martin, bill sponsor); *id.* at 7:22-25, 8:1 ("I think there was a fear by some legislators that if we continue doing what we're doing, we're creating false expectations on the parts of retirees that we will manage inflation when, in fact, we don't think we can afford to long term.") (Rob Gray, PERA representative).

In response, the General Assembly eliminated the Cost of Living Stabilization Fund and the biannual payments that had, since 1980, increased retiree benefits to the actual rate of inflation (with no cap). In its place, the General Assembly instituted a COLA limited to the *lesser* of actual inflation or 3.5% compounded, thus meaning that in periods of high inflation retirees would no longer receive a cost of living increase to match actual inflation.

The General Assembly in 1993 thus modified the COLA benefit for the same reason it did in 2010—to improve the actuarial soundness of the PERA plan and to reduce the escalating cost of the COLA benefit. In 1993, in a high inflation environment, that meant ending the 25-year practice of making the COLA benefit a complete catch up to inflation. In 2010, in a low inflation environment, that meant decreasing the 3.5% compounded COLA that has vastly outpaced inflation and exceeded investment returns.

As set forth above, the PERA COLA provisions from 1969 to 2011, and the DPSRS Plan documents from 1965 to 2009, contain no language, much less "clear and unmistakable" language, granting retirees an unchangeable COLA for the rest of their lives. The complete absence of any such right is further established by the numerous changes to the cost of living formulas for retirees under both the PERA and DPSRS systems. No PERA or DPS retiree has ever received what Plaintiffs claim to be their contract right—a COLA frozen at retirement. Plaintiffs ask the Court to create a contract right that has not existed in the 80 years of PERA's or DPS' existence.

The latest in the long history of legislative modifications to the COLA formula does not violate the Contract Clauses of either the Colorado or United States Constitutions. The Court's analysis need go no further to deny Plaintiffs' summary judgment motion under *DeWitt*, *McPhail*, or any other Colorado authority. Because Plaintiffs ignore *DeWitt* and its application of the modern Contract Clause test, Plaintiffs make no attempt to meet their additional burden to prove that Senate Bill 10-001: (1) substantially impaired a contract right by violating the parties' reasonable expectations; and (2) was unreasonable, unnecessary, and did not address a legitimate public purpose. *In re Dewitt*, 54 P.3d at 858-59. Accordingly, even should the Court find that retirees have a lifetime right to the COLA formula that was in place at their retirement, Plaintiffs' summary judgment motion must be denied.

Consistent with the Court's December 2, 2010 trial management order, PERA refers the Court to its separate, simultaneously filed motion seeking summary judgment in its favor on Plaintiffs' Contract Clause claims, and all other claims. In that motion, PERA discusses the remaining two elements of the modern Contract Clause test adopted in *DeWitt*.

CONCLUSION

PERA respectfully requests that the Court deny Plaintiffs' summary judgment motion on Count I of their Second Amended Complaint asserting a violation of the Colorado Contract Clause.

Respectfully submitted this 17th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2011, a true and accurate copy of the foregoing PERA Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment was served via Lexis-Nexis File & Serve on the following individuals:

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