SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

COLORADO COURT OF APPEALS
Court of Appeals Case No. 11CA1507

_____

City and County of Denver District Court No. 10CV1589
Honorable Robert S. Hyatt, Judge

Petitioners/Plaintiffs:
GARY R. JUSTUS; KATHLEEN HOPKINS; EUGENE HALAAS; and ROBERT P. LAIRD, JR., on behalf of themselves and those similarly situated,

v.

Respondents/Defendants:
THE STATE OF COLORADO; GOVERNOR JOHN HICKENLOOPER, in his official capacity; COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION; CAROLE WRIGHT, in her official capacity; and MARYANN MOTZA, in her official capacity.

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Supreme Court Case No.:
2012SC906

PETITIONERS-PLAINTIFFS' REPLY BRIEF

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 COLORADO COURT OF APPEALS Court of Appeals Case No. 11CA1507 City and County of Denver District Court No. 10CV1589 Honorable Robert S. Hyatt, Judge **Petitioners/Plaintiffs:** GARY R. JUSTUS; KATHLEEN HOPKINS; EUGENE HALAAS; and ROBERT P. LAIRD, JR., on behalf of themselves and those similarly situated, v. **Respondents/Defendants:** THE STATE OF COLORADO; GOVERNOR JOHN HICKENLOOPER, in his official capacity; COLORADO PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION; CAROLE WRIGHT, in her official capacity; and MARYANN MOTZA, in her official capacity.	▲ **COURT USE ONLY** ▲ Supreme Court Case No.: 2012SC906

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

It contains 3,592 words.

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I. INTRODUCTION

In its decision below, the Court of Appeals concluded that this Court's rulings in Police Pension and Relief Board of the City and County of Denver v. McPhail, 338 P.2d 694 (Colo. 1959), and Police Pension and Relief Bd. of City and County of Denver v. Bills, 366 P.2d 581 (Colo. 1961), are "dispositive of whether plaintiffs here have a contractual right to a particular COLA," and that plaintiffs do in fact "have a contractual right to the COLA in effect when their rights vested." Justus v. State, ___P.3d ___, 2012 WL 4829545, at *7 (Colo. App. Oct. 11, 2012).

In their respective Opening-Answer Briefs, the PERA and State Defendants strain to avoid the Court of Appeals' straightforward analysis, urging this Court to disregard McPhail and Bills, as well as the State's own interpretation of these cases in the Colorado Attorney General's "Formal Opinion." Plaintiffs Gary R. Justus, Kathleen Hopkins, Eugene Halaas, Jr., and Robert Laird, Jr., on behalf of themselves and those similarly situated (collectively, "Retirees"), will not belabor their points as to this Court's precedents and the State's interpretation of same – specifically that with regard to pension benefits for the already retired or eligible to retire, In Re Estate of DeWitt, 54 P.3d 849 (Colo. 2002), did not modify the test as applied in McPhail and Bills and therefore once, as the Court of Appeals found the

already retired or eligible to retire had a contractual right to the COLA raise, then any breach of that right was unconstitutional -- as Retirees' opening brief sets forth the pertinent analysis. See Retirees' Amended Brief at 19-25. Instead, Retirees here address a few discrete points which they believe Defendants have misstated or inadequately explained.

II. ARGUMENT

A. The COLA Benefit Is Part And Parcel of Retirees' Pension

In their Briefs, Defendants argue that Retirees are not entitled to a COLA at the levels in place at the time of their retirements. See PERA Brief at 24-32. Defendants are simply wrong.

As the Court of Appeals explained, "neither DeWitt nor any other supreme court decision casts doubt on the continued viability of the principles the court applied in both McPhail and Bills to determine whether, in this context, a contract right exists." 2012 WL 4829545, at *8. The Court of Appeals further observed that "Colorado appellate decisions analyzing whether a statute's language and the circumstances surrounding its enactment manifest an intent to create an enforceable contractual right have continued to regard the holdings of McPhail and Bills as authoritative (even with respect to the 'limited' vested rights of those who are ineligible to retire before an adverse change in a pension benefit)." Id. (citing

Colorado Springs Fire Fighters Ass'n., Local 5 v. City of Colorado Springs, 784 P.2d 766, 770 (Colo. 1989) ("Rights which accrue under a pension plan are contractual obligations which are protected under article II, section 11, of the Colorado Constitution and article I, section 10 of the United States Constitution."); Peterson v. Fire & Police Pension Ass'n., 759 P.2d 720, 723–25 (Colo. 1988) (applying the principles of McPhail and Bills to conclude that a surviving spouse had only a limited vested right to survivor benefits for a member who was not eligible for retirement before he died).

With regard to whether the Retirees have a contractual right to a particular COLA, the Court of Appeals analyzed the applicable language and surrounding circumstances and found that the Legislature intended to create an enforceable right. That court concluded: "We perceive no meaningful distinction between the escalation provision at issue in McPhail and Bills and a COLA provision: both increase plan members' pension benefits after they have retired, pursuant to a specified formula." 2012 WL 4829545, at *8 (citing Hayden v. Hayden, 665 A.2d 772, 774–75 (N.J.Super.Ct.App.Div.1995) ("post-retirement [COLA] increases are as much a part of the pension as the amounts initially established by the pension system on retirement"; a COLA is bargained for and granted based on an employer's assessment of the employees' worth) and Arena v. City of Providence,

919 A.2d 379, 395 (R.I. 2007) (concluding that the COLA was a vested pension benefit though the ordinance at issue did not specify whether the COLA was a mere gratuity or a vital part of the pension).

If Defendants' argument is taken to its logical conclusion, then the COLA is just a gratuitous benefit; PERA members have no right in *any* COLA or other post-retirement adjustment to their pension and the Legislature would have *carte blanche* to eliminate the Retirees' entire COLA benefit forever, whether or not that elimination was reasonable and necessary. If the COLA is not a vested benefit, Retirees would have no safeguard against the effects of inflation as future legislatures could eliminate the COLA on a mere whim.

Finally, the fact that the COLA formula changed over the course of Retirees' careers is of no import. Retirees do not dispute that while a particular Retiree was employed, and until he or she became eligible to retire, the Legislature had the authority to modify the applicable COLAs, including lowering or eliminating them. As Bills held:

> We now hold that not only prior to their actual retirement, but also prior even to their eligibility to retire, there was a limited vesting in these plaintiffs of their pension rights to the end that **although prior to their eligibility to retire the pension plan could be changed**, it could not be abolished nor could there be a substantial change of an adverse nature, without a corresponding change of a beneficial nature. An employee's pension rights prior to his eligibility to retire may be modified for the purpose of keeping the pension system flexible to permit adjustments in

> accord with changing conditions if at the same time the basic integrity of the plan is still maintained. **Hence, prior to eligibility for retirement changes may properly be made in a pension plan if these changes strengthen or better it, or if they are actuarially necessary.**

Bills, 148 Colo. at 390 (emphasis added).[1] However, once a Retiree becomes eligible to retiree, his or her right to a pension becomes fully vested, and he or she has every right to expect that pension benefits, including the COLA, could not be reduced. See McPhail, 139 Colo. at 343.

B. The Drastic COLA Reductions Were Not "Reasonable And Necessary"

1. The "reasonable and necessary" analysis is an essential element in the application of the contracts clause framework.

Retirees' opening brief addressed the general Colorado contracts clause framework applied in DeWitt, which did not involve impairment of any government contract. Retirees explained why DeWitt does not eviscerate the on-point public pension authority in McPhail and Bills. See Retirees' Amended Opening Brief at 19-25. In brief, DeWitt construed the Colorado Constitution and applied the three-part contracts clause analysis previously adopted by the United States Supreme Court with respect to the U.S. Constitution. Under DeWitt's general framework, a state law that operates as a substantial impairment of a

[1] Because of this principle, PERA members who were not eligible to retire prior to the effective date of SB 10-001 are not included in this putative class action: their rights differ from those who were already eligible to retire or were already retired when SB 10-001 became effective.

contractual relationship can pass constitutional muster, but **only** where there is a significant and legitimate public purpose for the challenged impairment, **and** that impairment is "reasonable and necessary" to serve that important public purpose.

Even if this Court finds that the general DeWitt analysis applies to public pension cases such as this one[2] and that the COLA is a vested benefit, then the Court may find as a matter of law that the reduction of the COLA is per se unreasonable since it reduces benefits of those already retired, or eligible to retire, (Retirees' Amended Opening Brief at 25), or that the reduction constitutes a "substantial impairment" given the size of the reduction. Retirees' Amended Opening Brief at 30. Alternatively, the Court could remand the case to the District Court to permit the Retirees to engage in full discovery and present evidence that the reduction was neither reasonable nor necessary.

2. Defendants have not met their burden of proof on the issue of whether the reduction of the COLA benefit was "reasonable and necessary."

As this case was decided on summary judgment, Defendants, as the moving parties, had the burden of establishing the non-existence of a genuine issue of material fact. Continental Airlines, Inc. v. Keenan, 731 P.2d 708, 712 (Colo. 1987).

[2] Retirees explained in their opening brief why DeWitt does not in fact control public pension cases such as this one. See Retirees' Amended Opening Brief at 19-24.

Moreover, the burden rests with Defendants to establish that the Legislature's actions were reasonable and necessary to serve an important public purpose. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 31 (1977) ("In the instant case the State has failed to demonstrate that repeal of the 1962 covenant was similarly necessary."); University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096, 1106 (9th Cir. 1999) ("Defendants bear the burden of proving that the impairment was reasonable and necessary."); Toledo Area AFL-CIO v. Pizza, 154 F.3d 307, 323 (6th Cir. 1998) ("Once it is determined that the state regulation is a substantial impairment and the extent of the impairment is measured, the burden shifts to the state."); Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868, 872 (Minn. 1986) ("those urging the constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation"). In short:

> [t]he relevant inquiry for the Court is to ensure that states neither "consider impairing the obligations of [their] own contracts on a par with other policy alternatives" nor "impose a drastic impairment when an evident and more moderate course would serve its purposes equally well," United States Trust, 431 U.S. at 30–31, 97 S.Ct. at 1522, nor act unreasonably "in light of the surrounding circumstances," *id.* at 31, 97 S.Ct. at 1522. Some factors to be considered under this inquiry include: "whether the act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." *See* Energy Reserves Grp., 459 U.S. at 410 n. 11, 103 S.Ct. 697 (citing Blaisdell, 290 U.S. at 444–47, 54 S.Ct. 231); *see also* Spannaus, 438 U.S. at 242–50, 98 S.Ct. 2716.

Donohue v. Mangano, 886 F.Supp.2d 126, 159-60 (E.D.N.Y. 2002).

"The mere existence of a financial crisis and consequently a legitimate public purpose for the passage of [pension reform legislation] does not end the relevant inquiry." Id. Rather, "[t]hat a contract-impairing law has a legitimate public purpose does not mean there is no Contracts Clause violation. The impairment must also be one where the means chosen are reasonable and necessary to meet the stated legitimate public purpose." Id. (citing Buffalo Teachers Fed'n. v. Tobe, 464 F.3d 362, 369 (2d. Cir 2006); see also Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 993 (2d Cir. 1997) ("A law that works substantial impairment of contractual relations must be specifically tailored to meet the societal ill it is supposedly designed to ameliorate.").

"Unless the State itself is a contracting party. . . '[a]s is customary in reviewing economic and social regulation. . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412-413 (1983) (quoting U.S. Trust Co., 431 U.S. at 22-23). Alternatively, where the State attempts to abridge its own contract:

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial

> obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

U.S. Trust Co., 431 U.S. at 26; see Energy Reserves Grp., 452 U.S. at 412 n.14 ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."); Carlstrom v. State, 694 P.2d 1, 5 (Wash. 1985) (citing U.S. Trust Co., 431 U.S. at 30-31) ("[f]inancial necessity though superficially compelling, has never been sufficient of itself to permit states to abrogate contracts.").

The State Defendants urge this Court to reverse the Court of Appeals and conclude that the reasonable and necessary determination can be made on the current record. However, the current record is not the full record since discovery has not been completed. See State Defendants' Opening-Answer Brief at 13-19. In fact, the State Defendants' arguments on this point only serve to underscore why full discovery is necessary. Notably, the State Defendants cite the testimony of "[m]any who spoke in support of Senate Bill 10-001," wherein PERA purportedly was "praised" for its "long, open consultation process" in formulating the Bill. Id. at 14. The fact that advocates of SB 10-001 spoke highly of its drafters does not

establish that the specific parameters of SB 10-001 are either reasonable or necessary.

The State Defendants also heavily rely on various hearsay statements offered for the truth of the matter asserted, citing testimony from certain "representatives" of a PERA member coalition that the COLA changes are "necessary," "the best solution possible," and "reflective of our goal of long-term fiscal stability for PERA." Id. at 14-15. The State Defendants also quote the testimony of one witness to the apparent effect that it "would be the most immoral thing I could imagine" if SB 10-001 were not enacted. Id. at 16. In further testimony touted by the State Defendants, another witness stated that it would be "selfish" not to pass the Bill. Id. at 16-17.

The quoted testimony does nothing to establish the absence of genuine disputed issues of material fact, which is required for a summary judgment ruling on whether the COLA changes enacted in SB 10-001 were both reasonable and necessary. Additionally, State Defendants offer nothing else to support their assertion. It would be a rare legislative hearing where proponents of a bill did not testify in its favor.[3]

[3] Retirees do not believe that it is proper to decide whether the particular COLA changes set forth in SB 10-001 were both reasonable and necessary on the basis of competing testimony before the Colorado Legislature. However, Retirees note – as

After discovery has been conducted and evidence submitted in the records, courts have rejected governmental claims of "economic necessity," unless the government is on the brink of financial ruin. In AFSCME v. City of Benton, Arkansas, 513 F.3d 874 (8th Cir. 2008), a union representing non-uniformed city employees sought to enjoin the City from terminating the City's payment of retiree health insurance premiums. After finding that the union contract providing the benefits had been substantially impaired, the Eighth Circuit rejected the City's "economic necessity" argument:

> The district court also found that the City had not demonstrated a significant economic interest to justify its actions. Although economic concerns can give rise to the City's legitimate use of the police power, such concerns must be related to **"unprecedented emergencies," such as mass foreclosures caused by the Great Depression**. Allied Structural Steel Co. v. Spannaus, 439 U.S. 234, 242, 98 S.Ct. 2716, 57 L.Ed 2d 727 (1978). Further, to survive a challenge under the Contract Clause, any law addressing such concerns must deal with a broad, generalized economic or social problem.

Id. at 882 (emphasis added); Professional Firefighters Ass'n. of Omaha, Local 385 v. City of Omaha, 2010 WL 2426446, at *5 (D. Neb. June 10, 2010) (citing Benton, 513 F.3d at 882) ("While it is always in the interest of the public to not increase taxes, the court finds the sanctity of the contractual relationships between

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the State Defendants do not – that there was ample testimony against the Bill as well as in its favor. See State Defendants' December 20, 2013, App. 6, Transcript of Senate Finance Committee Hearing, at 87 et seq.

the parties is of greater interest to the public unless there is an unprecedented emergency.")

Especially given that Defendants have the burden of proof, Retirees should at the very least be provided the opportunity to conduct full discovery and present evidence to the District Court that a "more moderate course would serve [the Defendants'] purposes equally well." Donohue, 886 F.Supp.2d at 159 (citing U.S. Trust Co., 431 U.S. at 30–31). For example, the Ninth Circuit found in a case involving a delay in salary payments to state workers:

> As the district court stated, "[a]lthough perhaps politically more difficult, numerous other alternatives exist which would more effectively and equitably raise revenues." Other options available to Defendants were a federal maximization project (to obtain additional reimbursements from the federal government), additional budget restrictions, the repeal of tax credits, and the raising of taxes. Defendants have not explained why it is reasonable and necessary that the brunt of Hawaii's budgetary problems be borne by its employees.

University of Hawaii Professional Assembly v. Cayetano, 183 F.3d 1096, 1107 (9th Cir. 1999) (finding that pay lag law to not be reasonable and necessary).

Here, Retirees should at the very least be provided the opportunity to hire pension actuaries and introduce expert reports to the Court. This evidence will demonstrate that there were equally viable options that the state could have undertaken without infringing on the rights of those *fully* vested in their pensions.

In addition, Retirees should at the very least be entitled to conduct discovery on the State's culpability in contributing to the funding deficits, and have a court determine whether it is reasonable for Retirees to now pay for the State's conscious choice to fail to adequately fund PERA by keeping employer rates artificially low. In a March 2010 Report, the PEW Center on the States reported that Colorado contributed only 68.3% of its full actuarial required contribution over the past 10 years, and flagged it as one of ten "lagging" states. PEW Report, CD Record p. 1264. For many years, Colorado failed to make its actuarial required contributions even though its contribution rates have been much lower than the national average. Most government employers pay the employer's share of Social Security (6.2%) and make contributions to a state pension system. In 2008, the median contribution rate of those states which also pay into Social Security was 8.7%. Thus, the median state contributed 14.9% to its employees' retirement. Several neighboring states had even higher combined Social Security/public pension rates: Arkansas PERS – 18.74%; New Mexico PERA – 22.79%; Utah SRS – 17.82% to 20.42%; Oklahoma PERS – 18.66%. 2008 Comparative Study of Major Public Employee Retirement Systems, Wisconsin Legislative Council (revised May 2010), CD Record p. 1318. In contrast, Colorado's employers only paid 10.15% into PERA in 2008 and nothing into Social Security. Id.

Moreover, Retirees should at the very least be given the opportunity to take a deposition of former PERA Executive Director Meredith Williams in order to discover what PERA's historical position has been with regard to legal protections afforded COLAs. For example, Mr. Williams wrote in December 2008 in an issue of the PERA publication "Retiree Update":

> PERA continues efforts to work with other large pension plans and others to ensure that our members' and retirees' retirements are protected and to find a resolution to the current market turmoil. A Colorado Attorney General's (AG) Formal Opinion concerns constitutional limits to the ability of the state General Assembly to alter retirement benefits for public employees under the pension program administered by PERA. The AG's opinion states that when a PERA member retires and begins receiving pension benefits, such member's pension rights have fully vested and such pension benefits may not be reduced. Current members may also have certain pension benefit rights protected under the Constitution, although the General Assembly may make changes to such benefits if the changes are balanced by corresponding changes of a beneficial nature or are actuarially necessary.

Retiree Update, December 2008, CD Record p. 1420.

Thus, even if this Court disagrees with Retirees' primary contention (i.e., that as a matter of law the reduction of the COLA is per se unreasonable since it reduces benefits of those already retired or eligible to retiree (Retirees' Amended Opening Brief at 25), and/or that the reduction constitutes a "substantial impairment" given the size of the reduction (id., at 30), the aforementioned factual

issues are just a few of those that show why the Retirees should be granted a remand to develop a full evidentiary record.[4]

CONCLUSION

For the foregoing reasons, Retirees respectfully asks this Court to find that the modification to the Retiree COLA as provided in Senate Bill 10-001 is unconstitutional as a matter of law. Alternatively, the case should be remanded to the District Court for further proceedings.

Respectfully Submitted,

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[4] Indeed, the South Dakota and Minnesota cases cited by Defendants were decided on summary judgment only **after** the parties engaged in full discovery. See Swanson v. State, No. 62-CV-10-05285 (Minn. Dist. Ct. June 29, 2011) (PERA C.A. Br. Ex. A); Tice v. State, Civil No. 10-225 (S.D. Dist. Ct. Apr. 11, 2012) (PERA C.A. Br. Ex. B).

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2014, a true and correct copy of the foregoing **PETITIONERS-PLAINTIFFS' REPLY BRIEF** was e-filed with the **Clerk of the Court** via ICCES (Integrated Colorado Courts E-filing System) that will electronically notify and serve all registered, interested parties to the case, including the following:

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