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Appeal from Court of Appeals, 2011CA1507 *Opinion Issued by Judge Jones (Graham and Terry, JJ., Concurring)* *District Court, City and County of Denver, 2010CV 1589* *Hon. Robert S. Hyatt, District Court Judge*	
Petitioners/Cross-Respondents: Gary R. Justus, Kathleen Hopkins, Eugene Halaas, Jr., and Robert P. Laird, Jr. v. **Respondents/Cross-Petitioners:** The State of Colorado; Governor John Hickenlooper, in his official capacity; Colorado Public Employees' Retirement Association; Carole Wright, in her official capacity; and Maryann Motza, in her official capacity.	Supreme Court Case No. 2012SC906
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PERA AND STATE DEFENDANTS' REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply 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 Reply Brief complies with C.A.R. 28(g). It contains 3,378 words.

The Reply Brief also complies with all other requirements of C.A.R. 28(k). It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and, if not why.

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INTRODUCTION

Plaintiffs offer no basis for exempting pension claims from the modern Contract Clause framework adopted in *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002). Their constitutional challenge to SB 10-1 fails each *DeWitt* prong.

First, Plaintiffs' claimed contractual right never existed. The COLA statutes' lack of durational or "entitlement" language and the surrounding circumstances of repeated COLA formula changes negate any contractual entitlement to a COLA frozen for life.

Second, SB 10-1 did not substantially impair Plaintiffs' reasonable expectations. To the contrary, given the many past COLA changes, statutory changes to future COLAs were foreseeable.

Third, even if Plaintiffs somehow could establish the first two prongs, their challenge would fail under *DeWitt*'s final prong because SB 10-1 was reasonable and necessary to serve a significant public purpose. As laws are presumed constitutional, and deference is owed to the General Assembly, Plaintiffs must demonstrate that SB 10-1 was unnecessary and unreasonable. They have not and cannot. The SB-1 adjustments, including to future COLAs, were reasonable and necessary based on PERA's undisputed financial condition at that time.

REPLY ARGUMENT

I. Plaintiffs Offer No Basis for Exempting Pension Claims from the Modern Contract Clause Framework Adopted in *DeWitt*.

Both courts below held correctly that the modern Contract Clause framework, applied without exception by the U.S. Supreme Court and adopted by *In re Estate of DeWitt*, 54 P.3d 849 (Colo. 2002), applies here. While Plaintiffs previously suggested *DeWitt* has no applicability to public pensions, they now take a slightly different tack, urging that public pension changes—including changes to prior COLA rates—are "per se unreasonable." A-R Br. 6. This is but a thinly-disguised attack against applying *DeWitt*—which held the Contract Clause is "not to be interpreted as absolute," 54 P.3d at 858—to public pensions. It should be rejected because it has no basis in constitutional text or case law.

The framework for resolving this case should be the same tripartite inquiry governing all Contract Clause challenges. The "[f]irst" issue is "whether there is a contractual relationship." *Id*. If so, the challenging party must "prove substantial impairment" of that contract by "demonstrat[ing] that the law was not foreseeable and thus disrupts the parties' expectations." *Id*. Finally, even a substantial impairment is constitutional if it meets the standards of "necessity and reasonableness." *Id*. at 858-59. Here, Plaintiffs' challenge fails all three prongs.

II. The Statutes' Lack of Durational or "Entitlement" Language and the Surrounding Circumstances of Repeated COLA Formula Changes Bely Plaintiffs' Claimed Contractual Right.

Plaintiffs cannot overcome the "presumption" that laws do not create contracts binding on future legislatures. *See* PERA O-A Br. 24-25 (quoting cases). Here, the prior laws setting particular COLA formulas have no durational language and changed repeatedly over the last four decades. *Id*. at 25-29. Contrary to Plaintiffs' assertion, the court of appeals did not find an intention to create a contract right based on the statutory language and surrounding circumstances present here. A-R Br. 3. Rather, the court of appeals relied entirely on *Bills* and *McPhail*. But the Denver Charter in *McPhail* and *Bills* contained language of "entitlement" and had existed unchanged for almost four decades. *See* PERA O-A Br. 29-30 (distinguishing *Police Pension & Relief Bd. v. Bills*, 366 P.2d 581 (Colo. 1961); *Police Pension & Relief Bd. v. McPhail*, 338 P.2d 694 (Colo. 1959)).

A very recent New Mexico Supreme Court decision—deciding whether a state "Constitution grants Retirees a right to an annual cost-of-living adjustment to their retirement benefit, based on the COLA formula in effect on the date of their retirement, for the entirety of their retirement"—held "Retirees [have] no such right." *Bartlett v. Cameron*, 316 P.3d 889, 891 (N.M. 2013). The court reasoned that "a cost-of-living *adjustment* to a retirement benefit, by its own terms, is not

necessarily the same thing as the underlying retirement benefit." *Id.* at 893 (emphasis in original). Though the statutory COLA there was less static than Colorado PERA's COLA, with no formulaic change since 1987, the court nonetheless wrote, "[T]he history of the COLA affecting retirees over the past twenty-five years or so suggests that it has not been static, but has changed from time to time at the discretion of our Legislature." *Id.* at 892.

The court thus concluded, consistent with the district court here, that "amendments to the COLA over the years demonstrate a legislative intent to promote a current public policy, subject to change, and not a clear and unambiguous legislative intent to provide a vested property right." *Id.* at 895. The New Mexico Supreme Court reached this conclusion despite an express constitutional provision in the state's constitution protecting "a retirement plan" which does not exist in Colorado. *Id.* at 893 (discussing N.M. Const. art. XX, § 22(D)).

As support, it cited many of the same recent cases relied on by PERA and the State here. *See id.* at 895 (citing *Me. Ass'n of Retirees v. Bd. of Trs. of Me. Pub. Emps. Ret. Sys.*, 954 F. Supp. 2d 38 (D. Me. 2013); *Tice v. State*, Civ. No. 10-225 (S.D. Dist. Ct. Apr. 11, 2012); *Swanson v. State*, No. 62-CV-10-05285 (Minn. Dist. Ct. June 29, 2011)). In contrast, Plaintiffs rely on two off-point decisions.

See Arena v. City of Providence, 919 A.2d 379, 394 (R.I. 2007) (privately negotiated collective bargaining agreement with express language); *Hayden v. Hayden*, 665 A.2d 772, 774-75 (N.J. Super. Ct. App. Div. 1995) (divorce case valuing pension benefits).

Finally, it must be reemphasized that this case does not present the issue of whether Colorado retirees are entitled to COLA protection. Given that COLAs have long existed in Colorado, and continue to exist after SB 10-1, that issue is not raised and need not be decided. It is enough simply to hold, as the district court did, that there is no contract right to a "specific" and "unchangeable" COLA formula frozen for life on the date of retirement or retirement eligibility.

III. SB 10-1 Would Be Constitutional Even if Prior Statutes Had Created a Contractual Entitlement to a COLA Frozen for Life.

A. SB 10-1 Did Not Substantially Impair Any Expectations Because Its Changes Were Foreseeable Given the Many Past COLA Changes.

The second *DeWitt* inquiry, whether there was "substantial impairment of a contractual relationship," requires Plaintiffs to "demonstrate the law was not foreseeable and thus disrupts the parties' expectations." *DeWitt*, 54 P.3d at 858. In their opening brief, Plaintiffs conceded that "[t]he primary consideration in determining whether the impairment is substantial is the extent to which

reasonable expectations under the contract have been disrupted." O-Br. 30 (citation of federal cases omitted; emphasis added).

Plaintiffs cannot demonstrate that SB 10-1 was "not foreseeable" or that they had any "reasonable expectation" that a specific COLA formula would remain invariable for life. To the contrary, for Plaintiffs and the thousands of retirees they seek to represent, the COLAs changed repeatedly both during their working years and during their retirements. Plaintiff Halaas reasonably could have expected upon first taking the bench as a judge that he would receive *no* COLA, as none then was in place for judicial division retirees, and the statutory COLA formula changed during both his tenure and retirement. Any expectation that the legislature was creating individualized COLA formulas frozen for life is "patently unreasonable." *AFSCME Councils v. Sundquist*, 338 N.W.2d 560, 569 (Minn. 1983); *cf. Retired Adjunct Profs of the State of R.I. v. Almond*, 690 A.2d 1342, 1347 (R.I. 1997) ("[p]ublic pensions have always been a heavily regulated legal arena," so "individual expectations of immunity from future statutory change would have been unwarranted even if these provisions were contractual in nature").

Plaintiffs, unable to meet the reasonable expectations/foreseeability prong, are reduced to arguing that substantial impairment is measured instead by the dollar amount at stake. They are forced to take the legally untenable position that

changes in the law during their working years were "of no import." A-R Br. 4. Those arguments are contrary to *DeWitt* and other modern Contract Clause cases.

B. SB 10-1, Including the COLA Readjustment, Was Reasonable and Necessary to Serve a Significant Public Purpose.

The final *DeWitt* inquiry, which the Court need reach only if it concludes Plaintiffs had the claimed contractual COLA right and that SB 10-1 substantially impaired it, looks to "the necessity and reasonableness of the statute." *DeWitt*, 54 P.3d at 859. This final inquiry does not license courts to "sit as superlegislatures." *Balt. Teachers Union v. Mayor & City Council of Balt.,* 6 F.3d 1012, 1019-22 (4th Cir. 1993). Rather, "even when the state impairs its own contractual obligations, the [legislative] judgment that the impairment was justified is afforded meaningful deference." *United Auto. Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 44-45 (1st Cir. 2011) ("*Fortuno*") (citing cases).

Here, the General Assembly acted to promote the general public welfare—including the interests of all PERA stakeholders—and did *not* act in some parochial "self-interest" or to raise "extra money" for unrelated purposes. *Cf. U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25-26 (1977) (explaining why laws impairing state contracts are not entitled to "complete deference"). Rather, as part of shoring up PERA, SB 10-1 *increased* state funding through higher employer contributions and kept more money in the trust so the trust corpus could grow. The

General Assembly's judgment regarding the reasonableness and necessity of the PERA adjustments therefore is entitled to broad deference.

1. Because Laws Are Presumed Constitutional, and Deference Is Owed to the General Assembly, Plaintiffs Must Demonstrate that SB 10-1 Was Unnecessary and Unreasonable.

Plaintiffs contend that PERA and the State bear the burden on this final prong. A-R Br. 6-7. That contention turns upside down the usual burdens imposed on constitutional challengers while ignoring the deference owed to legislative judgments in Contract Clause cases specifically and economic cases generally.

That Plaintiffs bear the burden on this final prong follows from this Court's usual rule "presum[ing] the challenged statutory scheme is constitutional unless [the challenger] establishes otherwise beyond a reasonable doubt." *Qwest Corp. v. Colo. Div. of Prop. Taxation*, 304 P.3d 217, 223 (Colo. 2013). It also follows because laws impairing even state contracts are "afforded meaningful deference." *Fortuno*, 633 F.3d at 44-45 (citing cases). Finally, it follows from the Supreme Court's general teaching that a party challenging a "legislative Act[] adjusting the burdens and benefits of economic life," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), "bears the burden of demonstrating its unconstitutionality." *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001).

Accordingly, in *Fortuno*, the most fully reasoned case on point, the First Circuit squarely held that "where plaintiffs sue a state . . . challenging the state's impairment of a contract to which it is a party, the plaintiffs bear the burden on the reasonable/necessary prong of the Contract Clause analysis." 633 F.3d at 42. The Second Circuit is in accord. *See Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 365 (2d Cir. 2006). While Plaintiffs cite earlier contrary suggestions by other courts, *see* A-R Br. 6-8 (citing Sixth and Ninth Circuit cases noted in *Fortuno*, 633 F.3d at 43 n.9), the cited opinions lack the analysis offered in the later First Circuit opinion.

Plaintiffs rely heavily on one lengthy block quote as supporting their position that the burden rests with Defendants to establish reasonableness and necessity. *See* A-R Br. 7-8 (quoting *Donohue v. Mangano*, 886 F. Supp. 2d 126, 159-60 (E.D.N.Y. 2012)). Plaintiffs' selective quotation, however, misleadingly omits the next sentence expressly stating: "A lack of reasonableness or necessity is an element of a Contract Clause claim *which the Plaintiffs bear the burden of establishing*." *Donohue*, 886 F. Supp. 2d at 160 (citing *Fortuno*; emphasis added).

2. The General Assembly Properly Determined that the Challenged Adjustments Were Reasonable and Necessary.

Plaintiffs have never denied that, as of 2010 when SB 10-1 was enacted, PERA was severely underfunded and that legislative action to shore it up was

necessary. Their current challenges under the third *DeWitt* prong take three tacks: (1) claims of "economic necessity" should be "rejected . . . unless the government is on the brink of financial ruin"; (2) the General Assembly bears "culpability in contributing to the funding deficits" because employer "contribution rates" were too low in the preceding decade; and (3) "there were equally viable options that the state could have undertaken" to shore up PERA. A-R Br. 11-13.

First, nothing requires that a state be "on the brink of financial ruin" for a law to be reasonable and necessary. To the contrary, the Supreme "Court has indicated that the public purpose *need not be addressed to an emergency or temporary situation*." *Energy Reserves Grp. Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983) (citing cases; emphasis added). Plaintiffs instead rely on an Eighth Circuit opinion stating—contrary to the Supreme Court—that economic "concerns must be related to 'unprecedented emergencies,' such as mass foreclosures caused by the Great Depression." *AFSCME v. City of Benton, Arkansas*, 513 F.3d 874, 882 (8th Cir. 2008) (partially quoting *Allied Structural Steel v. Spannaus*, 439 U.S. 234, 242 (1978)).

But *Allied Structural Steel* never imposed such a requirement, and the quoted passage simply observed that earlier precedent arose from "unprecedented emergencies brought on by the severe economic depression of the early 1930's."

Id. at 242 (discussing *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)). Instead, it went on to require only that the impairment be "necessary to meet an important general social problem." *Id*. at 247. The Supreme Court also later explained that it has required "a significant and legitimate public purpose . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves*, 459 U.S. at 411-12 (citing *U.S. Trust* and *Allied Structural Steel*).

In any event, Plaintiffs' first contention ultimately raises a distinction without a difference because an "unprecedented emergency" indisputably existed here. Plaintiffs cannot contest that after the 2008 worldwide financial crisis, for the first time in PERA's history, PERA was only 52% funded and would have been bankrupt in less than three decades absent dramatic fixes. *See generally* PERA O-A Br. 10-11.

Second, the proper inquiry turns not on the backward looking inquiry of what caused the crisis but on whether the reforms were a reasonable and necessary response to it. It cannot be disputed that many factors—including financial market meltdowns in 2000-01 and 2008, and 3.5% compounding COLAs in years where there was little or no inflation—contributed to the crisis. SB 10-1 adopted a balanced approach, lengthening service requirements, increasing employer and employee contributions and readjusting all future COLAs (most significantly for

future rather than current retirees). Employer contribution rates are now the same or higher than in other states: state and school division employers now contribute 13.95% to their employees' pension (while current employees contribute 11.5% (including through foregone wage increases), totaling 25.45% of salary), and those rates will increase until 2017 and 2018 when they reach 28.15% total for the state and school division and 31.75% total for the DPS division, respectively. §§ 24-51-401, 411, C.R.S.

Third, the proper judicial inquiry is *not* whether "there were equally viable options that the state could have undertaken" to shore up PERA. A-R Br. 12. The General Assembly enacted SB 10-1 after hearing from stakeholders including retirees (including unions and retiree organizations unanimously supporting the ultimate reforms) and after thoroughly considering a range of options. *See* State O-A Br. 13-19. Under the final Contract Clause inquiry, courts do not "sit as superlegislatures." *Balt. Teachers*, 6 F.3d at 1019-22. Giving due deference to the General Assembly's legislative judgments, the balanced reforms—requiring shared sacrifices by state employers, current employees, and retirees—were reasonable and necessary to ensure PERA's continued viability for all stakeholders.

3. Plaintiffs Are Not Entitled to Discovery Because the Record Is Complete and No Material Facts Are in Dispute.

Plaintiffs "[a]lternatively" contend that "at the very least" the Court should remand the case to the district court to allow them to "conduct full discovery" and "develop a full evidentiary record." A-R Br. 6, 9, 12-13, 15. But Plaintiffs were the first to move for partial summary judgment in November 2010—two months before discovery opened—and never sought a deposition and did not serve written discovery until April 27, 2011, two weeks *after* they responded to PERA's summary judgment motion and nine days prior to PERA filing its summary judgment reply brief. Tr.# 37453807 at 49 n.17. More importantly, on appeal, when PERA and the State argued SB 10-1's reasonableness and necessity, Plaintiffs never cited any need for further discovery. Nor did their certiorari petition or response so argue. In these circumstances, Plaintiffs' arguments regarding discovery and the purportedly incomplete record should be deemed waived. *See Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012) ("A basic principle of appellate jurisprudence is that arguments not advanced in the trial court *and* on appeal are generally deemed waived.") (emphasis added; citation omitted).

The record is complete, the material facts are not in dispute, and Plaintiffs can show no need for further discovery. Because a Contract Clause challenge is

based on an examination of challenged legislation, courts hold that the relevant evidence is that found in the text and history of the legislation, and in the public record. *See Buffalo Teachers*, 464 F.3d at 367-73 (granting summary judgment after review of legislative record of statute); *Balt. Teachers*, 6 F.3d at 1014 (same).

Here, the *entire*, extensive legislative record, gathered from the state archives and including hearing transcripts that PERA paid to have transcribed, is attached as Appendix A to PERA's 3/17/11 summary judgment motion and was also transmitted in the appellate record before this Court. Plaintiffs wrongly contend that statements therein by legislators and testifying witnesses are "hearsay." A-R Br. 10. Colorado courts have long taken judicial notice of the legislative record "when the history is a matter of public record in the office of the legislative reference service," *In re Interrog. Propounded by Gov. Roy Romer on HB 91s-1005*, 814 P.2d 875, 880 (Colo. 1991), and this includes analyzing statements made in the legislative history by legislators and those testifying before them. *See, e.g., Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 599-603 (Colo. 2005); *State v. Nieto*, 993 P.2d 493, 503 (Colo. 2000). Indeed, the speech-and-debate clause would preclude requiring legislators' testimony. *See* Colo. Const. art. V, § 16; *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 208 (Colo. 1991).

Plaintiffs manufacture nonexistent or legally immaterial disputes. They seek to (1) depose PERA's former executive director "to discover what PERA's historical position has been with regard to legal protections afforded COLAs," (2) "hire pension actuaries and introduce expert reports to the Court" regarding other "equally viable options," and (3) "conduct discovery on the State's culpability in contributing to the funding deficits." A-R Br. 12-14.

Discovery on the first topic would be pointless because the existence of a contract turns not on what PERA thinks or thought but on the statutory language and surrounding circumstances. As the court of appeals properly held, statements made in public pension fund publications are legally irrelevant extrinsic evidence. *See* Op. ¶ 36 (citing *Strunk v. Pub. Emps. Ret. Bd.*, 108 P.3d 1058, 1078 (Or. 2005)).

Nor are Plaintiffs entitled to offer expert testimony proposing alternative approaches to those enacted by the General Assembly. Such testimony would exceed the proper boundaries of judicial review by eschewing deference to the legislative judgments and asking courts to become superlegislatures.

Finally, as shown above, reviewing the reasonableness and necessity of the solution to the crisis confronting PERA by 2010 is forward rather than backward

looking. Plaintiffs' misguided effort to prove the State's purported "culpability" in "contributing" to that crisis does nothing to defeat the third *DeWitt* inquiry.

IV. SB 10-1 Does Not Violate the Takings Clause.

PERA and the State previously demonstrated that SB 10-1's COLA modifications did not "take" any property from Plaintiffs. PERA O-A Br. 37-38. Because Plaintiffs do not further address that point, there is nothing on which to reply. SB 10-1 does not violate the Takings Clause.

CONCLUSION

The Court should uphold the constitutionality of SB 10-1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2014, a true and correct copy of PERA and State Defendants' Reply Brief was served via ICCES to the following individuals:

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