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STATE OF WASHINGTON

No. 852308

SUPREME COURT OF THE STATE OF WASHINGTON

BONNIE ANTHIS, individually, and as Personal Representative of the  
Estate of HARVEY ALLEN ANTHIS, Respondent,

v.

WALTER WILLIAM COPLAND, Appellant

AMENDED AMICUS CURIAE BRIEF

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## STATEMENT OF CASE

Mr. Copland, a former Tacoma police captain, broke both hips in the line of duty resulting in his permanent disability, for which he receives a duty disability pension from the Law Enforcement Officers and Fire Fighters Retirement System (LEOFF-I). Mr. Copland is currently incarcerated with his LEOFF-I disability pension as his sole source of income. CP 53; 55; 58-60. His pension is deposited directly in his bank account by the LEOFF system and the Tacoma City Retirement System.<sup>1</sup> These deposits are the sole source of moneys in that account. CP 62 -81.

Following Mr. Copland's appeal of the damages award in the civil case filed by Ms. Anthis, which was upheld, garnishment proceedings commenced.<sup>2</sup> On May 22, 2009, the Benton County Superior Court issued a "Final Order on Pension Assets" ordering that "once the LEOFF 1 pension assets are dispersed by the state to the defendant, they are subject to execution, attachment, and garnishment." CP 116, 117.

The Washington State Patrol Troopers Association (Troopers) and the American Federation of State, County and Municipal Employees, AFL-

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<sup>1</sup> As a LEOFF-I member who belonged to Tacoma's pre-LEOFF police retirement system, Mr. Copland is entitled to a supplemental payment from Tacoma to the extent his LEOFF pension is less than it would have been if all his service had been in Tacoma's pre-LEOFF system.

<sup>2</sup> See *Anthis v. Copland*, Ct. of Appeals, Div. III (Cause #266257), Unpublished Opinion, 7/31/08 (for additional procedural history relating to this case.)

CIO (AFSCME) collectively (Amicus), while submitting this amicus brief supporting Mr. Copland's position, recognize the compelling nature of Ms. Anthis's circumstances. Troopers and AFSCME submit this brief because the Washington State Patrol Retirement System and other state retirement plans contain an antialienation statute essentially identical to RCW 41.26.053(1) of the LEOFF I Act, RCW 43.43.130. The Court's result here will be applied to the pensions of members of Troopers and AFSCME pensions. Before reaching that result the Court should consider the bedrock pension policy of antialienation. It is the Troopers' and AFSCME's position that modification of that policy is a question for the Legislature, not the Judiciary.

#### ARGUMENT

The antialienation statute at issue in this case, RCW 41.26.053, has a parallel provision in every active state-wide public retirement system.<sup>3</sup> RCW 41.26.053(1), like every antialienation statute, exempts pensions paid under its system from "[e]xecution, garnishment,

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<sup>3</sup> See RCW 2.10.180 (Judges' Retirement System); RCW 2.12.090 (Judicial Retirement System); RCW 41.32.053 (Teachers' Retirement System); RCW 41.35.100 (School Employees' Retirement System); RCW 41.37.090 (Public Safety Employees' Retirement System); RCW 41.40.052 (Public Employees' Retirement System), and RCW 43.43.310 (Washington State Patrol Retirement System).

attachment, the operation of bankruptcy or insolvency laws, or other process of law whatsoever, and shall be unassignable." This includes protection from attachment to satisfy state and local tax liens. Each statute includes specific exceptions to the exemption, but none allow attachment for satisfaction of a civil judgment other than child support or dissolution. *See, e.g.,* RCW 41.26.053(2), (3). The virtually identical statutory language and the uniformity of the policy it embodies presage the far-reaching effect of the trial court's erroneous decision in this case. Should this Court adopt the trial court's ruling, it will apply to all Washington public pension systems, including, but not limited to, the Washington State Patrol Retirement System, the Public Employees' Retirement System, and the Teachers' Retirement System. As it considers compromising the Legislature's protection of Washington's public pensions, the Court should be mindful of the longstanding policy against alienation of pension benefits.

**A. Federal Antialienation Statutes Continue to Protect Pensions After Distribution.**

Many public retirement systems include antialienation provisions similar to those enacted by the Washington State Legislature.<sup>4</sup> Those provisions are similarly ubiquitous in federal law.

### **1. Federal Railroad Retirement Act.**

The Federal Railroad Retirement Act prohibits attachment of its benefits through "legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C. §231m. The Supreme Court found this provision continued to protect pension benefits after distribution, rejecting the Petitioner's request to permit attachment following receipt:

[T]hat course[post-receipt attachment], however, runs contrary to the language and purpose of § 231m, and would mechanically deprive petitioner of a portion of the benefit Congress, in § 231d(c)(3), indicated was designed for him alone.

Section 231m plays a most important role in the statutory scheme. Like anti-attachment provisions generally, it ensures that the benefits actually reach the beneficiary.

*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583, 584 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (citations omitted).

### **2. Social Security Benefits.**

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<sup>4</sup> See, e.g., Illinois Pension Code §4-135; Pennsylvania Code §8533; Indiana Code §5-10.3-8-9; Missouri Code §70.695. California csgov §21255, attached as exhibit 1.

Congress provided similar protections for Social Security pensions, providing, “[n]one of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.” 42 U.S.C. §407. This protection survives after disbursement “as long as [the moneys] are identifiable as social security benefits.” See exhibit 2. Washington law recognizes that continuing protection, RCW 6.15.020(2).

The Social Security provisions do not, however, protect retirement benefits for Washington’s Law Enforcement Officers. Members of the Washington State Patrol Retirement System are not covered by Social Security. See exhibit 3. Their sole protection is the antialienation provision in RCW 43.43.310. This highlights the importance of construing Washington’s antialienation provisions to include the same level of protection afforded Social Security benefits. The same can be said for many of the members of LEOFF-I, of which respondent Copland is a member. Social Security coverage varies by employer. Those not covered must, like Troopers, rely on the protections of their antialienation statute, RCW 41.26.053, to protect their public service pensions.

### 3. ERISA.

The Employee Retirement and Income Security Act (ERISA), requires private pension plans to include antialienation provisions, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. §1056(d)(1).<sup>5</sup> While ERISA generally does not apply to governmental plans, 29 U.S.C. §1003(b)(2), cases construing ERISA's antialienation requirement are instructive:

("[The anti-alienation provision] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . and their dependents . . . "). Pension benefits support participants and beneficiaries in their retirement years, and ERISA's pension plan safeguards are designed to further this end.

*Boggs v. Boggs*, 520 U.S. 833, 852, 117 S.Ct. 1754, 138 L.Ed.2d 45, (1997) (quoting *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990)).

The LEOFF-I Act at issue here promotes the same policy:

The purpose of this chapter is to provide for an actuarial reserve system for the payment of death, disability, and retirement benefits to law enforcement officers and firefighters, and to beneficiaries of such employees, thereby enabling such employees to provide for themselves and their dependents in case of disability or

---

<sup>5</sup> Congress placed an identical requirement in the Internal Revenue Code as a condition for favorable pension plan tax treatment, 26 U.S.C. §401(a)(13)(A).

death, and effecting a system of retirement from active duty.

RCW 41.26.020.

The policy and language of all pension antialienation provisions protect pension moneys *before* disbursement. They continue to protect Social Security and railroad pensions *after* disbursement. The Federal Circuits are split on whether the less strident language of ERISA's antialienation clause survives disbursement.

In *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995), the lower court ordered attachment of an ERISA pension to pay restitution to defrauded investors. Recognizing that it could not attach funds while still held by the pension trust, the order directed Mr. Smith to turn over the funds once he received them. *Id.* at 682 In ruling that ERISA's antialienation statute protected Mr. Smith's pension after disbursement, the court relied on *Hisquierdo*, summarizing its holding that "pension annuities cannot be alienated even once disbursed to the beneficiary." *Smith* at 683. Finding the Railroad Retirement Act antialienation provisions applied in *Hisquierdo* to be "substantially similar to those in ERISA", the *Smith* court held:

The government should not be allowed to do indirectly what it cannot do directly; it cannot require Smith to turn

over his pension benefits in a lump sum, nor can it require him to turn over his benefits as they are paid to him. "Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear." *Guidry*, 493 U.S. at 377, 110 S.Ct. at 688. Congress has made a policy decision to protect the ERISA income of retirees, "even if that decision prevents others from securing relief for the wrongs done them." *Id.* at 376, 110 S.Ct. at 687.

The Court further noted "as a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." *Id.* This court, too, has noted the danger in eroding through exception the anti-alienation policy of ERISA. That entire legislation was aimed at guaranteeing the security of retirement income for American workers.... **We decline to participate in the diminution of these safeguards in circumstances which might seem harmless enough in particular instances but which, in the aggregate, might invite creditors to believe that ERISA funds are not, after all, inviolate.**

*Id.* at 684 (emphasis added).

While the Ninth Circuit has disagreed, it significantly noted, "[t]he text of § 206(d)(1) is unclear whether it prohibits the alienation and assignment of the right to receive only undistributed pensions funds or in addition prohibits the alienation and assignment of funds that have actually been distributed to the plan beneficiary." *Wright v. Riveland*, 219 F.3d 905, 919-921 (9<sup>th</sup> Cir. 2000). The court relied on 26 C.F.R. § 1.401(a)-13(c)(1)(ii), which limits ERISA's antialienation protection to legal

orders "enforceable against the plan", to find ERISA protection ended at distribution.

*Wright* distinguished the Fourth Circuit's decision in *Smith*, disagreeing with *Smith's* reliance on *Hisquierdo's* construction of the Railroad Retirement Act:

Section 231m(a) of the Railroad Retirement Act prohibits benefits from being subject to attachment or garnishment "under any circumstances whatsoever." Neither § 206(d)(1) nor the applicable regulation contains such a sweeping prohibition.

*Wright*, 219 F.3d at 921. Despite reaching different results under ERISA, the reasoning of both the Fourth Circuit and the Ninth Circuit support continuing the protection of Washington's antialienation statutes after disbursement subject only to those specific exceptions to the exemption in the statutes. *See, e.g.*, RCW 41.26.053(2), (3).

**B. Washington's Antialienation Statutes Continue to Protect Public Pensions After Distribution.**

**1. Washington Requires Liberal Construction in Favor of Pensioners.**

Mr. Copland is an intended beneficiary of the LEOFF I Act, RCW 41.26.020. "The law is well established that pension legislation must be liberally construed most strongly in favor of the beneficiaries." *Hanson v. Seattle*, 80 Wn.2d 242, 247, 493 P.2d 775 (1972). *See also Shurtliff v.*

*Retirement Systems*, 103 Wn.App. 815, 825, 15 P.2d 164 (2000). “Liberal construction’ is a command that the coverage of an act’s provisions in fact be liberally construed and that its exceptions be narrowly confined.” *Vogt v. Seattle First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991), see also *Seattle Fire Fighters v. Hollister*, 48 Wn.App.129, 737 P.2d 1302 (1987).

The rule of liberal construction applies with even more force when construing pension statutes protecting beneficiaries from attachment of benefits. Washington law incorporates a longstanding policy that “exemption laws are favored in the law and are to be liberally construed.” *White v. Douglas* 6 Wn.2d 356 (1940). A holding that the protection of Washington’s pension alienation statutes ends at disbursement is tantamount to holding that those statutes provide no real protection other than a procedural hurdle easily cleared by creditors. Such a holding contravenes the requirement of liberal construction. Fortunately, Washington’s antialienation statutes are so broadly and strongly worded, that they protect public pensions whether or not the Court construes them liberally.

## **2. Washington’s Antialienation Statutes Protect Pension Proceeds.**

Washington's antialienation statutes include the sweeping language the Ninth Circuit in *Wright, supra*, found lacking in ERISA. Each of those statutes protects public pension benefits by first enumerating a number of specific exemptions and ending with a blanket exemption against any "other processes of law whatsoever." See statutes listed in fn 2, *supra*. This is very different from the "unclear" language of ERISA. It is the rationale of *Hisquierdo*, not *Wright*, that applies to construction of Washington's antialienation statutes.

While both parties correctly note an absence of cases construing RCW 41.26.053, Washington's courts have construed the Public Employees' Retirement System's (PERS) antialienation statute. In *Boronat v. Boronat*, 13 Wn.App. 671, 537 P.2d 1050 (1975), the Court refused Mrs. Boronat's urging to allow attachment of Mr. Boronat's PERS pension to satisfy her community property interest:

The language of RCW 41.40.380 is much broader than the language in these cases. The exemption is not limited to 'creditors' or 'debts.' The rights granted by the retirement system are not subject to garnishment 'or other process of law whatsoever.' No exception is made in the statute, and we will read none into it.

...

We, too, decline to carve out an exception which cannot be found in the language of the statute, especially since here it is such strong language.

*Boronat* at 674.<sup>6</sup>

The "strong language" of Washington's antialienation statutes demonstrate that Washington's public retirees, regardless of retirement system, are entitled to the same level of protection accorded both Federal Railroad Retirement Act retirees in *Hisquierdo* and Social Security retirees under 42 U.S.C §407 and RCW 6.15.020(2). Allowing post-distribution attachment of Mr. Copland's pension "[r]uns contrary to the language and purpose of [the statute] and would mechanically deprive petitioner of a portion of the benefit Congress ... indicated was designed for him alone." *Smith* at 684 (quoting *Hisquierdo* at 583, 99 S.Ct. at 809.)

Allowing attachment of Washington public pension payments after distribution effectively negates the legislatively-created antialienation statutes. A beneficiary could only avoid attachment by traveling to Olympia, picking up his or her pension in cash, and keeping it under the mattress. This belies common sense and clearly was not the Legislature's intent.

**C. Any Amendment to the Legislature's Prohibition of Attachment of Pension Benefits Should be Left to the Legislature.**

**1. The Legislature Amends Antialienation Provisions When Needed.**

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<sup>6</sup> RCW 41.40.380 was recodified as 41.40.052 by ch. 35, laws of 1991.

The Legislature has responsibly considered and enacted exceptions to antialienation. After *Boronat, supra*, declined to judicially amend the PERS antialienation statute, the Legislature debated the issue and prospectively authorized spousal attachment of pension benefits, including LEOFF benefits. See RCW 41.50.670; 41.40.052; 41.26.053(3). Congress affected a similar result in ERISA.

Following the Fourth Circuit's decision in *Smith*, Congress enacted the Mandatory Victims Restitution Act (MVRA), requiring courts to order restitution for crime victims or their survivors: "Notwithstanding any other Federal law (including section 207 of the Social Security Act), a judgment imposing a fine may be enforced against all property or rights to property of the person fined." 18 U.S.C §3613. The MVRA trumps both the specifically referenced Social Security Act antialienation provisions and ERISA's. See *U.S. v. Miller* 588 F. Supp. 2d 789, 795, 796 (W.D. Mich. 2008) (and cases cited therein, which hold the MVRA allows attachment of pensions despite *Smith*.)

**2. Any Judicial Amendment of the Antialienation Clause Could Jeopardize the Tax-Exempt Status of Washington's Retirement Systems.**

Judicial erosion of Washington's antialienation statutes endangers the tax exempt status of Washington's public pension plans. LEOFF-I, and

all Washington's public pension plans, enjoy qualification under 26 U.S.C. §401(a) of the Internal Revenue Code (IRC). See Exhibit 4. This means, among other things, that members can make their contributions in pre-tax dollars and defer taxation of benefits until retirement. These tax advantages come with significant strings attached, including a requirement that plans can only be qualified if they protect member funds from alienation, 26 U.S.C. 401(a)(13)(A). Failure to provide this protection can result in disqualification of the plan. *In re Moore*, 907 F.2d 1476, 1480 (4th Cir. 1990). While this provision has been superseded in the case of federally-ordered restitution under the MVRA, its prohibition against attachment of federally-qualified public plans remains in effect with regard to civil judgments generally. See *United States v. DeCay*, 620 F.3d 534 (5th Cir. 2010).

The IRS antialienation language is essentially identical to ERISA's. If the IRS finds the reasoning of the Fourth Circuit more persuasive than the Ninth Circuit's, then allowing attachment in this case violates the IRS's antialienation provisions, with the potential disqualification of Washington's public pension plans. While it may be possible to follow Congress's lead and craft an exception for a particular type of order, as was done for child support, such an exception would need to be carefully

drafted to remain within IRS requirements. The Constitution places that power with the Legislature.

**D. Amicus Move To Submit Correspondence Bearing On The Tax-Exempt Status of The State Plans.**

Pursuant to RAP 10.3(a)(8), Amicus moves to submit exhibit 4 as part of the appendix to this brief. Exhibit 4 consists of the Washington State Department of Retirements System's member communication regarding withdrawal of member pension contributions. The publication applies to all plans administered by the department and discusses the restrictions on withdrawal of tax deferred contributions, Exhibit 4, p. 2-5. The included withdrawal form states: "DRS accounts are 401(a) accounts." Exhibit 4, p. 11, sec. C. Because this exhibit serves to inform the Court and establish the noncontroversial fact that Washington's public pension plans are qualified 401(a) plans, the exhibit should be allowed.

**CONCLUSION**

Pension antialienation statutes such as the one at issue here are broad Legislative expressions of bedrock pension policy. *Boronat, Guidry,* and *Smith*, all looked to the Legislature to debate modification of that

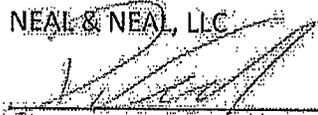
policy. That is particularly appropriate here where a decision compromising the antialienation protections of LEOFF-I members also compromises the member rights in all of Washington's statewide public pension systems, including possibly jeopardizing the right to favorable tax treatment.

RCW 41.26.053, and the parallel antialienation provisions of Washington's other public pension systems, protect Washington's public pensions from "any process of law whatsoever." That protection is empty if it evaporates once a public retiree receives his monthly pension check. The protection of those statutes, like the protection of parallel federal statutes, continues after disbursement. Exceptions to those protections are the province of the Legislature.

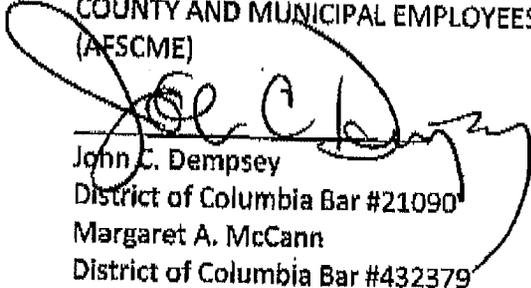
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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2011, I caused to be served a true and correct copy of the foregoing, Amended Amicus Brief by the method indicated below, and addressed to the following:

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**Subject:** Anthis, Respondent v. Copland, Appellant, Supreme Court Cause No. 852308- Amended Amicus Brief

Please find attached the Amended Amicus Curiae Brief for filing in the above matter.

Thank you.

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