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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION; et al, and all others  
similarly situated,

Respondents/Cross-Appellants,

vs.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT  
SYSTEMS;

Appellants/Cross-Respondents.

CHERYL COSTELL, STEPHEN GORE, RICHARD MORVAN, and  
JERALD NEWELL, on behalf of themselves and a class of persons  
similarly situated,

Respondents,

vs.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT  
SYSTEMS;

Appellants.

WASHINGTON FEDERATION OF STATE EMPLOYEES, PAULETTE  
THOMPSON and DANA HUFFORD,

Respondents/Cross-Appellants,

vs.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT  
SYSTEMS;

Appellants/Cross-Respondents.

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WASHINGTON  
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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS & ASSOCIATION OF WASHINGTON CITIES

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## I. INTRODUCTION

Our constitution makes clear that “[t]he legislative authority of the state of Washington shall be vested in the legislature.” CONST. art. II, § 1. One component of this authority is the ability to establish and regulate a pension system for Washington’s public employees. *Wash. State Pub. Employment Bd. v. Cook*, 88 Wn.2d 200, 206, 559 P.2d 991 (1977). Conversely, this Court’s function is to enforce statutes as written so long as such legislation does not run afoul of the federal or state constitution. *Duke v. Boyd*, 133 Wn.2d 80, 87-88, 942 P.2d 351 (1997).

The Plaintiffs in these cases argue that the legislature violated article I, § 23, in 2007, when it repealed statutes passed in 1998 that conferred a benefit to retirees that allowed them to share in extraordinary investment gains. To reach the result advanced by the Plaintiffs in these consolidated cases, the Court would have to judicially excise specific sections of Engrossed Substitute House Bill [ESHB] 2491 (1998) and Substitute Senate Bill [SSB] 6306 (1998) [collectively referred to herein as “1998 Acts”], both of which provided in no uncertain terms:

The legislature reserves the right to amend or repeal this chapter in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that amendment or repeal.

LAWS OF 1998, ch. 340, § 3, *codified at* Former RCW 41.30.030 (2007); LAWS OF 1998, ch. 341, § 312(4), *codified as amended at* Former RCW 41.31A.020(4) (2007).<sup>1</sup>

If the Court concludes as it should and defers to the legislature's ability to "keep[] the pension system flexible and maintain[] its integrity," *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993) (citations and internal quotation marks omitted), then the Plaintiffs' claim to have a vested right in a benefit to which there was no "contractual right" fails. On the other hand, if the Court concludes that the legislature acted outside its authority by "reserv[ing] the right to amend or repeal this chapter in the future," then the Plaintiffs must also show that the legislature still would have passed the substantive gain-sharing provisions in the first place. Otherwise, gain-sharing must also be invalidated. This is a hurdle that these Plaintiffs cannot overcome, because the language of both statutes makes clear that the reservation of rights sections were crucial to the legislature's endeavor into uncharted waters. In other words, the legislature enacted gain-sharing only on the express assumption that it

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<sup>1</sup> SSB 6306 also afforded the gain-sharing benefit to members of the Teachers Retirement Systems (Plans 1 and 3) (TRS) and Plan 3 of the School Employees Retirement System (SERS), the latter of which was created by SSB 6306, LAWS OF 1998, ch. 341, § 3, *codified at* RCW 41.35.020. This brief will focus primarily on the provisions affecting members of the Public Employees Retirement System (PERS), as those members are employed by the cities and towns that amici curiae represents. See RAP 10.3(e). However, the arguments herein apply with equal force to TRS and SERS.

had the ability to repeal that benefit in the future. Consequently, if the legislature could not have reserved its rights in the way that it did, then the entire statutory scheme giving rise to gain-sharing must fall as well. Under either scenario, there is no vested right to gain-sharing in Washington's public pension scheme.

Undersigned amicus curiae, writing on behalf of the Washington State Association of Municipal Attorneys (WSAMA) and Association of Washington Cities (AWC), offers this brief in support of reversing the trial courts' orders to the extent they invalidated the legislature's repeal of gain-sharing.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

WSAMA is a non-profit organization of municipal attorneys in Washington. Washington has 281 cities and towns, ranging from Seattle at over 600,000 citizens to Krupp, with a population of about 50. WSAMA members represent municipalities throughout the state, as both in-house counsel and as private, outside legal counsel. WSAMA associate members include attorneys that advise their municipality clients on employment matters, including deferred compensation under the Public Employment Retirement Systems (PERS), chapter 41.40 RCW.

AWC is a private, non-profit corporation that represents Washington's cities and towns before the State Legislature, the State

Executive branch and regulatory agencies. Membership in the AWC is voluntary, however the association includes 100% participation from Washington's 281 cities and towns. A 25-member board of directors oversees AWC's activities. Its mission is to serve its members through advocacy, education and services. It has provided from time to time amicus briefing to Washington courts on issues of significant importance to its members.

Moreover, a decision striking down the repeal of gain-sharing would result in drastic and severe consequences for municipalities around the State. Because public employees' contributions are capped, any need to provide additional funding to the PERS plans necessarily falls on municipalities. RCW 41.40.048, 41.40.330(1). Critical municipal services, such as police, fire, public safety, and road maintenance and safety would have to be cut even further than they have in recent years to shoulder the financial burden continued gain-sharing would cause. *Accord* CP at 5887-89, 5939-40, 5974-76, 6060.<sup>2</sup>

As such, both WSAMA and AWC have a strong interest in the outcome of this case.

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<sup>2</sup> "When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Plaintiffs did not offer any competing evidence to the facts offered by the State outlining the deleterious effects on municipal budgets if gain-sharing were judicially reinstated, meaning the Court can accept those facts as "hav[ing] been established." *Id.*

### **III. STATEMENT OF THE CASE**

As discussed below, the critical issue in this case is one of law, namely the extent of the legislature's power to regulate a pension system for public employees. As such, WSAMA/AWC incorporates by reference the factual discussion presented by the parties, thus negating any need to repeat it here.

### **IV. ISSUES PRESENTED**

(1) Whether the legislature may repeal a future pension enhancement, before the enhancement actually takes effect, when the legislature has explicitly reserved the right to do so without violating the contracts clause of the Washington Constitution, article I, § 23.

(2) Whether, if the legislature does not have the ability to reserve the right to repeal a pension benefit conferred, the entire benefit conferred by that statute must be invalidated because:

- (a) The Court cannot sever unconstitutional language from a statute if it cannot be reasonably believed the legislature would have enacted the statute anyway;  
and
- (b) This Court's jurisprudence on public pensions prohibits judicially merging the most favorable parts of several pension statutes, but instead

requires that an employee's pension rights be determined by the latest act that can be constitutionally applied.

## V. ARGUMENT

The basic thrust of the Plaintiffs' argument is that in the 1998 Acts the Legislature impermissibly reserved the right to repeal any future gain-sharing benefit that had not previously been realized. Consequently, Plaintiffs ask this Court to hold that the legislature's repeal of all future gain-sharing in 2007 amounts to an unconstitutional impairment of a contractual right.

The fundamental flaw in this approach, however, is it disregards this Court's precedent addressing when a specific section can be severed and leave the remaining statutory language intact. Specifically, the Court cannot judicially excise one part of a statute due to an alleged constitutional infirmity, but allow the remaining sections to stand if "it could not be believed that the legislature would have passed one without the other." *State ex rel. King County v. Tax Comm'n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933). As discussed in greater detail below, the history behind the reservation of rights clauses shows beyond doubt that the legislature would not have extended a gain-sharing benefit to the

state's public employees had it known such a conferral was necessarily permanent.

- A. If the Court gives effect to Former RCW 41.31.030 and Former RCW 41.31A.020(4) and recognizes the legislature's ability to reserve the right to repeal a future pension benefit for the security and integrity of the pension system, then the 2007 Act repealing gain sharing is constitutional.**

As aptly described by the State, the legislature enacted both ESHB 2491 and SSB 6306 in 1998 to enable members of PERS Plans 1 and 3 to enjoy the benefits of extraordinary investment returns. Those benefits were codified for PERS 1 in chapter 41.31 RCW and for PERS 3 in chapter 41.31A RCW. *See* LAWS OF 1998, ch. 340, § 15; LAWS OF 1998, ch. 341, § 314. But the legislature later realized, as it had feared, that this method of funding the retirement systems was unsustainable, as the costs to both the State's General Fund and to public employers were staggering if gain-sharing were to continue:

*The portion of the contribution rates adopted for gain-sharing are projected to generate about \$147 million General Fund-State and \$340 million in total employer costs during the 2007-09 biennium. Over the next 25 years, the standard period for reflecting the long-term cost of pension system changes, gain-sharing is projected to cost about \$3.0 billion General Fund-State and \$6.7 billion in total employer contribution rate costs.*

FINAL BILL REP., EHB 2391 (2007), available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/2391.FBR.pdf>. Of course, despite the Plaintiffs' arguments that

there was no need to repeal gain-sharing, it must be remembered that “[t]he wisdom, necessity and expediency of the law are not for judicial determination,’ and an enactment may not be struck down as beyond the police power unless it ‘is shown to be clearly unreasonable, arbitrary or capricious.’” *Weden v. San Juan County*, 135 Wn.2d 678, 700, 958 P.2d 273, 284 (1998) (quoting *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 159, 579 P.2d 1331 (1978)).

The legislature recognized the multi-billion dollar liability and threat posed to basic pension benefits and other necessary government services, such as public safety and education, if gain-sharing continued unchecked. Consequently, the legislature passed Engrossed House Bill 2391 in 2007, which repealed future gain-sharing in both chapters 41.31 and 41.31A RCW, with an effective date of January 2, 2008. LAWS OF 2007, ch. 491, § 13.<sup>3</sup>

The argument that EHB 2391 violates the constitution is premised on the provision that states: “No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” CONST. art. I § 23. Inherent in this argument, though is the notion that these Plaintiffs held a contractual right to future gain-sharing benefits afforded by the

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<sup>3</sup> Section 1 of EHB 2391 amended RCW 41.31A.020 for a period of time between July 1, 2007 and January 2, 2008. *See* LAWS OF 2007, ch. 491, §§ 13, 19 (noting Section 1’s effective date as July 1, 2007, and the effective repeal date of January 2, 2008). As such, RCW 41.31A.020 was repealed as of January 2, 2008.

1998 statutes, regardless of whether those laws were amended or repealed.

But the law said just the opposite:

The legislature reserves the right to amend or repeal this chapter in the future and *no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that amendment or repeal.*

Former RCW 41.30.030 (emphasis added); *see also* Former RCW 41.31A.020(4) (2007).

The goal of any statutory analysis is to give effect to the legislature's intent, which is derived solely from the plain language of the statute whenever possible. *Schrom v. Bd. for Volunteer Firefighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). Though courts "construe ambiguous pension statutes 'in favor of the party for whose benefit the pension statute was intended,'" that rule has no application to unambiguous statutes. *Id.* at 32 & n.8 (quoting *Bowen v. Statewide City Employees Ret. Sys.*, 72 Wn.2d 397, 402, 433 P.2d 150 (1967)). Statutes are ambiguous if they are "fairly susceptible to different, reasonable interpretations," but they are not ambiguous "merely because different interpretations are conceivable." *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004).

Here, there is no other way to construe the reservation of rights language of Former RCW 41.31.030 and Former 41.31A.020(4). Both statutes confined the gain-sharing sections to separate chapters in Title 41 RCW. LAWS OF 1998, ch. 340, § 15; LAWS OF 1998, ch. 341, § 314. As

such, this language could not be more clear: (1) “[t]he legislature reserves the right to amend or repeal *this chapter*,” meaning either chapter 41.31 RCW or chapter 41.31A RCW, in which the gain-sharing provisions were codified; and (2) “no member or beneficiary has a contractual right to” any “postretirement adjustment not granted prior to *that* amendment or repeal.” Use of the word “that” undeniably refers to the “amendment or repeal” of “this chapter” that might occur “in the future.”

And as recognized just a few years ago in another pension case, this Court “cannot ‘delete language from an unambiguous statute.’” *McAllister v. City of Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623, 630-31, 210 P.3d 1002 (2009) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). But that is exactly what the Plaintiffs ask this Court to do: judicially erase Former RCW 41.31.030 (ESHB 2491, § 3) and Former RCW 41.31A.020(4) (SSB 6306, § 312(4)). This is not a power the Court has. Unless a provision of the state or federal constitution forbids the statute, it must be enforced. *Duke*, 133 Wn.2d at 87-88.

Consequently, unless the Court invalidates Former RCW 41.31.030 and Former RCW 41.31A.020(4), it must give effect to that language, which unambiguously negates any perpetual contract right to gain-sharing post-amendment or repeal.

**B. The reservation of rights section was intimately connected with the entire chapter establishing the gain-sharing benefit, meaning that the invalidation of the reservation of rights section results in the invalidation of gain-sharing altogether.**

Not surprisingly, the Plaintiffs' argument hinges on the notion that the legislature cannot, in the context of public pensions, reserve the right to amend or repeal a future increase and declare that members and retirees have no contractual right to receive it in perpetuity. *See* Br. of Resp'ts & Cross-Appellants at 25 ("the ROR language relied upon by the State . . . is ineffective because it is inconsistent with the nature of deferred compensation and the reasonable expectations of employees."). In this sense, Plaintiffs' argument hinges on whether this Court will strike down Section 3 of ESHB 2491, *codified at* Former RCW 41.31.030, and Section 312(4) of ESHB 6306, *codified at* Former RCW 41.31A.020(4).

But where the Plaintiffs fail to offer any analysis is whether and how the Court can take the best parts of ESHB 2491 and SSB 6306 (the gain-sharing benefit), and strike the allegedly worst part (reservation of rights).<sup>4</sup> Assuming the legislature could not reserve its right to repeal a future pension increase, then the Court must examine whether *any* part of ESHB 2491 and/or SSB 6306 could be enforced. This Court has

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<sup>4</sup> The only constitutional provision cited in the Plaintiffs' brief is article I, section 23, which as discussed above prohibits the passage of any law "impairing the obligations of contracts." CONST., art. I, § 23. Nothing in the Plaintiffs' brief explains how an Act impairs a contractual right the existence of which is expressly disclaimed by the same piece of legislation. Amici agrees with the analysis advanced by the State in this regard.

consistently refused to sever allegedly unconstitutional provisions from constitutional ones if:

the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

*Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995) (quoting *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (quoting *State Tax Comm'n*, 174 Wash. at 339-40)). For example, the Court refused to sever a constitutionally deficient provision from a legislative financing act because the infirm section “represent[ed] the heart and soul of the Act,” meaning that “the Act would be virtually worthless without it.” *Leonard*, 127 Wn.2d at 202. In *Hall* the Court declined to sever the unconstitutional portion of the previous version of RCW 4.92.110 because “the unconstitutional provisions are so ‘intimately connected’ with the condition precedent requirement that they are not capable of meaningful severation.” *Hall*, 97 Wn.2d at 583. Conversely, in *State Tax Commission*, a case involving a property tax statute, the Court noted that the “Legislature ha[d] made it clear that it would have passed the act as to intercounty property even though it had been advised as to the invalidity of such an act as to intracounty property.” *State Tax Comm'n*, 174 Wash. at 340. In other words, unlike *Leonard* and *Hall*, there was support in

*State Tax Commission* for the proposition that the legislature would have passed the constitutional sections regardless of whether the unconstitutional sections were ultimately struck down.

The reservation of rights sections in ESHB 2491 and SSB 6306 cannot be severed from the sections granting the gain-sharing benefit. As articulated by the State, the reservation of rights sections were inserted into ESHB 2491 and SSB 6306 specifically because “the full impact of gain-sharing was uncertain and that the gain-sharing provisions might have to be refined in the future.” Br. of Appellant at 8 (citing CP at 1619). In this sense, “it [can]not be believed that the legislature would have passed [gain-sharing] without the [reservation of rights clause].” *Leonard*, 127 Wn.2d at 201; *see also* CP at 1619.

Furthermore, neither ESHB 2491 nor SSB 6306 contains a severability clause. Although the presence of such a clause certainly would not be dispositive of whether the Court *could* sever an allegedly constitutionally infirm section (i.e., the reservation of rights clause), *see Leonard*, 127 Wn.2d at 201-02, the absence of such a clause is highly indicative that the legislature would *not* have passed gain-sharing had it believed the benefit would remain permanently. *Compare State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 153, 247 P.2d 787 (1952) (invalidating “statute [that] contain[ed] no separability provision” in its

entirety because the lack of such a severability clause meant the statute “must be considered as a unit or as an inseparable legislative enactment”) *with State v. Anderson*, 81 Wn.2d 234, 237-40, 501 P.2d 184 (1972) (reversing decision invalidating a statute in its entirety, highlighting the importance of the severability clause and the legislative intent the constitutional sections would have been passed anyway).

As a result, even if the Court were to accept the Plaintiffs’ suggestion that the legislature cannot, pursuant to its broad police power, reserve the right to repeal a future pension increase and declare that no person has a contractual right to it, then there still is no right to continued gain-sharing because the pensioners would then be entitled to retire under the pension scheme as it existed *before* the 1998 Acts. *See infra*, Part V.C.

**C. The inability to sever the reservation of rights section from the substantive gain-sharing provisions is consistent with this Court’s pension jurisprudence, which defines an employee’s pension by the latest act that can be constitutionally applied in lieu of any requested hybrid system.**

Plaintiffs place heavy reliance on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), to argue that they are contractually entitled to (a) receive the gain-sharing benefits provided in the 1998 Acts (b) ignore the reservation of rights clauses in the 1998 Acts, and (c) receive the added benefits conferred by EHB 2391 (2007). *Bakenhus* does

not allow—much less require—a court to craft a hybrid pension system if a later statute is deemed to have impaired existing contractual rights.

*Bakenhus* held: “[T]he employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions.” *Bakenhus*, 48 Wn.2d at 701. Three years later, the Court clarified its precedent on legislative modifications to pension plans by holding that “pension rights are to be determined *by the latest act which could constitutionally be applied.*” *Dailey v. City of Seattle*, 54 Wn.2d 733, 739, 344 P.2d 718 (1959) (emphasis added).

*Bakenhus* and its progeny are grounded in the constitutional prohibition in article I, section 23 forbidding the passage of any “law impairing the obligations of contracts.” CONST. art. I, § 23; *see also Letterman v. City of Tacoma*, 53 Wn.2d 294, 298-99, 333 P.2d 650 (1958) (“The *Bakenhus* case specifically dealt with the constitutionality of the 1937 police pension act as applied to Mr. Bakenhus.”); *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 282, 333 P.2d 642 (1958) (recognizing *Bakenhus* held a 1937 amendment to a public pension act “*could not, constitutionally, be applied to Mr. Bakenhus as a limitation on his pension rights*”) (italics in original).

Yet in cases in which the pensioner succeeded in proving that subsequent legislation unconstitutionally impaired his or her preexisting pension rights, the pensioner was allowed only to *retire* under the preexisting pension act, *not* to combine the most favorable parts of several statutes to receive an *increase* in that former pension. For example, in *Bakenhus* the plaintiff, a former police officer, convinced this Court that the 1937 pension act unconstitutionally capped his pension at \$125. *Bakenhus*, 48 Wn.2d at 701. His remedy was the ability to retire under the act that defined his rights prior to 1937. *Id.* at 697, 702-03.

In *Eisenbacher* former Tacoma firefighters, like Mr. Bakenhus, claimed a 1935 cap on their pension to \$125 per month unconstitutionally impaired their rights under prior legislation, which if applied would result in more money. *Eisenbacher*, 53 Wn.2d at 282. This Court agreed, and ordered the firefighters be paid in accordance with “the Firemen’s Relief and Pension Act *in force prior to 1935.*” *Id.* at 281 (emphasis added); *see also id.* at 284, 286.

Likewise, *Letterman* considered which of several different pension acts (1919, 1929, 1935, 1955) applied to a Tacoma firefighter employed between 1929 and 1957. *Id.* at 296-300. The Court first held that the 1929 act’s amendments did not unreasonably impair the firefighter’s rights under the 1919 act, consequently concluding “that the 1929 act c[ould]

validly be applied to respondent [firefighter].” *Id.* at 299. The Court then held that “[t]he 1935 act could *not* constitutionally be applied to respondent as a limitation on his pension rights,” concluding that the firefighter’s pension would be governed by either the 1929 pension act or the 1955 act. *Id.* The Court held that, per the terms of the 1955 act, the firefighter could within 60 days elect between retiring under either the 1929 act or the 1955 act, but he could not choose his preferred provisions of both acts. *Id.* at 300-01.

Lastly, *Dailey* held that a 1955 act governing police officers (ch. 41.20 RCW), was unconstitutional as applied to Captain Dailey. *Dailey*, 54 Wn.2d at 742. The Court then held that “Captain Dailey could and did retire under the terms of the 1915 act, and that the terms of chapter 69, Laws of 1955, are not applicable to his retirement.” *Id.*

These authorities each hold and reaffirm that “pension rights are to be determined by *the latest act which could constitutionally be applied.*” *Id.* at 739 (emphasis added); *Letterman*, 53 Wn.2d at 298; *Eisenbacher*, 53 Wn.2d at 280. Not surprisingly then, this Court has rejected prior attempts to create a hybrid pension by borrowing different sections from separate pension acts. *McAllister*, 166 Wn.2d at 632; *Vallet v. City of Seattle*, 77 Wn.2d 12, 19-21, 459 P.2d 407 (1969).

For example, *Vallet* involved a police officer at the rank of Inspector who elected to retire in 1965. *Id.* at 13. At issue was whether a 1915 act or a 1961 act determined the amount of benefits due. *Id.* at 16. The 1915 statute provided a pension at one-half his rank's salary, but that amount was fixed. *Id.* at 16-17 (citing LAWS OF 1915, ch. 40, § 2). The 1961 statute's pension was capped at the level of one-half of a Captain's salary, but the amount escalated with the pay of Captains in active service. *Id.* (citing LAWS OF 1961, ch. 191, § 1). The police officer sought a pension at one-half the salary of Inspector, as under the uncapped 1915 statute, that would escalate like pensions under the 1961 statute. *Id.* at 19. After the officer prevailed at the trial court, this Court reversed, agreeing with the city's argument "that the *Bakenhus* rule does not allow the selection by respondent of the best parts of several pension plans, but only requires the application of the most favorable statute to respondent's status at the time of his retirement." *Id.* The Court found that the 1961 statute's "modification to respondent's pension rights [was] reasonable and equitable and respondent must, therefore, retire under the 1961 act and *cannot select the most favorable parts of the 1915 and 1961 acts as a basis for his pension rights.*" *Id.* at 22 (emphasis added). The Court found that "to permit [one] to receive the most beneficial parts of the 1915

and 1961 acts to the exclusion of any detriments contained therein would result in absurd consequences to the whole pension system.” *Id.* at 19.

The Court followed *Vallet* more recently in *McAllister*. There, two retired firefighters argued that *Bakenhus* required the City of Bellevue to calculate the excess payment owed to them under RCW 41.26.040(2) by using a more favorable definition of the statutory term “basic salary” as used in a different statute, namely the 1955 Pension Act, ch. 41.18 RCW. *McAllister*, 166 Wn.2d at 626-28. The Court rejected that argument by following *Vallet* and held that “the City is correct that the McAllisters may be trying to ‘cherry pick’ the best of LEOFF and the 1955 Act.” *Id.* at 632. The Court held that allowing a pensioner “to ‘blend’ the best of two different pension plans would run counter to our holding in *Vallet* and introduce instability into the administration of the plans.” *Id.*

Pursuant to this long line of authorities, the Court must either uphold the reservation of rights clauses in the 1998 Acts or strike them down in their entirety *along with* the substantive gain-sharing benefit of which these Plaintiffs want to take advantage. Otherwise, the Court would run afoul of the rule which is to have pension rights “be determined by the latest act which could constitutionally be applied.” *Dailey*, 54 Wn.2d at 739; *accord McAllister*, 166 Wn.2d at 632. The Plaintiffs cannot have their pension rights defined by the most favorable parts of the 1998 Acts

(gain-sharing) but simultaneously ignore another integral part of that statute (reservation of rights).

## VI. CONCLUSION

Pensioners cannot, consistent with this Court's jurisprudence, pick and choose which parts of a pension act they desire to craft a new design the legislature did not enact. For all of the foregoing reasons and for the reasons advanced by the State, WSAMA and AWC ask this Court to reverse the trial court's order to the extent it granted summary judgment to the Plaintiffs and denied summary judgment to the State.

RESPECTFULLY SUBMITTED this 23rd day of September, 2013.

/s/ Daniel G. Lloyd

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**CERTIFICATE OF SERVICE**

I certify that on the date referenced below, I mailed (via first class mail, postage prepaid) a copy of the foregoing document to each and every attorney of record herein, as identified below:

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Dear Mr. Carpenter:

Pursuant to Order 25700-B-334 (Sept. 4, 1997), and the Clerk's protocols pursuant to said order, please find attached (1) Motion for Leave to File Amicus Curiae Brief, and (2) Brief of Amicus Curiae, for filing in the below referenced case:

*Wash. Educ. Ass'n v. State*, No. 87242

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